

*In the Matter of*

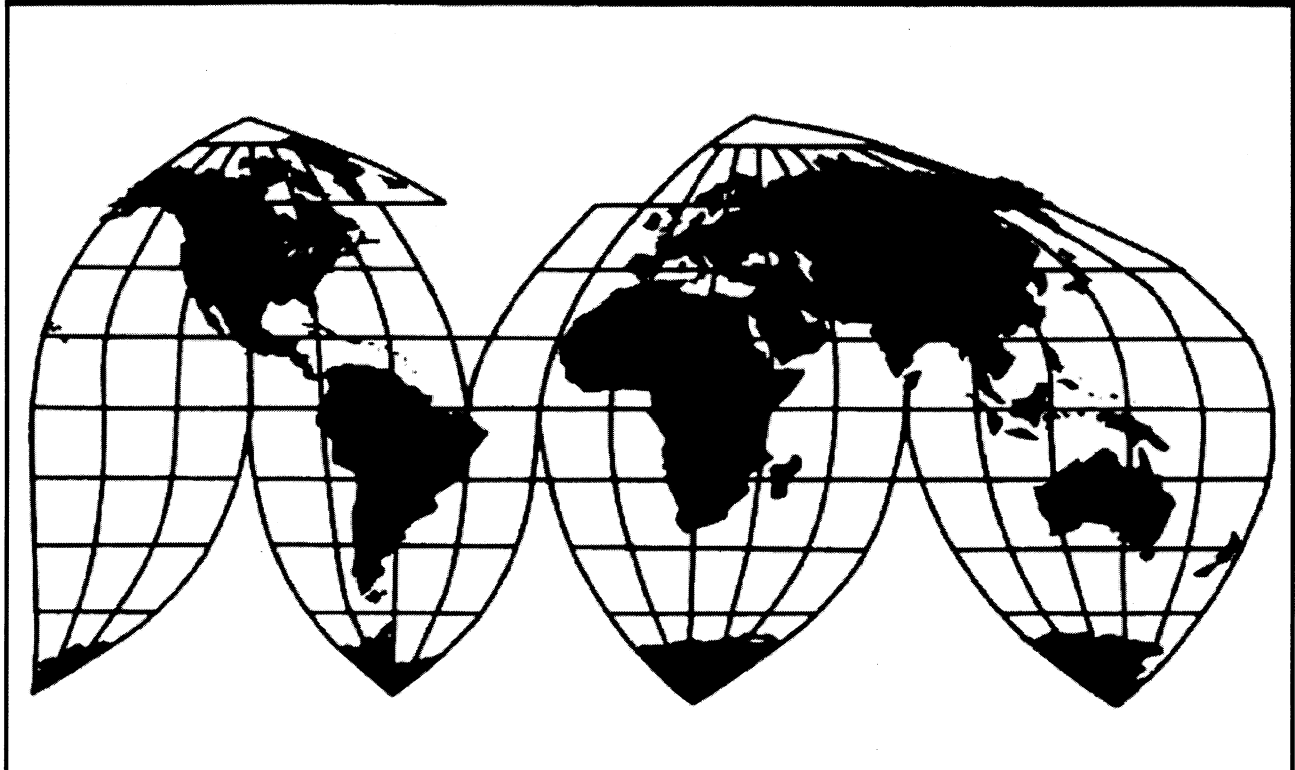
**Certain Laminated Floor Panels**

Investigation No. 337-TA-545

Publication 4004

May 2008

**U.S. International Trade Commission**



Washington, DC 20436

# **U.S. International Trade Commission**

## **COMMISSIONERS**

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**Shara L. Aranoff, Vice Chairman\***  
**Deanna Tanner Okun**  
**Charlotte R. Lane**  
**Irving A. Williamson\***  
**Dean A. Pinkert\***

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\*Commissioner Marcia E. Miller, whose term ended on September 6, 2005, participated in the decision to institute the investigation. Commissioner Shara L. Aranoff, whose term commenced on September 6, 2005, participated in all subsequent phases of the investigation. Commissioner Irving A. Williamson was sworn in on February 7, 2007, and Commissioner Dean A. Pinkert was sworn in on February 26, 2007; they did not participate in this investigation. Commissioner Stephen Koplan, whose term ended on February 6, 2007, and Commissioner Jennifer A. Hillman, whose term ended on February 23, 2007, did participate in this investigation.

**Address all communications to  
Secretary to the Commission  
United States International Trade Commission  
Washington, DC 20436**



# **U.S. International Trade Commission**

Washington, DC 20436

[www.usitc.gov](http://www.usitc.gov)

## ***In the Matter of*** **Certain Laminated Floor Panels**

Investigation No. 337-TA-545



**Publication 4004**

**May 2008**



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

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**In the Matter of** )

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**CERTAIN LAMINATED** )  
**FLOOR PANELS** )  
\_\_\_\_\_ )

**Inv. No. 337-TA-545**

**NOTICE OF FINAL DETERMINATION; ISSUANCE OF GENERAL EXCLUSION  
ORDER AND CEASE AND DESIST ORDERS; TERMINATION OF INVESTIGATION**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has found a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 337) based on the infringement of nine asserted claims of three asserted patents and has issued a general exclusion order and cease and desist orders in the above-captioned investigation. The investigation is terminated.

**FOR FURTHER INFORMATION CONTACT:** Michael Haldenstein, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3041. Copies of all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on July 29, 2005, based on a complaint filed by Unilin Beheer B.V., Flooring Industries Ltd., and Unilin Flooring N.C. LLC (collectively "Unilin"). 70 *Fed. Reg.* 44694 (August 3, 2005). The complaint (as amended) alleged violations of section 337 of the Tariff Act of 1930 ("section 337") in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain laminated floor panels by reason of infringement of one

or more of claims 1, 14, 17, 19, 20, 21, 37, 52, 65, and 66 of U.S. Patent No. 6,006,486 (“the ‘486 patent”), claims 1, 2, 10, 13, 18, 19, 22, 23, 24, and 27 of U.S. Patent No. 6,490,836 (“the ‘836 patent”), claims 1-6 of U.S. Patent No. 6,874,292 (“the ‘292 patent”), and claims 1, 5, 13, 17, 27, and 28 of U.S. Patent No. 6,928,779 (“the ‘779 patent”). The investigation was subsequently terminated with respect to the ‘486 patent. The Commission named as respondents 32 companies located in Canada, China, South Korea, Malaysia, and the United States. *Id.* Two respondents have been terminated from the investigation as a result of settlement agreements.

On July 3, 2006, the ALJ issued his final initial determination (“ID”), including his recommended determination on remedy and bonding. The complainants, the Commission investigative attorney (“IA”), and several respondents petitioned for review of various portions of the final ID.

On September 25, 2006, after considering the final ID, the written submissions and other relevant portions of the record, the Commission determined to review those portions of the ALJ’s final ID concerning: (1) construction of the “elastically bendable portion” limitation of claim 1 of the ‘836 patent and claim 4 of the ‘292 patent, (2) infringement of claims 1 and 2 of the ‘836 patent and claims 3 and 4 of the ‘292 patent; (3) infringement by the defaulting respondents; (4) invalidity of the asserted claims of the ‘779 patent; and (5) the validity of the asserted claims of the ‘836 and ‘292 patents to the extent implicated by the Commission’s review described in item (1). The Commission received written submissions on the issues under review and on remedy, the public interest, and bonding.

Having examined the record in this investigation, including the submissions on review and responses thereto, the Commission has determined that there is a violation of section 337 with respect to claims 1, 2, 10, 18, and 23 of the ‘836 patent, claims 3 and 4 of the ‘292 patent, and claims 5 and 17 of the ‘779 patent.

The Commission has also made determinations on the issues of remedy, the public interest, and bonding. The Commission has determined that the appropriate form of relief is a general exclusion order prohibiting the unlicensed entry of laminated floor panels covered by claims 1, 2, 10, 18, and 23 of the ‘836 patent, claims 3 and 4 of the ‘292 patent, and claims 5 and 17 of the ‘779 patent. The Commission has also determined to issue cease and desist orders limited to claim 1 of the ‘836 patent and directed to defaulting domestic respondents Dalton Carpet Liquidators, Inc., Pacific Flooring Manufacture, Inc., P.J. Flooring Distributor, R.A.H. Carpet Supplies, Inc., Salvage Building Material, Inc., Stalheim (USA), Inc., Universal Floor Covering, Inc., and Vegas Laminate Hardwood Floors LLC.

The Commission has determined that the public interest factors enumerated in 19 U.S.C. § 1337(d), (f), and (g) do not preclude issuance of the aforementioned remedial orders, and that the bond during the Presidential period of review shall be set at 100 percent of the entered value for any covered laminated floor panels.

The authority for the Commission's determinations is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.45 - 210.51 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.45 - 210.51).

By order of the Commission.



Marilyn R. Abbott  
Secretary to the Commission

Issued: January 5, 2007



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

**In the Matter of**

**CERTAIN LAMINATED FLOOR  
PANELS**

**Inv. No. 337-TA-545**

**GENERAL EXCLUSION ORDER**

The Commission has determined that there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the unlawful importation and sale of certain laminated floor panels that infringe claims 1, 2, 10, 18, and 23 of U.S. Patent No. 6,490,836 (“the ‘836 patent”), claims 3 and 4 of U.S. Patent No. 6,874,292 (“the ‘292 patent”), and claims 5 and 17 of U.S. Patent No. 6,928,779 (“the ‘779 patent”).

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined that a general exclusion from entry for consumption is necessary to prevent circumvention of an exclusion order limited to products of named persons and because there is a pattern of violation of section 337 and it is difficult to identify the source of the infringing products. Accordingly, the Commission has determined to issue a general exclusion order prohibiting the importation of infringing laminated floor panels. The Commission has further determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) do not preclude issuance of the general exclusion order, and that the bond during the Presidential review period shall be in the amount of 100 percent of the entered value of the articles in question.

Accordingly, the Commission hereby **ORDERS** that:

1. Laminated floor panels covered by one or more of claims 1, 2, 10, 18, and 23 of the '836 patent, claims 3 and 4 of the '292 patent, and claims 5 and 17 of the '779 patent are excluded from entry into the United States for consumption, entry for consumption from a foreign trade zone, or withdrawal from warehouse for consumption, for the remaining term of the listed patents, except under license of the patent owner or as provided by law.
2. This Order does not apply to articles that are imported or manufactured abroad by any of the following entities: Armstrong World Industries, Inc.; Alloc, Inc.; Beaulieu International Group; or Valinge Innovation AB.
3. Pursuant to procedures to be specified by U.S. Customs and Border Protection (Customs), as U.S. Customs and Border Protection deems necessary, persons seeking to import laminated floor panels that are potentially subject to this Order shall certify that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the products being imported are not excluded from entry under paragraph 1 of this Order. At its discretion, U.S. Customs and Border Protection may require persons who have provided the certification described in this paragraph to furnish such records or analyses as are necessary to substantiate the certification.
4. Notwithstanding paragraph 1 of this Order, the aforesaid laminated floor panels are entitled to entry into the United States for consumption, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, under bond in the amount of 100 percent of entered value pursuant to subsection (j) of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337(j)) and the Presidential Memorandum for the United States Trade Representative of July 21, 2005 (70 Fed. Reg. 43251), from the day after this Order is received by the United States Trade Representative until such time as the United States Trade Representative notifies the Commission that this Order is approved or disapproved but, in any event, not later than 60 days after the date of receipt of this Order.
5. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to laminated floor panels that are imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.
6. The Commission may modify this Order in accordance with the procedures described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).
7. The Secretary to the Commission shall serve copies of this Order upon each party of record in this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and U.S. Customs and Border



Protection.

8. Notice of this Order shall be published in the *Federal Register*.

By Order of the Commission.



Marilyn R. Abbott  
Secretary to the Commission

Issued: January 5, 2007



**REISSUE**

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

**In the Matter of**

**CERTAIN LAMINATED FLOOR  
PANELS**

**Inv. No. 337-TA-545**

**ORDER TO CEASE AND DESIST**

IT IS HEREBY ORDERED THAT Pacific Flooring Manufacture, Inc., located at 2975 Whipple Road, Union City, CA 94587, cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), and soliciting U.S. agents or distributors for laminated floor panels that infringe claim 1 of U.S. Patent No. 6,490,836, except as provided in Section IV.

**I.**

**Definitions**

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Respondent" shall mean Pacific Flooring Manufacture, Inc., located at 2975 Whipple Road, Union City, CA 94587.

(C) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity.

(D) "United States" shall mean the fifty States, the District of Columbia, and Puerto

Rico.

(E) The terms “import” and “importation” refer to importation for entry for consumption, entry for consumption from foreign trade zone, and withdrawal from warehouse for consumption under the Customs laws of the United States.

(F) The term “covered products” shall mean laminated floor panels that infringe claim 1 of U.S. Patent No. 6,490,836 (“the ‘836 patent”).

## II.

### Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

## III.

### Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by the Order. For the remaining term of the ‘836 patent, Respondent shall not (except under license from the patent owner):

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation), in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or

(E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

#### IV.

##### Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the '836 patent licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

#### V.

##### Reporting

For purposes of this reporting requirement, the reporting periods shall commence on July 1 of each year and shall end on the subsequent June 30. However, the first report required under this section shall cover the period from the date of issuance of this Order through June 30, 2007. This reporting requirement shall continue in force until such time as Respondent will have truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the quantity in units and the value in dollars of covered products that Respondent has imported or sold in the United States after importation during the reporting period and the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be

referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

## VI.

### Record-keeping and Inspection

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, both in detail and in summary form as are required to be retained by subparagraph VI(A) of this Order.

## VII.

### Service of Cease and Desist Order

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported

covered products in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII (A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the date of expiration of the '836 patent.

## VIII.

### Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to Sections V and VI of this Order should be in accordance with Commission Rule 201.6, 19 C.F.R. § 201.6. For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

## IX.

### Enforcement

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75, including a proceeding for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

## X.

### Modification

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

## XI.

### Bonding

The conduct prohibited by Section III of this Order may be continued during the sixty (60) day period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond of 100% of entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered products imported on or after the date of issuance of this order are subject to the entry bond as set forth in the general exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. See Commission Rule 210.68, 19 C.F.R. § 210.68. The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, this Order, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order



as to Respondent on appeal, or unless Respondent exports the products subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By Order of the Commission.

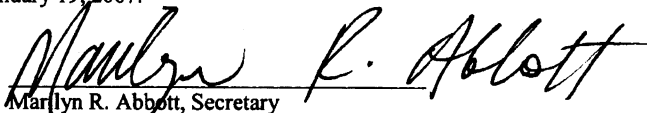
A handwritten signature in black ink, appearing to read "Marilyn R. Abbott", with a large, stylized flourish at the end.

Marilyn R. Abbott  
Secretary to the Commission

Reissued: January 12, 2007

CERTIFICATE OF SERVICE

I Marilyn R. Abbott, hereby certify that the attached NOTICE OF FINAL DETERMINATION; ISSUANCE OF GENERAL EXCLUSION ORDER AND CEASE AND DESIST ORDERS; TERMINATION OF INVESTIGATION, has been served on upon all parties and Commission Investigative Attorney, David Hollander, Esq. via first class mail and air mail where necessary on January 19, 2007.



Marilyn R. Abbott, Secretary  
U.S. International Trade Commission  
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**UNITED STATES INTERNATIONAL TRADE COMMISSION**  
**Washington, D.C.**

**In the Matter of**

**CERTAIN LAMINATED FLOOR  
PANELS**

**Inv. No. 337-TA-545**

**ORDER TO CEASE AND DESIST**

IT IS HEREBY ORDERED THAT Dalton Carpet Liquidators, Inc., located at 804 East Broad Street, Gadsden, Alabama 35903, cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), and soliciting U.S. agents or distributors for laminated floor panels that infringe claim 1 of U.S. Patent No. 6,490,836, except as provided in Section IV.

**I.**

**Definitions**

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Respondent" shall mean Dalton Carpet Liquidators, Inc., located at 804 East Broad Street, Gadsden, Alabama 35903.

(C) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity.

(D) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(E) The terms “import” and “importation” refer to importation for entry for consumption, entry for consumption from foreign trade zone, and withdrawal from warehouse for consumption under the Customs laws of the United States.

(F) The term “covered products” shall mean laminated floor panels that infringe claim 1 of U.S. Patent No. 6,490,836 (“the ‘836 patent”).

## II.

### Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

## III.

### Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by the Order. For the remaining term of the ‘836 patent, Respondent shall not (except under license from the patent owner):

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation), in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after

importation, transfer, or distribution of covered products.

#### IV.

##### Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the '836 patent licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

#### V.

##### Reporting

For purposes of this reporting requirement, the reporting periods shall commence on July 1 of each year and shall end on the subsequent June 30. However, the first report required under this section shall cover the period from the date of issuance of this Order through June 30, 2007. This reporting requirement shall continue in force until such time as Respondent will have truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the quantity in units and the value in dollars of covered products that Respondent has imported or sold in the United States after importation during the reporting period and the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

## VI.

### Record-keeping and Inspection

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, both in detail and in summary form as are required to be retained by subparagraph VI(A) of this Order.

## VII.

### Service of Cease and Desist Order

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in



subparagraph VII (A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the date of expiration of the '836 patent.

## VIII.

### Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to Sections V and VI of this Order should be in accordance with Commission Rule 201.6, 19 C.F.R. § 201.6. For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

## IX.

### Enforcement

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75, including a proceeding for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

## X.

### Modification

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

## XI.

### Bonding

The conduct prohibited by Section III of this Order may be continued during the sixty (60) day period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond of 100% of entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered products imported on or after the date of issuance of this order are subject to the entry bond as set forth in the general exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. See Commission Rule 210.68, 19 C.F.R. § 210.68. The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, this Order, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or

destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By Order of the Commission.



Marilyn R. Abbott  
Secretary to the Commission

Issued: January 5, 2007



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

**In the Matter of**

**CERTAIN LAMINATED FLOOR  
PANELS**

**Inv. No. 337-TA-545**

**ORDER TO CEASE AND DESIST**

IT IS HEREBY ORDERED THAT Pacific Flooring Manufacture, Inc., located at 391 Foster City Blvd., Foster City, CA 94404, cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), and soliciting U.S. agents or distributors for laminated floor panels that infringe claim 1 of U.S. Patent No. 6,490,836, except as provided in Section IV.

**I.**

**Definitions**

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Respondent" shall mean Pacific Flooring Manufacture, Inc., located at 391 Foster City Blvd., Foster City, CA 94404.

(C) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity.

(D) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(E) The terms “import” and “importation” refer to importation for entry for consumption, entry for consumption from foreign trade zone, and withdrawal from warehouse for consumption under the Customs laws of the United States.

(F) The term “covered products” shall mean laminated floor panels that infringe claim 1 of U.S. Patent No. 6,490,836 (“the ‘836 patent”).

## II.

### Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

## III.

### Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by the Order. For the remaining term of the ‘836 patent, Respondent shall not (except under license from the patent owner):

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation), in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after

importation, transfer, or distribution of covered products.

#### IV.

##### Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the '836 patent licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

#### V.

##### Reporting

For purposes of this reporting requirement, the reporting periods shall commence on July 1 of each year and shall end on the subsequent June 30. However, the first report required under this section shall cover the period from the date of issuance of this Order through June 30, 2007. This reporting requirement shall continue in force until such time as Respondent will have truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the quantity in units and the value in dollars of covered products that Respondent has imported or sold in the United States after importation during the reporting period and the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

## VI.

### Record-keeping and Inspection

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, both in detail and in summary form as are required to be retained by subparagraph VI(A) of this Order.

## VII.

### Service of Cease and Desist Order

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in



subparagraph VII (A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the date of expiration of the '836 patent.

## VIII.

### Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to Sections V and VI of this Order should be in accordance with Commission Rule 201.6, 19 C.F.R. § 201.6. For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

## IX.

### Enforcement

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75, including a proceeding for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

## X.

### Modification

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

## XI.

### Bonding

The conduct prohibited by Section III of this Order may be continued during the sixty (60) day period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond of 100% of entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered products imported on or after the date of issuance of this order are subject to the entry bond as set forth in the general exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. See Commission Rule 210.68, 19 C.F.R. § 210.68. The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, this Order, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or

destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By Order of the Commission.



Marilyn R. Abbott  
Secretary to the Commission

Issued: January 5, 2007



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

**In the Matter of**

**CERTAIN LAMINATED FLOOR  
PANELS**

**Inv. No. 337-TA-545**

**ORDER TO CEASE AND DESIST**

IT IS HEREBY ORDERED THAT P.J. Flooring Distributor, located at 1455 Monterey Pass Rd., Suite 105, Monterey Park, CA 91754, cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), and soliciting U.S. agents or distributors for laminated floor panels that infringe claim 1 of U.S. Patent No. 6,490,836, except as provided in Section IV.

**I.**

**Definitions**

As used in this Order:

- (A) "Commission" shall mean the United States International Trade Commission.
- (B) "Respondent" shall mean P.J. Flooring Distributor, located at 1455 Monterey Pass Rd., Suite 105, Monterey Park, CA 91754.
- (C) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity.
- (D) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(E) The terms “import” and “importation” refer to importation for entry for consumption, entry for consumption from foreign trade zone, and withdrawal from warehouse for consumption under the Customs laws of the United States.

(F) The term “covered products” shall mean laminated floor panels that infringe claim 1 of U.S. Patent No. 6,490,836 (“the ‘836 patent”).

## II.

### Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

## III.

### Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by the Order. For the remaining term of the ‘836 patent, Respondent shall not (except under license from the patent owner):

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation), in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after

importation, transfer, or distribution of covered products.

#### IV.

##### Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the '836 patent licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

#### V.

##### Reporting

For purposes of this reporting requirement, the reporting periods shall commence on July 1 of each year and shall end on the subsequent June 30. However, the first report required under this section shall cover the period from the date of issuance of this Order through June 30, 2007. This reporting requirement shall continue in force until such time as Respondent will have truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the quantity in units and the value in dollars of covered products that Respondent has imported or sold in the United States after importation during the reporting period and the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

## VI.

### Record-keeping and Inspection

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, both in detail and in summary form as are required to be retained by subparagraph VI(A) of this Order.

## VII.

### Service of Cease and Desist Order

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in



subparagraph VII (A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the date of expiration of the '836 patent.

## VIII.

### Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to Sections V and VI of this Order should be in accordance with Commission Rule 201.6, 19 C.F.R. § 201.6. For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

## IX.

### Enforcement

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75, including a proceeding for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

## X.

### Modification

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

## XI.

### Bonding

The conduct prohibited by Section III of this Order may be continued during the sixty (60) day period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond of 100% of entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered products imported on or after the date of issuance of this order are subject to the entry bond as set forth in the general exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. See Commission Rule 210.68, 19 C.F.R. § 210.68. The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, this Order, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or

destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By Order of the Commission.



Marilyn R. Abbott  
Secretary to the Commission

Issued: January 5, 2007



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

**In the Matter of**

**CERTAIN LAMINATED FLOOR  
PANELS**

**Inv. No. 337-TA-545**

**ORDER TO CEASE AND DESIST**

IT IS HEREBY ORDERED THAT R.A.H. Carpet Supplies, Inc., located at 551 Main Avenue, Wallington, New Jersey 07057, cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), and soliciting U.S. agents or distributors for laminated floor panels that infringe claim 1 of U.S. Patent No. 6,490,836, except as provided in Section IV.

**I.**

**Definitions**

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Respondent" shall mean R.A.H. Carpet Supplies, Inc., located at 551 Main Avenue, Wallington, New Jersey 07057.

(C) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity.

(D) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(E) The terms “import” and “importation” refer to importation for entry for consumption, entry for consumption from foreign trade zone, and withdrawal from warehouse for consumption under the Customs laws of the United States.

(F) The term “covered products” shall mean laminated floor panels that infringe claim 1 of U.S. Patent No. 6,490,836 (“the ‘836 patent”).

## II.

### Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

## III.

### Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by the Order. For the remaining term of the ‘836 patent, Respondent shall not (except under license from the patent owner):

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation), in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after

importation, transfer, or distribution of covered products.

#### IV.

##### Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the '836 patent licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

#### V.

##### Reporting

For purposes of this reporting requirement, the reporting periods shall commence on July 1 of each year and shall end on the subsequent June 30. However, the first report required under this section shall cover the period from the date of issuance of this Order through June 30, 2007. This reporting requirement shall continue in force until such time as Respondent will have truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the quantity in units and the value in dollars of covered products that Respondent has imported or sold in the United States after importation during the reporting period and the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

## VI.

### Record-keeping and Inspection

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, both in detail and in summary form as are required to be retained by subparagraph VI(A) of this Order.

## VII.

### Service of Cease and Desist Order

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in



subparagraph VII (A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the date of expiration of the '836 patent.

### VIII.

#### Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to Sections V and VI of this Order should be in accordance with Commission Rule 201.6, 19 C.F.R. § 201.6. For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

### IX.

#### Enforcement

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75, including a proceeding for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

## X.

### Modification

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

## XI.

### Bonding

The conduct prohibited by Section III of this Order may be continued during the sixty (60) day period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond of 100% of entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered products imported on or after the date of issuance of this order are subject to the entry bond as set forth in the general exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. See Commission Rule 210.68, 19 C.F.R. § 210.68. The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, this Order, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or

destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By Order of the Commission.



Marilyn R. Abbott  
Secretary to the Commission

Issued: January 5, 2007



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

**In the Matter of**

**CERTAIN LAMINATED FLOOR  
PANELS**

**Inv. No. 337-TA-545**

**ORDER TO CEASE AND DESIST**

IT IS HEREBY ORDERED THAT Salvage Building Material, Inc., located at 951 N. Liberty St., Winston-Salem, North Carolina 27101, cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), and soliciting U.S. agents or distributors for laminated floor panels that infringe claim 1 of U.S. Patent No. 6,490,836, except as provided in Section IV.

**I.**

**Definitions**

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Respondent" shall mean Salvage Building Material, Inc., located at 951 N. Liberty St., Winston-Salem, North Carolina 27101.

(C) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity.

(D) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(E) The terms “import” and “importation” refer to importation for entry for consumption, entry for consumption from foreign trade zone, and withdrawal from warehouse for consumption under the Customs laws of the United States.

(F) The term “covered products” shall mean laminated floor panels that infringe claim 1 of U.S. Patent No. 6,490,836 (“the ‘836 patent”).

## II.

### Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

## III.

### Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by the Order. For the remaining term of the ‘836 patent, Respondent shall not (except under license from the patent owner):

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation), in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after

importation, transfer, or distribution of covered products.

#### IV.

##### Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the '836 patent licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

#### V.

##### Reporting

For purposes of this reporting requirement, the reporting periods shall commence on July 1 of each year and shall end on the subsequent June 30. However, the first report required under this section shall cover the period from the date of issuance of this Order through June 30, 2007. This reporting requirement shall continue in force until such time as Respondent will have truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the quantity in units and the value in dollars of covered products that Respondent has imported or sold in the United States after importation during the reporting period and the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

## VI.

### Record-keeping and Inspection

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, both in detail and in summary form as are required to be retained by subparagraph VI(A) of this Order.

## VII.

### Service of Cease and Desist Order

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in



subparagraph VII (A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the date of expiration of the '836 patent.

## VIII.

### Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to Sections V and VI of this Order should be in accordance with Commission Rule 201.6, 19 C.F.R. § 201.6. For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

## IX.

### Enforcement

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75, including a proceeding for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

Modification

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

XI.

Bonding

The conduct prohibited by Section III of this Order may be continued during the sixty (60) day period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond of 100% of entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered products imported on or after the date of issuance of this order are subject to the entry bond as set forth in the general exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. See Commission Rule 210.68, 19 C.F.R. § 210.68. The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, this Order, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or

destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By Order of the Commission.



Marilyn R. Abbott  
Secretary to the Commission

Issued: January 5, 2007



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

**In the Matter of**

**CERTAIN LAMINATED FLOOR  
PANELS**

**Inv. No. 337-TA-545**

**ORDER TO CEASE AND DESIST**

IT IS HEREBY ORDERED THAT Stalheim (USA), Inc., located at 173600 Colima Road, #332, Rowland Heights, California 91748, cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), and soliciting U.S. agents or distributors for laminated floor panels that infringe claim 1 of U.S. Patent No. 6,490,836, except as provided in Section IV.

**I.**

**Definitions**

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Respondent" shall mean Stalheim (USA), Inc., located at 173600 Colima Road, #332, Rowland Heights, California 91748.

(C) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity.

(D) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(E) The terms “import” and “importation” refer to importation for entry for consumption, entry for consumption from foreign trade zone, and withdrawal from warehouse for consumption under the Customs laws of the United States.

(F) The term “covered products” shall mean laminated floor panels that infringe claim 1 of U.S. Patent No. 6,490,836 (“the ‘836 patent”).

## II.

### Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

## III.

### Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by the Order. For the remaining term of the ‘836 patent, Respondent shall not (except under license from the patent owner):

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation), in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after

importation, transfer, or distribution of covered products.

#### IV.

##### Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the '836 patent licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

#### V.

##### Reporting

For purposes of this reporting requirement, the reporting periods shall commence on July 1 of each year and shall end on the subsequent June 30. However, the first report required under this section shall cover the period from the date of issuance of this Order through June 30, 2007. This reporting requirement shall continue in force until such time as Respondent will have truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the quantity in units and the value in dollars of covered products that Respondent has imported or sold in the United States after importation during the reporting period and the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

## VI.

### Record-keeping and Inspection

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, both in detail and in summary form as are required to be retained by subparagraph VI(A) of this Order.

## VII.

### Service of Cease and Desist Order

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in



subparagraph VII (A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the date of expiration of the '836 patent.

### VIII.

#### Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to Sections V and VI of this Order should be in accordance with Commission Rule 201.6, 19 C.F.R. § 201.6. For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

### IX.

#### Enforcement

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75, including a proceeding for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

## X.

### Modification

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

## XI.

### Bonding

The conduct prohibited by Section III of this Order may be continued during the sixty (60) day period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond of 100% of entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered products imported on or after the date of issuance of this order are subject to the entry bond as set forth in the general exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. See Commission Rule 210.68, 19 C.F.R. § 210.68. The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, this Order, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or

destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By Order of the Commission.

A handwritten signature in black ink, appearing to read "M. R. Abbott", with a large, sweeping loop at the end.

Marilyn R. Abbott  
Secretary to the Commission

Issued: January 5, 2007



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

**In the Matter of**

**CERTAIN LAMINATED FLOOR  
PANELS**

**Inv. No. 337-TA-545**

**ORDER TO CEASE AND DESIST**

IT IS HEREBY ORDERED THAT Universal Floor Covering, Inc., located at 4500 Automall Parkway, Fremont, California 94538, cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), and soliciting U.S. agents or distributors for laminated floor panels that infringe claim 1 of U.S. Patent No. 6,490,836, except as provided in Section IV.

**I.**

**Definitions**

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Respondent" shall mean Universal Floor Covering, Inc., located at 4500 Automall Parkway, Fremont, California 94538.

(C) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity.

(D) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(E) The terms “import” and “importation” refer to importation for entry for consumption, entry for consumption from foreign trade zone, and withdrawal from warehouse for consumption under the Customs laws of the United States.

(F) The term “covered products” shall mean laminated floor panels that infringe claim 1 of U.S. Patent No. 6,490,836 (“the ‘836 patent”).

## II.

### Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

## III.

### Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by the Order. For the remaining term of the ‘836 patent, Respondent shall not (except under license from the patent owner):

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation), in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after

importation, transfer, or distribution of covered products.

#### IV.

##### Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the '836 patent licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

#### V.

##### Reporting

For purposes of this reporting requirement, the reporting periods shall commence on July 1 of each year and shall end on the subsequent June 30. However, the first report required under this section shall cover the period from the date of issuance of this Order through June 30, 2007. This reporting requirement shall continue in force until such time as Respondent will have truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the quantity in units and the value in dollars of covered products that Respondent has imported or sold in the United States after importation during the reporting period and the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

## VI.

### Record-keeping and Inspection

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, both in detail and in summary form as are required to be retained by subparagraph VI(A) of this Order.

## VII.

### Service of Cease and Desist Order

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in



subparagraph VII (A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the date of expiration of the '836 patent.

## VIII.

### Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to Sections V and VI of this Order should be in accordance with Commission Rule 201.6, 19 C.F.R. § 201.6. For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

## IX.

### Enforcement

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75, including a proceeding for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

## X.

### Modification

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

## XI.

### Bonding

The conduct prohibited by Section III of this Order may be continued during the sixty (60) day period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond of 100% of entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered products imported on or after the date of issuance of this order are subject to the entry bond as set forth in the general exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. See Commission Rule 210.68, 19 C.F.R. § 210.68. The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, this Order, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or

destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By Order of the Commission.

A handwritten signature in black ink, appearing to read "M. R. Abbott", is written over the typed name and title. The signature is fluid and cursive, with a large loop at the end.

Marilyn R. Abbott  
Secretary to the Commission

Issued: January 5, 2007



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

**In the Matter of**

**CERTAIN LAMINATED FLOOR  
PANELS**

**Inv. No. 337-TA-545**

**ORDER TO CEASE AND DESIST**

IT IS HEREBY ORDERED THAT Vegas Laminate Hardwood Floors LLC, located at 4059 Renate Drive, Las Vegas, Nevada 89103, cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), and soliciting U.S. agents or distributors for laminated floor panels that infringe claim 1 of U.S. Patent No. 6,490,836, except as provided in Section IV.

**I.**

**Definitions**

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Respondent" shall mean Vegas Laminate Hardwood Floors LLC, located at 4059 Renate Drive, Las Vegas, Nevada 89103.

(C) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity.

(D) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(E) The terms “import” and “importation” refer to importation for entry for consumption, entry for consumption from foreign trade zone, and withdrawal from warehouse for consumption under the Customs laws of the United States.

(F) The term “covered products” shall mean laminated floor panels that infringe claim 1 of U.S. Patent No. 6,490,836 (“the ‘836 patent”).

## II.

### Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

## III.

### Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by the Order. For the remaining term of the ‘836 patent, Respondent shall not (except under license from the patent owner):

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation), in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after

importation, transfer, or distribution of covered products.

#### IV.

##### Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the '836 patent licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

#### V.

##### Reporting

For purposes of this reporting requirement, the reporting periods shall commence on July 1 of each year and shall end on the subsequent June 30. However, the first report required under this section shall cover the period from the date of issuance of this Order through June 30, 2007. This reporting requirement shall continue in force until such time as Respondent will have truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the quantity in units and the value in dollars of covered products that Respondent has imported or sold in the United States after importation during the reporting period and the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

## VI.

### Record-keeping and Inspection

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, both in detail and in summary form as are required to be retained by subparagraph VI(A) of this Order.

## VII.

### Service of Cease and Desist Order

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in



subparagraph VII (A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the date of expiration of the '836 patent.

## VIII.

### Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to Sections V and VI of this Order should be in accordance with Commission Rule 201.6, 19 C.F.R. § 201.6. For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

## IX.

### Enforcement

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75, including a proceeding for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

## X.

### Modification

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

## XI.

### Bonding

The conduct prohibited by Section III of this Order may be continued during the sixty (60) day period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond of 100% of entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered products imported on or after the date of issuance of this order are subject to the entry bond as set forth in the general exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. See Commission Rule 210.68, 19 C.F.R. § 210.68. The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, this Order, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or

destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By Order of the Commission.




Marilyn R. Abbott  
Secretary to the Commission

Issued: January 5, 2007

CERTIFICATE OF SERVICE

I Marilyn R. Abbott, hereby certify that the attached **NOTICE OF FINAL DETERMINATION; ISSUANCE OF GENERAL EXCLUSION ORDER AND CEASE AND DESIST ORDERS; TERMINATION OF INVESTIGATION**, has been served on upon all parties and Commission Investigative Attorney, David Hollander, Esq. via first class mail and air mail where necessary on January 5, 2007.



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

**ON BEHALF OF COMPLAINANT UNILIN  
BEHNER B.V., ET. AL.:**

Cecilia H. Gonzalez  
Margaret D. Macdonald  
**HOWREY LLP**  
1299 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2402  
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**PUBLIC VERSION**

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

**In the Matter of**

**CERTAIN LAMINATED FLOOR  
PANELS**

**Inv. No. 337-TA-545**

**COMMISSION OPINION**

On July 3, 2006, the administrative law judge ("ALJ") issued a final initial determination ("ID") finding a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the above-captioned investigation. The ALJ recommended that the Commission issue a general exclusion order and cease and desist orders directed to several domestic respondents. On September 25, 2006, the Commission determined to review a number of conclusions of the final ID. 71 *Fed. Reg.* 57564 (Sept. 29, 2006).

The Commission has now determined to reverse the ALJ's determinations concerning certain of these conclusions and to provide relief in the form of a general exclusion order and cease and desist orders directed to defaulting domestic respondents.

Specifically, the Commission has determined to exclude from entry for consumption into the United States laminated floor panels that infringe one or more of claims 1, 2, 10, 18, and 23 of U.S. Patent No. 6,490,836 ("the '836 patent"), claims 3 and 4 of U.S. Patent No. 6,874,292 ("the '292 patent"), and claims 5 and 17 of U.S. Patent No. 6,928,779 ("the '779 patent"). The Commission has also determined to issue cease and desist orders to certain defaulting domestic

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respondents pursuant to 19 U.S.C. § 1337(g)(1), but limited to claim 1 of the ‘836 patent. The Commission has determined that the public interest factors set out in 19 U.S.C. § 1337(d), (f), and (g) do not preclude issuance of these remedial orders and that the amount of the bond for temporary importation during the Presidential review period should be 100 percent of entered value.

### **I. BACKGROUND**

#### **A. Procedural History**

The Commission instituted this investigation on July 29, 2005, based on a complaint filed by Unilin Beheer B.V. of the Netherlands, Flooring Industries Ltd. of Ireland, and Unilin Flooring N.C. LLC of North Carolina (collectively “Unilin”).<sup>1</sup> 70 *Fed. Reg.* 44694 (August 3, 2005). The complaint (as amended) alleged violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain laminated floor panels by reason of infringement of one or more of claims 1, 14, 17, 19, 20, 21, 37, 52, 65, and 66 of U.S. Patent No. 6,006,486 (“the ‘486 patent”), claims 1, 2, 10, 13, 18, 19, 22, 23, 24, and 27 of the ‘836 patent, claims 1-6 the ‘292 patent, and claims 1, 5, 13, 17, 27 and 28 of the ‘779 patent. The investigation was subsequently terminated with respect to the ‘486 patent on motion by complainants (Order No. 8, unreviewed by the Commission). 70 *Fed. Reg.* 61309 (Oct. 21, 2005). Unilin also subsequently limited its assertions of infringement to claims 1, 2, 10, 18, and 23 of the ‘836 patent, claims 3 and 4 of the ‘292 patent, and claims 5 and

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<sup>1</sup> Unilin Beheer B.V. is the owner by assignment of the ‘836 patent, the ‘292 patent and the ‘779 patent. See ID FF 1-4.



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17 of the '779 patent. ID 13, 18, 19.

The Commission named as respondents 32 companies located in Canada, China, South Korea, Malaysia, and the United States. 70 *Fed. Reg.* 44694 (August 3, 2005). The investigation was assigned to administrative law judge Paul J. Luckern.

On July 3, 2006, the ALJ issued his final initial determination, including his recommended determination on remedy and bonding. He found that certain products of respondents infringe claims 10, 18, and 23 of the '836 patent, but that claims 1 and 2 of the '836 patent are not infringed by respondents' products, except that claim 1 is infringed by the products of the defaulting respondents. He also found that claims 3 and 4 of the '292 patent are not infringed by respondents' products. The ALJ further found that claims 5 and 17 of the '779 patent are invalid for lack of a written description, as required by 35 U.S.C. § 112 ¶ 1, but if valid, those claims were infringed by some of respondents' products. He concluded that the asserted claims of the '836 patent and '292 patents are not invalid.

The ALJ recommended a general exclusion order with a certification provision directed to infringing products and cease and desist orders against defaulting domestic respondents. He also recommended a bond in the amount of 100 percent of entered value to permit importation during the Presidential review period.

The Commission received petitions for review from complainants, respondents, and the Commission investigative attorney ("IA"). It determined to review several conclusions in the ID: (1) construction of the "elastically bendable portion" limitation contained in claim 1 of the '836 patent and claim 4 of the '292 patent; (2) proof of infringement of claims 1 and 2 of the '836

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patent and claims 3 and 4 of the '292 patent, specifically whether complainants had proven that respondents' products had a bent lower lip upon coupling and the ALJ's two independent grounds for non-infringement; (3) infringement by the defaulting respondents; (4) invalidity of the asserted claims of the '779 patent; and (5) the validity of the asserted claims of the '836 and '292 patents to the extent implicated the Commission's review of the construction of claim 1 of the '836 patent and claim 4 of the '292 patent. 71 *Fed. Reg.* 57564 (Sept. 29, 2006).

Complainants and the IA filed submissions in response to the Commission's determination to review certain determinations of the ALJ as well as remedy, bonding, and the public interest. The Greenberg Respondents<sup>2</sup> and the PSV Respondents<sup>3</sup> filed submissions addressing the issues on review, as well as remedy, bonding and the public interest. Two other respondents (as well as several non-parties) filed comments on the issues of remedy, bonding, and the public interest.<sup>4</sup>

### **B. Products at Issue**

The products at issue are laminated floor panels which can be assembled without the use

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<sup>2</sup> The Greenberg Respondents (represented by Greenberg Traurig LLP) are Changzhou Saili Wood Co. Ltd., Changzhou Wujin Zhongxin Wood, Co. Ltd., Jiangsu Lodgi Woods Industry Co., Ltd., Yingbin-Nature (Guangdong) Wood Industry Co., Ltd. and Hansol Homedeco Co., Ltd. All of the Greenberg Respondents, except for Hansol Homedeco (which is now separately represented), filed a joint submission concerning the issues on review, as well as remedy and bonding.

<sup>3</sup> The PSV Respondents consist of respondents Power Dekor Group Co., Ltd., Shengda Flooring Corp., and Vöhringer Wood Product (Shanghai) Co., Ltd.

<sup>4</sup> Chinafloors Timber (Shanghai) Co. Ltd. (Chinafloors) and Yekalon Industry, Inc. filed individual comments on remedy. We have not considered any submissions that were not timely filed.

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of glue by virtue of integrated locking elements on the side edges of the panels. The floor panels of complainants are typically rectangular, with coupling parts on both the short and long sides. Full size panels are typically 48 inches long, between 5 and 8 inches wide, and between 8 and 12 millimeters thick. *See* ID 11-12.

### **C. Patents at Issue**

The '836 patent, the '292 patent, and the '779 patent are all related. The '836 patent was a continuation of the application that became the '486 patent, originally filed on June 10, 1997. The '836 patent, entitled "Floor Panel With Edge Connectors," issued on December 10, 2002. The '292 patent and the '779 patent are continuations of the application that became the '836 patent. The '292 patent and the '779 patent are both entitled "Floor Panels With Edge Connectors" and issued on April 5, 2005, and August 16, 2005, respectively.

## **II. ANALYSIS**

### **A. Claim Construction**

#### **1. Proper Construction of "Elastically Bendable Portion" (Claim 1 of the '836 Patent; Claim 4 of the '292 Patent)**

We determined to review the ALJ's claim construction with respect to one limitation, the location of the elastically bendable portion referred to in claim 1 of the '836 patent and claim 4 of the '292 patent. The claims provide that "said elastically bendable portion of the lower lip comprises a portion of said lower lip located between the deepest point of said groove and the lowermost bottom area of said recess." '836 Patent 14:33-36; '292 Patent 14:49-52. The ALJ had found that this language meant that the two claims require bending "in a portion that only encompasses the deepest point of the groove and the lowermost bottom area of the recess." ID

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51. Because it was unclear what the ALJ meant by “only” in this context, we requested briefing from the parties on “whether the location of the ‘elastically bendable portion’ of the lower lip is limited to a particular portion of the lip.”

Complainants’ position is that claim 1 of the ’836 patent and claim 4 of the ’292 patent require that there be bending of the lower lip in at least the portion of the lower lip that is located between the deepest point of the groove and the bottom of the recess. They maintain this is clear from the claim language itself. Unilin Brief (Unilin Br.) at 5-6. Other parties are in agreement. IA Brief (IA Br.) at 6-7; Greenberg Respondents’ Brief (Greenberg Br.) at 6; PSV Respondents Brief (PSV Br.) at 10-11.

Consistent with the parties’ positions and based upon the plain language of the claims, we conclude that the bending in the lower lip must occur in the elastically bendable portion but that bending is not prohibited elsewhere in the lower lip. None of the parties argues that this claim construction affects the ALJ’s determinations concerning validity of claim 1 of the ’836 patent or claim 4 of the ’292 patent.<sup>5</sup> See IA Br. at 24; Unilin Br. at 8; PSV Br. at 40-41.

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<sup>5</sup> The Commission did not review the ALJ’s construction of the so-called “snap” claims of the ’836 patent, thus agreeing with the ALJ’s construction as set out in the final ID. In its petition for review of that construction, respondent Hansol argued, inter alia, that prosecution history disclaimer required a different result. The IA argued that Hansol had failed to raise that argument before the ALJ. The Commission notes that, even if that argument had been properly raised, the alleged disclaimer is not clear and unmistakable.

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### **B. Infringement**

We determined to review the ALJ's conclusions with respect to non-infringement of claims 1 and 2 of the '836 patent, claims 3 and 4 of the '292 patent and infringement by the defaulting respondents. On review, we reverse the ALJ's conclusions with respect to claims 1 and 2 of the '836 patent and claims 3 and 4 of the '292 patent and we affirm his determination with respect to infringement by the defaulting respondents.

#### **1. Testing for Presence of the Bent Lower Lip Limitations of Claims 1 and 2 of the '836 Patent and Claims 3 and 4 of the '292 Patent**

Claims 1 and 2 of the '836 patent and claims 3 and 4 of the '292 patent require an elastically bendable portion on the lower lip of the groove that has a relaxed, unbent position, and that when coupled with another coupling part is slightly bent. The ALJ concluded that complainants failed to prove by a preponderance of the evidence that respondents' products met all the limitations of the claims. The ALJ's essential finding was that the test performed by complainants' expert, Loferski, for measuring the presence of a bent lower lip was unreliable. ID 102. The ALJ also found that respondents' experts' testimony indicated that the lower lip was not bent upon coupling. ID 102.

Loferski used a Mitutoyo gauge to measure the height of the distal end of the lower lip before and after coupling of the panels in order to determine if the lower lip had been bent slightly by the coupling. ID 81. He required a difference of at least 0.03 mm in order to conclude there was a bent lower lip. Tr. at 388-90 (Loferski).

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The ALJ criticized Loferski's test for a number of reasons. First, he found the test to be unreliable because Loferski did not independently calibrate the Mitutoyo gauge. ID 98. The ALJ's view was that it was insufficient to simply rely upon the manufacturer's warranty or a second, more precise, gauge, as Loferski did, to verify calibration of the first gauge, because there was no way to be certain the second gauge was calibrated correctly either. ID 98. Moreover, the ALJ observed that Loferski may not have returned the Mitutoyo gauge to the exact same spot for the second measurements. Loferski had marked each of the three measurement locations within a pencil mark, which had a width of approximately 0.5 mm, but the ALJ concluded that Loferski may not have returned the gauge to the exact same spot within the pencil mark and that surface variations may have affected his measurements. ID 100.

The ALJ also found that tests performed by respondents' experts Lang and Cao also supported his finding that complainants failed to show that respondents' products have a lower lip that bends upon coupling of the panels. ID 102.

Dr. Lang was an expert for respondent Yekalon and performed tests for the presence of a bent lower lip in which he coupled Yekalon's accused floor panels and then took successive measurements with a Mitutoyo gauge, starting at 35 mm from the joint, and moving closer to the joint in order to determine if the lower lip is bent due to the coupling of the panels. ID 84. Dr. Cao, an expert for the Greenberg Respondents, also performed a test designed to determine if the lower lip was bent due to the coupling of certain accused panels. His test relied upon a magnetic sensor, a displacement transducer, which could determine the precise position of metallic foil on the panel near the joint. Cao measured the position of the lower lip before and after assembly of

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the panels. According to the ALJ, Cao's measurements showed much less bent lower lip displacement than Loferski's test. ID 83.

Complainants and the IA urge the Commission to reverse the ALJ and find that Loferski's bent lower lip test was sufficient to prove that the lower lip bends in respondents' products. Respondents urge the Commission to uphold the ALJ's rejection of Loferski's testing as unreliable.

We have reviewed the evidence and extensive arguments of the parties concerning Loferski's testing for the presence of a bent lower lip in the accused products upon the coupling of the panels. We conclude that Loferski's methodology was reasonable and that respondents' criticisms of Loferski's testing do not undermine his conclusions. We find that his testing was sufficiently reliable to demonstrate the presence of a bent lower lip in respondents' products accused of infringing the asserted claims.<sup>6</sup>

The ALJ faulted Loferski for failing to calibrate his Mitutoyo gauge before testing for a bent lower lip. ID 98. However, the evidence does not indicate that proper use of this particular gauge requires that it be calibrated by the user. The instructions do not refer to user calibration of the gauge, and the gauge itself does not have any apparent calibration mechanism. *See* CX-115 and CPX-601. The manufacturer's warranty states as follows: "Mitutoyo Corporation conducts quality assurance under ISO 9000 certified quality system. This product conforms to the MITUTOYO inspection standard, and the standard(s) used for the calibration is/are traceable to

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<sup>6</sup> The ALJ independently found that the Engagement Products of respondent Yekalon do not infringe any of the asserted claims. ID 89-94. We determined not to review that conclusion.

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the national (international) standard(s).” CX-115. Indeed, there was evidence that the Mitutoyo gauge cannot be calibrated by the user. Tr. at 2936 (Loferski) (“[T]his gauge cannot be calibrated by the user. . . . It is calibrated by the factory.”). Although other experts such as Lang and Thiers testified that they are familiar with the use of the Mitutoyo gauge, neither indicated that calibration is required for proper use of the gauge. Respondents’ expert Lang used a Mitutoyo gauge for his test and did not calibrate the Mitutoyo gauge; he testified that he did not view the calibration of the gauges used by Loferski as a problem. Tr. at 2132.

Further, Loferski repeated the test with a second, more accurate, Mitutoyo gauge, and the measurements of the second gauge confirmed the measurements of the first gauge. Nevertheless, the ALJ found that any problems with the original gauge or Loferski’s methodology would not be solved by a Mitutoyo gauge of higher resolution. ID 96. However, that a second gauge confirmed the measurements of the first gauge does provide an indication that the first gauge was accurate. Loferski also testified that he checked the accuracy of his gauge by measuring standardized strips of metal, “feeler gauges,” that measured between 0.05 mm and 1 mm in thickness. The ALJ stated that this was inadequate because the thinnest feeler gauge was 0.05 mm thick and Loferski based his infringement conclusions on measurements of .03 mm or greater. ID 98. However, Loferski’s use of the feeler gauges is an additional indication that his gauge was accurate. ID 98.

Another basis for the ALJ’s rejection of Loferski’s test was the ALJ’s concern that Loferski may not have returned to the precise same location with the pencil mark for the second measurement after the coupling of the panels and that surface irregularities caused Loferski to



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take inaccurate second measurements. ID 100. Respondents have identified little evidence that the panels that were tested had surface irregularities that undermined the accuracy of Loferski's measurements. Complainants offered evidence that there are no surface irregularities within the pencil marks or at a distance of 2 mm and 5 mm away from the pencil marks. CX-107.1; CX-107.2; CX-107.3. Given the absence of evidence of significant surface irregularities, we find surface irregularities are not a basis for rejecting Loferski's test results.

Further, it is apparent that use of a Mitutoyo gauge would always involve some contact with the object to be measured and include the potential for variations or imperfections in the surface of the panel being measured to affect the test. We believe Loferski's multiple measurements at each point was a reasonable approach to account for these possibilities. As noted, Loferski also required at least .03 millimeters of displacement before he would conclude that the lower lip had been bent and he repeated his test at three locations on each sample.

Respondents characterize Loferski's testing as "unrepeatable" and therefore not reliable. *See Greenberg Br.* at 16-17. However, the exhibit cited by respondents, CX-107.1, generally shows the same measurements for the same samples at the same measurement point. The measurements do differ for different measurement points and for different samples of the same product, but this does not undermine the reliability of the test because Loferski was not making identical measurements at the same point of the same panel.

In their response to the Commission's review of the issue, the PSV Respondents rely upon *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593-94 (1993), in which the Supreme Court specified four factors as important in weighing the reliability of expert testimony: "(1) the

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testability of the hypothesis; (2) whether the theory or technique has been subject to peer review and publication; (3) the known or potential rate of error; and (4) whether the technique is generally accepted.” PSV Br. at 15. They argue that none of these factors supports the reliability of Loferski’s testing.

We do not find this argument persuasive. One would not expect a test developed for such a limited purpose to have previously been generally accepted by Loferski’s peers.<sup>7</sup> Further, a Mitutoyo gauge was acknowledged by experts on both sides to be an appropriate tool for measurement of the height of a panel. Respondents’ expert Cao acknowledged that an instrument such as the Mitutoyo gauge has been used for many years for measuring the height of a planar surface. Tr. at 964-965. Dr. Lang, an expert for respondent Yekalon, also used a Mitutoyo gauge in his test for a bent lower lip, suggesting that use of a Mitutoyo gauge is appropriate for such a measurement. Unilin’s experts testified that, internally, Unilin routinely uses a Mitutoyo gauge for quality control. Tr. at 107-108.

Respondents also contend that Loferski was not qualified to make the measurements with the Mitutoyo gauge. However, respondents’ expert on measurement, Dr. Rice, indicated that one of ordinary skill in the art of wood science should be able to measure for a bent lower lip. Tr. at 2131, 2529. We therefore find that the evidence indicates that use of a Mitutoyo gauge for

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<sup>7</sup> As Unilin notes, in *Daubert*, the Court itself recognized that peer review may not be present where the subject of a litigation is not a subject that generates widespread academic interest. *Daubert*, 509 U.S. at 594 (“Some propositions are too particular, too new, or of too limited interest to be published.”). Unilin Reply at 7.

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measuring the height of a panel at the lower lip is accepted practice in the wood science industry and that Loferski, an expert in wood science, was qualified to make measurements of the height of the panel at the lower lip.

Respondents' other criticisms, such as that Dr. Rice demonstrated in his "phantom lower lip" test that Loferski's test would indicate a bent lower lip when there was no tongue to bend the lower lip are also without merit. Unilin explained that Rice's test apparatus was different from Dr. Loferski's equipment. "They are quite different, and they are quite different because I was in fact holding the panel flat with a massive transfer stand." Tr. at 2477 (Rice). Loferski testified that Rice's apparatus caused the whole panel to bend and that when he performed the test with his own apparatus, his test did not indicate bending of the lower lip when the tongue had been removed. Tr. at 2826-30.

We also requested briefing concerning respondents' experts' testing for a bent lower lip. In response, the IA and complainants point out that Dr. Cao and Dr. Lang performed tests that indicate the presence of a bent lower lip in the accused products. Lang, an expert for Yekalon, tested five Yekalon products and he testified that only one product lacked a bent lower lip upon coupling. RX 1016; RX 1017; Tr. at 2153. Cao's testing also found the presence of a bent lower lip in the respondents' products he tested, although the amount of bending in the lip was reported to be much smaller than that measured by Loferski. Unilin and the IA both explained that Cao's testing indicated less bending than Loferski's test because Cao, unlike Loferski, did not measure bending at the distal end of the lower lip where the maximum amount of bending of the lip

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would be expected. Cao and Lang's testing therefore provides evidence of the presence of a bent lower lip in the products they tested and tends to support Loferski's findings.

The Greenberg Respondents assert that Cao's testing revealed deflections of the lower lip that are so small that no biasing force would result from such a small amount of bending. The ALJ's construction of the bent lower lip limitation does not require any particular amount of deflection or bending to produce the biasing force required by the claims.<sup>8</sup> ID 65. Loferski's testimony indicated that the '836 patent's specification refers to bending of the lower lip of several hundredths of a millimeter producing a biasing force, but this was measured at the distal end. *See* Tr. at 388-90. Respondents also did not petition for review of the ALJ's claim construction, and even a small amount of bending would generate some biasing force.

In sum, we find the evidence demonstrates that Loferski's test was a reasonable method for testing for the presence of a bent lower lip, and while his test may not have been perfect, neither respondents nor the ALJ identified any significant sources of error in the test. Respondents' experts' testing also supports Loferski's conclusions that the accused products meet the bent lower lip limitations. We therefore accept Loferski's conclusions with respect to the presence of a bent lower lip in respondents' products as required by claims 1 and 2 of the '836 patent and 3 and 4 of the '292 patent. *See* CX-102.3; CX-129C.

### **2. The ALJ's Independent Ground for Non-Infringement of Claim 1 of the '836 Patent and Claim 4 of the '292 Patent**

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<sup>8</sup> The biasing force limitations are contained in claims 1 and 2 of the '836 patent and claims 3 and 4 of the '292 patent. The ALJ concluded that the presence of a bent lower lip would also indicate that a biasing force is created. *See* ID 43, 53, 82, 105.

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The ALJ identified as an independent ground for finding no infringement of claim 1 of the '836 patent and claim 4 of the '292 patent that the claims require an “elastically bendable portion of the lower lip” at a specific location on the lip (*i.e.*, between the groove and the recess). The ALJ concluded that Loferski’s measurement of bending at the distal end was not sufficient to show that there is bending in the elastically bendable portion. ID 104.

We requested briefing on this finding and whether it is appropriate to analyze the lower lip as a cantilever beam, and therefore whether it is appropriate to find that the entire lower lip is necessarily bent when the distal end is bent. Complainants and the IA urge the Commission to reject the ALJ’s conclusion with respect to measurement at the distal end of the lower lip. The respondents argue in support of that conclusion.

Upon reviewing the record and the arguments of the parties, we conclude that bending at the distal end of the lower lip indicates that the lower lip was bent in the elastically bendable area (between the deepest point of the groove and the bottom of the recess in the groove). The ALJ’s rejection of the conclusion that the lower lip bends along its length was premised on the presence of an underlayer under the floor panels. He found that it would support the elastically bendable portion of the lower lip and prevent it from bending. ID 50. However, the underlayer as disclosed in the '836 patent is “compressible,” indicating it would not prevent the lower lip from bending. '836 Patent 10:45-49. *See also* '292 Patent 10:50-54. Further, if the underlayer supported the lower lip as the ALJ found, the underlayer would prevent the lower lip from bending at the distal end, which is clearly inconsistent with the '836 patent and the evidence at trial concerning the bending of the distal end of the lower lip of respondents’ products.

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Unilin's expert Loferski testified that the lower lip of the accused floor panels is a cantilever beam and bends throughout its length. Tr. 345-46, 353-54, 356, 358-59, 380-81, 598-601. Expert testimony from respondents' experts Rice and Lang also indicated that the lower lip is a cantilever beam. Tr. at 2158, 2515-17. Thus, expert testimony indicated that one of ordinary skill in the art understood the lower lip to be a cantilever beam, despite the term "cantilever" not being used in the '836 patent. Further, the '836 patent supports the conclusion that the lower lip bends throughout its length; Fig. 23 in the '836 patent depicts a lower lip bent along its length.

Respondents argue that a finding that the entire lower lip bends as a cantilever beam suggests a conclusion that the elastically bendable portion limitation is always satisfied, rendering the limitation "meaningless." We do not agree, however, that respondents' assertion identifies any fault in our analysis. Under different facts, it might have been adduced, for a given accused product, that bending of the lower lip occurs only at some points other than the "elastically bendable portion" located between the groove and recess. In such a case, the limitation would not be satisfied and the accused product not infringing. Here, however, experts Loferski, Rice, and Lang each indicated that the lower lip in the accused devices is a cantilever beam. While the finding as to the cantilever beam is dispositive and adverse to Respondents' position as to infringement of this limitation, the finding does not in any way render the limitation meaningless. However, even assuming the premise of respondents' argument is correct, the evidence indicated that the lower lip acts as a cantilever beam and the meaning of the "elastically bendable portion" limitation is clear from the claim language. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005) ("In some cases, the ordinary meaning of claim

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language as understood by a person of skill in the art may be readily apparent even to lay judges, and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood words.”)

Accordingly, we reverse the ALJ’s conclusion that complainants failed to prove infringement of claim 1 of the ‘836 patent and claim 4 of the ‘292 patent because bending at the distal end of the lower lip did not necessarily indicate bending in the elastically bendable portion. We conclude that complainants demonstrated that bending occurs in the elastically bendable portion of the lower lip of respondents’ accused products.

### **3. The ALJ’s Independent Ground for Non-Infringement of Claim 2 of the ‘836 Patent**

The ALJ also found an independent basis for his finding no infringement of claim 2 of the ‘836 patent. Claim 2 of the ‘836 patent requires that the panel “[maintain] the bent condition of the elastically bendable portion of the lower lip [during shifting of the panels.]” Unilin’s expert Loferski testified that during shifting of the panels, the bent lower lip must be maintained as there is no place it can go. Tr. at 2856. The ALJ rejected this evidence and explained that the ‘836 patent “provides no support for the notion that a lower lip must remain in the bent position during lateral shifting of the coupled panels, or that the lower lip cannot move while the panel is being shifted,” rejecting Loferski’s testimony as insufficient. ID 105.

Complainants argue that the ALJ incorrectly found that the specification does not teach that the lower lip remains bent during shifting. Unlin Br. at 43. The IA agrees with complainants that the evidence demonstrated that the limitation is satisfied in the accused products. IA Br. at

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17-18. Respondents agree with the ALJ and assert that without any supporting tests or data, the Commission should reject Loferski's opinion. PSV Br. at 39; Greenberg Br. at 29.

Loferski testified that if the lower lip was bent before lateral shifting, "there would be no reason at all that the lower lip would not remain in the bent condition. So from a practical and a scientific viewpoint, there would be no reason why the lower lip would not still be bent while it was being shifted." Tr. at 2856-7. Our view is that Loferski's conclusion is reasonable even if he did not perform additional testing to ensure that the lower lip remained bent. If the panels remained engaged there is no apparent reason why the lower lip would not remain in the bent position. We are unaware of a reasonable basis for finding that the lower lip returns to an unbent position during lateral shifting. We therefore reverse the ALJ's conclusion with respect to this limitation and conclude that complainants have demonstrated that it is satisfied by respondents' products that have been shown to have a bent lower lip upon coupling.

### **4. Conclusion**

For the foregoing reasons, we accept Dr. Loferski's findings and reject the ALJ's two independent grounds for non-infringement. Based upon these findings and given that there is no dispute that the other limitations of these claims were met by the products accused of infringing them, we conclude that complainants have demonstrated infringement of claims 1 and 2 of the '836 patent and claims 3 and 4 of the '292 patent by the accused products of the active respondents and respondent Yongan,<sup>9</sup> with the exception of the Engagement Products of

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<sup>9</sup> Yongan Forestry (Group) Joint Stock Co. Ltd. (Yongan) was active in the investigation until April 5, 2006 when it withdrew its participation. ID 126.



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respondent Yekalon. ID 73-77.

### **C. Infringement by the Defaulting Respondents**

Seventeen respondents defaulted during the course of the investigation. The ALJ noted that Commission Rule 210.16 (c) indicates that “[t]he facts alleged in the complaint will be presumed to be true with respect to the defaulting respondent.” The ALJ found that although the complaint contained allegations that “certain of the proposed respondents” infringed certain claims of the asserted patents, the only specific allegations of infringement with respect to any of the remaining claims by the several defaulting respondents were contained in the claim charts for claim 1 of the ‘836 patent, and he limited his finding of infringement to that claim. ID 126. We reviewed the ALJ’s conclusion that the defaulting respondents had only infringed claim 1 of the ‘836 patent.

Complainants argue that the ALJ erred in not finding that the defaulting respondents had infringed all asserted claims. They maintain that the complaint is clear in alleging infringement of all the asserted claims against each of the respondents in the complaint and amended complaint. In short, they assert that there were specific allegations of infringement of all asserted claims for every respondent. Unilin Br. at 57-58. The IA agrees with complainants that the defaulting respondents should be found to have infringed all asserted claims. IA Br. at 18-19. The IA’s view is that general allegations in the complaint are sufficient to support a finding of infringement by the defaulters as to all of the claims that remain in the investigation. *Id.* at 18.

We agree with the ALJ that the amended complaint was ambiguous with respect to which claims were being asserted against which respondents. *See* ID 126; Amended Complaint (CX-

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91) at ¶ 6.1. While the facts alleged in the complaint are presumed to be true with respect to a party found in default, unless the complainants have alleged in the complaint that a particular claim is infringed by a particular respondent, there is no basis for finding infringement of the claim by the particular respondent. Complainants' assertion that the ALJ's approach here was inconsistent with that of two earlier investigations, *Certain Insect Traps*, Inv. No. 337-TA-498 and *Certain Ink Sticks For Solid Ink Printers*, Inv. No. 337-TA-549, is misplaced; in both of those cases the complaint clearly asserted infringement of the asserted claims against a respondent who eventually was found in default and against whom a cease and desist order was issued with respect to those claims.

The ALJ did not indicate, as complainants suggest, that a claim chart is required for each claim in order for a defaulting respondent to be found to have infringed the claim. The ALJ simply required a specific allegation of infringement of a particular claim by a specific defaulting respondent.

### **D. Invalidity of the '779 Patent**

We determined to review the ALJ's determination that the asserted claims of the '779 patent, claims 5 and 17, are invalid. The ALJ found that the term "clearance," which had been added to the specification and claims during prosecution, was new matter, and that, in the absence of the term in the specification, the claims were invalid as not supported by a written description.

The ALJ began his analysis with a review of the history of the '779 patent. He noted that the '779 patent application was a continuation of the '836 patent application, which was a

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continuation of the '486 patent application, originally filed on June 10, 1997. The applicants for the '779 patent application used the original 1997 specification and incorporated its drawings by reference. That specification did not contain any references to the term "clearance." ID 28.

On October 8, 2002, applicants filed a preliminary amendment to amend the specification of the '779 application. ID 28. Before the 2002 preliminary amendment, the specification referenced three separate terms: (1) recess, (2) intermediate space (or space), and (3) dust chamber (or chamber). ID 32. The preliminary amendment amended the specification to refer to, *inter alia*, "clearance." ID 28. The ALJ found that the "amended specification detailed that a clearance can be a recess, a space/intermediate space, or a chamber/dust chamber. The administrative law judge finds that this is a new concept." ID 32 (citation omitted). The ALJ found nothing in the specification, before the October 8, 2002, preliminary amendment, that suggested that a clearance is a recess, a space, intermediate space, or a chamber/dust chamber. ID 33. Nor did he find any indication that a person of ordinary skill in the art would know that these three different types of spaces could be treated as the same or that there were two distinct meanings for clearance. ID 33. He found that a person of ordinary skill in the art would only know that the identified chambers are clearances from the language added to the specification by the 2002 amendment. ID 33-34. For these reasons, he concluded that the applicants had introduced new matter through the 2002 amendment by adding the term "clearance" and amending the specification to define the term "clearance" to mean a recess, space or a chamber. ID 34-35. He also found that the applicants introduced new matter "when they amended the specification to detail that the space identified in Figure 4 between the panels above the tongue is

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a chamber” and “when they amended the specification to state that the chamber created by the intermediate space in Figure 9 is an independent clearance.” ID 35.

The ALJ observed that the applicants had drafted new claims containing the term “clearance”<sup>10</sup> along with the amendments to the specification of October 8, 2002. ID 35-36. Without the amendments to the original specification and their discussion of clearances, the ALJ determined that claims 5 and 17 of the ‘779 patent, which both use the term “clearance,” are invalid for failure to provide a written description, as required by 35 U.S.C. § 112. ID 36.

The statutory prohibition against adding new matter to an application is found in 35 U.S.C. § 132, which provides that “[n]o amendment shall introduce new matter into the disclosure of the invention.” 35 U.S.C. § 132. The written description requirement is contained in the first paragraph of 35 U.S.C. § 112:

The specification shall contain a **written description of the invention**, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

(Emphasis added.)

The written description requirement “ensures that, as of the filing date, the inventor conveyed

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<sup>10</sup> The ALJ found that the term clearance had a different meaning in claim 1 than in claim 13. He interpreted the term “clearance” in claim 1 of the ‘779 patent (from which claim 5 depends) to mean “an open space between two coupled panels, one panel containing a tongue, and one panel containing a groove, that is not created by normal machining tolerances.” ID 72. He construed the term “clearance” in claim 13 of the ‘779 patent (from which claim 17 depends) to mean “an indentation, of either the tongue panel or groove panel of an uncoupled joint, that is not created through normal machining tolerances.” ID 72; ‘779 Patent 15:6-9, 16:16-21. The Commission determined not to review this claim construction.

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with reasonable clarity to those of skill in the art that he was in possession of the subject matter of the claims.” *Unocal v. Atlantic Richfield Co.*, 208 F.3d 989, 997 (Fed. Cir. 2000). The prohibition against new matter together with the written description requirement, insures that the inventor fully possessed the subject matter claimed in the application when it was originally filed. *Turbocare Div. of Demag Delaval Turbomachinery Corp. v. Gen. Elec. Co.*, 264 F.3d 1111 (Fed. Cir. 2001).

Complainants’ position is that the ALJ erred in finding that clearances were not disclosed in the original application. They argue that the ALJ in fact identified over a dozen disclosures in the original specification of “clearances” by these other names without even considering the drawings. Unilin Br. at 44-45. They also maintain that the ALJ in fact indicated that the term “clearances” did not add anything new to the original specification beyond being a collective term embracing recesses, spaces, and chambers (*i.e.*, a “genus” comprised of the three “species”). *Id.* at 48, 54. The IA agrees with complainants that the ALJ erred in finding that “clearances” were new matter. He similarly argues that the original specification disclosed the concept of “clearance” and that the amendment simply provided a new name for what was already disclosed. IA Br. at 21.

The Greenberg Respondents and the PSV Respondents support the ALJ’s conclusion that the addition of the term “clearances” in the 2002 amendment constituted new matter and that the asserted claims are invalid.

After reviewing the ALJ’s detailed findings and the submissions of the parties, we conclude that the applicants’ introduction of the term “clearance” by amendment does not

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constitute new matter. We agree with Unilin and the IA that the preliminary amendment introduced the term “clearance” as a generic term encompassing spaces, chambers and recesses in the coupling joint of the panels. *See* ID 28 (showing relevant changes to specification made by the preliminary amendment). The ALJ acknowledged that spaces, chambers and recesses were described in the original specification. However, he found the idea that all three could be considered clearances a new concept and concluded that a person skilled in the art would not have known that the term “clearance” could be used for the other three terms. ID 32-34.

In our view, the analysis here must focus on whether the original disclosure indicates that the patentee was in possession of the subject matter of these disputed claims at the time of the original application. *Turbocare Div. of Demag Delaval Turbomachinery Corp. v. Gen. Elec. Co.*, 264 F.3d 1111, 1118 (Fed. Cir. 2001). “[T]he new claims or other added material must find support in the original specification.” *Id.* (citing *Schering Corp. v. Amgen Inc.*, 222 F.3d 1347, 1352 (Fed. Cir. 2000)). *See also TurboCare*, 264 F.3d at 1118 (“The fundamental inquiry is whether the material added by amendment was inherently contained in the original application.”) (citations omitted).

The Federal Circuit has indicated that the use of a new term by the patentee to describe what was already disclosed does not constitute new matter. *See Schering Corp.*, 222 F.3d at 1352 (no new matter because there was no attempt to broaden invention through use of new term). In this case, the preliminary amendment introduced a new term for the previously

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disclosed spaces, chambers and recesses in the original specification.<sup>11</sup>

The ALJ's other basis for finding new matter in the amendment is that the original specification did not explain that recesses in the groove of the panel can create chambers upon the coupling of panels. *See* ID 33-34. However, in appropriate circumstances, "drawings alone may provide a 'written description' of an invention." *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1565 (Fed. Cir. 1991). "[T]he written description requirement can be satisfied by 'words, structures, figures, diagrams, formulas, etc.'" *Koito Mfg. Co. v. Turn-Key-Tech, LLC*, 381 F.3d 1142, 1154 (Fed. Cir. 2004) (quoting *Lockwood v. Am. Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed.Cir.1997)). Indeed, in *Koito*, the Federal Circuit held that a single figure in a specification can demonstrate that a patentee was in possession of the subject matter claimed. 381 F.3d at 1155 ("Figure 1 thus demonstrates that the inventor was 'in possession' of the patent claims . . . .").

In the original application for the '779 patent, drawings show the use of recesses to create chambers or spaces for dust. The original specification, in its figures, clearly shows that recesses in uncoupled panels can be used to create chambers in coupled panels. *See* JX-8 at Figs. 2, 3, 4, 5, and 7 (Unilin-ITC-074590-91) (depicting recesses forming chambers upon coupling of tongue

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<sup>11</sup> This is further supported by the fact that the examiner did not issue a new matter objection in response to the filing of the preliminary amendment despite the obvious introduction of a new term. Thus, the examiner apparently did not view the addition of the term "clearance" to the specification to be outside the scope of the original specification. At least one case has stated that a lack of a new matter objection "carries an especially weighty presumption of correctness." *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1574-75 (Fed. Cir. 1992)

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and groove of panels).

Given the foregoing, we conclude that no new matter was introduced by the patentee's amendment which used the term clearance as a generic term for recesses, chambers, and spaces and also explained that recesses are used to create chambers. The amendment did no more than label specific clearances and explain what was already shown in the specification and figures of the original application. *See* ID 28. The term did not alter the separate but related meanings of recesses, chambers, and spaces as originally described. Indeed, as the ALJ found, because of this, the term "clearance" has different meanings in different claims. ID 72.

A patent carries the presumption of validity and the party challenging a patent's validity has the burden of overcoming this presumption by clear and convincing evidence. *Advanced Display Sys., Inc. v. Kent State Univ.*, 212 F.3d 1272 (Fed. Cir. 2000). That burden has not been met here as the original application shows full possession of the subject matter of the amended claims. Accordingly, we reverse the ALJ's conclusion that the asserted claims of the '779 patent are invalid for failure to meet the written description requirement. We have previously declined to review, and therefore adopted, the ALJ's determination that if claims 5 and 17 of the '779 patent are valid, those claims are infringed by certain products of certain respondents. *See* ID 73-77, 118-125.

### **E. Remedy, the Public Interest, and Bonding**

The ALJ recommended the issuance of a general exclusion order if the Commission agreed with his determination that there is a violation of section 337. Also, in view of the number of laminated floor panels that would be excluded from any general exclusion order, the



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ALJ recommended that a certification provision be included as part of the general exclusion order. ID 173. He also recommended that the Commission issue cease and desist orders against all defaulting domestic respondents in the investigation. ID 173-174. Finally, he recommended a bond of 100 percent of entered value to permit temporary importation during the Presidential review period. ID 174-175.

### **1. Remedy**

#### **a. General Exclusion Order**

The criteria for issuing a general exclusion order are found in section 337(d)(2), which provides:

The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that-

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

The Commission has noted that the criteria of section 337(d)(2) “do not differ significantly” from the factors in *Certain Airless Paint Spray Pumps and Components thereof*, Inv. 337-TA-90, USITC Pub. 1199 (November 1981). See *Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing Same*, Inv. No. 337-TA-372, USITC Pub. No. 2964 (May 1996), Comm’n. Opn. 5.

In *Spray Pumps*, the Commission held that a complainant seeking a general exclusion order must show both (1) a widespread pattern of unauthorized use of its patented invention and

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(2) certain business conditions from which one might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles. *Spray Pumps*, Comm’n. Opn. at 18. The Commission stated that among the evidence which might be presented to prove a “widespread pattern of unauthorized use of the patented invention” would be: (1) a Commission determination of unauthorized importation into the United States of infringing articles by numerous foreign manufacturers; or (2) the pendency of foreign infringement suits based upon foreign patents which correspond to the domestic patent in issue; (3) other evidence which demonstrates a history of unauthorized use of the patented invention. *Spray Pumps*, Comm’n. Opn. 18-19.

Among the evidence which might be presented to prove the “business conditions” referred to would be: (1) an established demand for the patented product in the U.S. market and conditions of the world market; (2) the availability of marketing and distribution networks in the United States for potential foreign manufacturers; (3) the cost to foreign entrepreneurs of building a facility capable of producing the patented article; (4) the number of foreign manufacturers whose facilities could be retooled to produce the patented articles; or (5) the cost to foreign manufacturers of retooling their facility to produce the patented articles. *Spray Pumps*, Comm’n. Opn. 19.

The ALJ detailed the large number of foreign manufacturers and domestic importers of floor products that are covered by the asserted claims of the three patents and the large market in the United States for the accused products. He also noted that the U.S. market for laminated floor panels exceeds a billion dollars per year. ID 171-172.

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Complainants and the IA both agree with the ALJ's recommendation of a general exclusion order based on the ALJ's findings of a "widespread pattern" of unauthorized use of the patented invention and the "business conditions" prongs of the test for whether a general exclusion order is warranted. Unlin Br. at 62-63; IA Br. 24-27. The PSV Respondents and Greenberg Respondents do not oppose issuance of a general exclusion order in this investigation provided it contains a certification provision. PSV Br. at 65-66; Greenberg Br. at 40.

We agree with the ALJ's conclusion that there has been a widespread pattern of unauthorized use of the patented invention and that business conditions in the United States are conducive to further unauthorized importations absent a general exclusion order. *Id.* Hence, we adopt the ALJ's recommendation of a general exclusion order.

Complainants and the IA agree with the ALJ's recommendation that certain laminated floor products should not be excluded by a general exclusion order. These include, as noted by the ALJ, products that are the subject of pending litigation in federal court. Unilin Reply 33-34; Unlin Br. at 67 (citing ID 173). The Commission generally does not grant relief beyond that requested. *See Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, Comm. Op. at 10 (November 1994) ("there is no reason to issue an order that excludes other types of entry when Complainant . . . has not requested" such a remedy). Accordingly, we include an exception in the remedial orders for laminated floor panels imported or manufactured by the Alloc companies: Armstrong World Industries, Inc.; Alloc, Inc.; Beaulieu International

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Group; or Valinge Innovation AB.<sup>12</sup>

We also adopt the ALJ's recommendation that a provision for certification be included in the general exclusion order rather than requiring U.S. Customs and Border Protection ("CBP") to determine by testing whether floor panels are covered by any of the asserted claims. The Federal Circuit indicated in *Hyundai Electronics Indus. v. International Trade Comm.*, 899 F.2d 1204, 1209 (Fed. Cir. 1990) that the Commission's use of a certification provision in conjunction with an exclusion order is well within its authority. CBP has indicated its preference for a certification provision.<sup>13</sup> Given the number of claims asserted and the number of products, actual and potential, not subject to the order, it is reasonable to provide CBP with maximum flexibility to administer the order. Non-infringing products, such as Yekalon's Engagement Products, can be certified as non-infringing, and be allowed entry.

### **b. Cease and Desist Orders**

Section 337(f) permits the Commission to issue, in lieu of or in addition to an exclusion order, a cease and desist order directing persons found to have violated section 337 "to cease and

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<sup>12</sup> Non-parties Uniboard Canada, Inc., the Faus Group, Inc., and Balterio NV, also filed individual submissions on remedy, the public interest, and bonding. These firms generally sought specific exemptions in the general exclusion order. However, complainants have only indicated that they do not seek relief with respect to the products imported or manufactured by the Alloc companies. The other firms' concerns with respect to their allegedly non-infringing products can be addressed by the certification provision in the general exclusion order. A number of submissions were received after the Commission's deadline for submissions. The additional submissions received by the Commission after the October 17, 2006 deadline have not been considered.

<sup>13</sup> The IA, having consulted with CBP, states that CBP prefers to have a certification provision included in the order because of the flexibility it will give CBP, rather than requiring CBP to test imported laminated floor panels to see if they are infringing. IA Reply at 10.

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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 likewise subject to cease and desist orders. *Certain Video Game Systems*, Inv. No. 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).

Relying upon the Commission’s practice of issuing cease and desist orders to defaulting domestic respondents, the ALJ recommended cease and desist orders in this investigation. ID 174. The parties have not identified any basis for not following Commission practice in the instant investigation. We accordingly have determined to issue cease and desist orders to the defaulting domestic respondents, *i.e.*, Dalton Carpet Liquidators, Inc., Pacific Flooring Manufacture, Inc., P.J. Flooring Distributor, R.A.H. Carpet Supplies, Inc., Salvage Building Material, Inc., Stalheim (USA), Inc., Universal Floor Covering, Inc., and Vegas Laminate Hardwood Floors LLC. As noted above, the cease and desist orders are limited to claim 1 of the ‘836 patent.

### **2. The Public Interest**

Under sections 337(d), (f), and (g), the Commission, in determining whether to impose a remedy, must weigh the remedy sought against the effect such remedy would have on the following public interest factors: (1) the public health and welfare, (2) competitive conditions in

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the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those subject to the investigation, and (4) U.S. consumers. 19 U.S.C. § 1337 (d), (f), and (g).

Unilin and the IA argue that issuance of a general exclusion order and cease and desist orders is not precluded by consideration of the public interest factors. The respondents do not argue otherwise.

Laminated floor panels are not the kind of product that have been found by the Commission in the past to raise public interest concerns, and we are not aware of any public interest considerations that militate against a general exclusion order or cease and desist orders directed to the defaulting domestic respondents. We therefore determine that consideration of public interest factors do not preclude the issuance of the remedial orders.

### **3. Bonding**

Pursuant to section 337(j)(3), the bond during the 60-day period of Presidential review is to be set “in an amount determined by the Commission to be sufficient to protect the complainant from any injury.” 19 U.S.C. § 1337(j)(3).

The ALJ found that evidence regarding pricing suggested a large price differential between Unilin’s domestic product and the accused products, and accordingly he recommended a bond of 100 percent of entered value during the Presidential review period. ID 175. At least some of the accused products are sold for less than half the price of Unilin’s products. *Id.*

Complainants, the PSV Respondents and the IA agree that a bond in the amount of 100 percent during the Presidential review period is appropriate. Unilin Br. at 70-71; IA Br. at 30; PSV Br. at 66. The Greenberg Respondents argue that no bond is appropriate because

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complainants have not demonstrated injury by imports of infringing floor panels. Greenberg Resp. at 47. Yekalon argues that it should not be required to post a bond. Yekalon Br. at 3.

We see no error in the ALJ's bonding recommendation. ID 175. Consequently, we adopt the ALJ's recommendation of a 100 percent bond during the Presidential review period.

By order of the Commission.

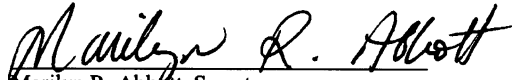
A handwritten signature in black ink, appearing to read 'Marilyn R. Abbott', with a large, stylized flourish at the end.

Marilyn R. Abbott  
Secretary to the Commission

Issued: January 24, 2007

CERTIFICATE OF SERVICE

I Marilyn R. Abbott, hereby certify that the attached **COMMISSION OPINION**, has been served on upon all parties and Commission Investigative Attorney, David Hollander, Esq. via first class mail and air mail where necessary on January 25, 2007.



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

**In the Matter of**

**CERTAIN LAMINATED  
FLOOR PANELS**

**Inv. No. 337-TA-545**

**NOTICE OF COMMISSION DETERMINATION TO REVIEW PORTIONS OF A  
FINAL INITIAL DETERMINATION; SCHEDULE FOR FILING WRITTEN  
SUBMISSIONS ON THE ISSUES UNDER REVIEW AND ON REMEDY,  
THE PUBLIC INTEREST, AND BONDING; EXTENSION OF TARGET DATE**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to review portions of the final initial determination ("ID") issued by the presiding administrative law judge ("ALJ") on July 3, 2006, in the above-captioned investigation. The Commission has also determined to extend the target date for completion of the investigation until November 21, 2006.

**FOR FURTHER INFORMATION CONTACT:** Michael Haldenstein, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3041. Copies of the ALJ's ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on July 29, 2005, based on a complaint filed by Unilin Beheer B.V., Flooring Industries Ltd., and Unilin Flooring N.C. LLC (collectively "Unilin"). 70 *Fed. Reg.* 44694 (August 3, 2005). The complaint (as amended) alleged violations of section 337 of the Tariff Act of 1930 ("section

337") in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain laminated floor panels by reason of infringement of one or more of claims 1, 14, 17, 19, 20, 21, 37, 52, 65, and 66 of U.S. Patent No. 6,006,486 ("the '486 patent"), claims 1, 2, 10, 13, 18, 19, 22, 23, 24, and 27 of U.S. Patent No. 6,490,836 ("the '836 patent"), claims 1-6 of U.S. Patent No. 6,874,292 ("the '292 patent"), and claims 1, 5, 13, 17, 27, and 28 of U.S. Patent No. 6,928,779 ("the '779 patent"). The investigation was subsequently terminated with respect to the '486 patent. The Commission named as respondents 32 companies located in Canada, China, South Korea, Malaysia, and the United States. *Id.* Two respondents have been terminated from the investigation as a result of settlement agreements. The administrative law judge set October 3, 2006, as the target date for completion of the investigation.

On July 3, 2006, the ALJ issued his final ID, including his recommended determination on remedy and bonding. The complainants, the Commission investigative attorney ("IA"), and several respondents have petitioned for review of various portions of the ID.

Having considered the ID, the petitions for review, the responses thereto, and other relevant portions of the record, the Commission has determined to review those portions of the ALJ's final ID concerning: (1) construction of claim 1 of the '836 patent and claim 4 of the '292 patent; (2) infringement of claims 1 and 2 of the '836 patent and claims 3 and 4 of the '292 patent; (3) infringement by the defaulting respondents; (4) invalidity of the asserted claims of the '779 patent; and (5) the validity of the asserted claims of the '836 and '292 patents to the extent implicated by the Commission's review described in item (1).

On review, the Commission requests briefing based on the evidentiary record. In particular, the Commission is interested in briefing on the following issues: In connection with issue (1), whether the location of the "elastically bendable portion" of the lower lip is limited to a particular portion of the lip (as discussed by the IA in his Petition for Review at p. 14, n.11); in connection with issue (2), the reliability of Dr. Loferski's bent lower lip test and the results of other experts' tests for a bent lower lip in the accused products; in connection with issue (2), whether the bent lower lip should be analyzed as a cantilevered beam; in connection with issue (2), whether the evidence was sufficient to prove that the lower lip remains in the bent position during lateral shifting of the coupled panels; in connection with issue (3), the legal and policy issues the Commission should consider with respect to infringement by defaulting respondents.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so

indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the President has 60 days to approve or disapprove the Commission's action. During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed. The Commission also requests that complainants provide the expiration dates of the asserted patents and the HTSUS numbers of the allegedly infringing goods.

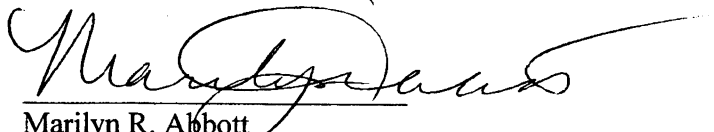
**WRITTEN SUBMISSIONS:** The parties to the investigation are requested to file written submissions on the issues under review. The submissions should be concise and thoroughly referenced to the record in this investigation. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the July 3, 2006, recommended determination by the ALJ on remedy and bonding. Complainants and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. The written submissions and proposed remedial orders must be filed no later than close of business on October 10, 2006. Reply submissions must be filed no later than the close of business on October 17, 2006. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6. Documents for which confidential treatment by the Commission is sought will be treated

accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.42-.46 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.42-.46).

By order of the Commission.

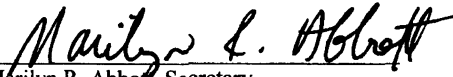


Marilyn R. Abbott  
Secretary to the Commission

Issued: September 25, 2006

CERTIFICATE OF SERVICE

I Marilyn R. Abbott, hereby certify that the attached NOTICE OF A COMMISSION DETERMINATION TO REVIEW PORTIONS OF A FINAL INITIAL DETERMINATION; SCHEDULE FOR FILING WRITTEN SUBMISSIONS ON THE ISSUES UNDER REVIEW AND ON REMEDY, THE PUBLIC INTEREST, AND BONDING; EXTENSION OF TARGET DATE, has been served on upon all parties and Commission Investigative Attorney, David Hollander, Esq. via first class mail and air mail where necessary on September 26, 2006.

  
Marilyn R. Abbott, Secretary  
U.S. International Trade Commission  
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UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C.

|                                |   |                              |
|--------------------------------|---|------------------------------|
| In the Matter of               | ) |                              |
|                                | ) |                              |
| CERTAIN LAMINATED FLOOR PANELS | ) | Investigation No. 337-TA-545 |
|                                | ) |                              |

Notice To The Parties

The Final Initial and Recommended Determinations were filed on July 3, 2006. Attached are the title page, the conclusions of law and the order, which are not confidential and which form a portion of said determinations. If a party wants to pick up a copy of the Final Initial and Recommended Determinations from the Secretary's Office, it should telephone the Secretary's Office after 11:00 am on July 5 to determine when the filing will be so available.

Counsel for complainants and the active respondents as well as the staff received a copy of this notice on July 3, 2006.

  
\_\_\_\_\_  
Paul J. Luckern  
Administrative Law Judge

Issued: July 3, 2006



**PUBLIC VERSION**

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

|                                |   |                              |
|--------------------------------|---|------------------------------|
| In the Matter of               | ) |                              |
|                                | ) |                              |
| CERTAIN LAMINATED FLOOR PANELS | ) | Investigation No. 337-TA-545 |
|                                | ) |                              |

**Final Initial and Recommended Determinations**

This is the administrative law judge's Final Initial Determination, under Commission rule 210.42. The administrative law judge, after a review of the record developed, finds that there is jurisdiction; that the claims in issue of U.S. Patent Nos. 6,490,836 and 6,874,292 are not invalid; that the claims in issue of U.S. Patent No. 6,928,779 are invalid; that only asserted claims 10 and 18 of U.S. Patent No. 6,490,836 are infringed by the active respondents and respondent Yongan as alleged by complainants and that claim 23 of said patent is infringed by certain accused products of the active respondents and of respondent Yongan; that claim 1 of the '836 patent, is infringed by the defaulting respondents; that there is no equitable estoppel involving respondent Vöhringer; and that there is a domestic industry involving said patents. Thus, he finds a violation of section 337 of the Tariff Act of 1930, as amended, has occurred.

This is also the administrative law judge's Recommended Determination on remedy and bonding, pursuant to Commission rules 210.36(a) and 210.42(a)(1)(ii), should the Commission find a violation of section 337. The administrative law judge recommends that the Commission issue a general exclusion order, with a certification provision, directed to infringing laminated

floor panels and further issue certain cease and desist orders against defaulting domestic respondents. He also recommends that any bond, during the Presidential review period, be set at 100 percent of the entered value.

## CONCLUSIONS OF LAW

1. The Commission has in rem jurisdiction.
2. The Commission has in personam jurisdiction over the Greenberg respondents, the PSV respondents, the Chinafloor respondents, respondent Yekalon and respondent Yongan.
3. There has been an importation of certain laminated floor panels which are the subject of the alleged unfair trade allegations.
4. An industry exists in the United States, as required by subsection (a)(2) of section 337, that exploits the '836, '292 and '779 and patents in issue.
5. The asserted claims of the '836 and '292 patents are not invalid.
6. The asserted claims of the '779 patent are invalid.
7. The products accused by complainants of infringing claims 10 and 18 of the '836 patent so infringe said claims.
8. With the exception of China Floors Easy Click 7.3mm (RS 132-134); China Floors Easy Click 8.3mm (RS 138-140); China Floors Easy Click 12.3mm (RS 141-143); China Floors Art Plus 8.3mm (RS 037-039); Vöhringer Type C (RS 016-018); Yongan Arc Locking 8.2 mm (RS 0520054); Yongan Arc Locking 10 mm (RS 043-045) Lodgi Arc Locking 8.2mm (RS 046-048); Lodgi Arc Locking 12mm (RS 049-051); Saili Woods Semi-Arc Locking 8.2 mm (RS 034-036); Wujin Arc-Locking 8.2mm (RS 058-060); Wujin Arc-Locking 12mm (RS 055-057); and Yingbin Arc Locking 8.2mm (RS 070-072), the products accused by complainants of infringing claim 23 of the '836 patent so infringe said claim.
9. There is infringement of claim 1 of the '836 patent by the defaulting respondents.
10. Complainants have not established infringement of claim 1 of the '836 patent by

the active respondents and by respondent Yongan.

11. Complainants have not established infringement of claim 2 of the '836 patent and claims 3 and 4 of the '292 patent by any accused product.

12. There is no equitable estoppel involving respondent Vöhringer.

13. There is a violation of section 337.

14. The record supports issuance of a general exclusion order with a certification provision directed to infringing products and certain cease and desist orders against defaulting domestic respondents. It also supports imposition of a bond in the amount of 100 percent of the entered value, during the Presidential review period.

## ORDER

Based on the foregoing, and the record as a whole, it is the administrative law judge's Final Initial Determination that there is a violation of section 337 in the importation into the United States, sale for importation, and the sale within the United States after importation of certain laminated floor panels. It is also the administrative law judge's recommendation that a general exclusion order, with a certification provision, should issue directed to infringing products. The administrative law judge further recommends that a bond in the amount of 100 percent of the entered value, be imposed during the Presidential review period.

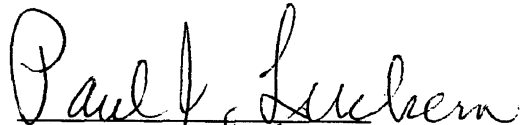
The administrative law judge hereby CERTIFIES to the Commission his Final Initial and Recommended Determinations together with the record consisting of the exhibits admitted into evidence. The pleadings of the parties filed with the Secretary and the transcript of the pre-hearing conference, and the hearing, are not certified, since they are already in the Commission's possession in accordance with Commission rules.

Further it is ORDERED that:

1. In accordance with Commission rule 210.39, all material heretofore marked in camera because of business, financial and marketing data found by the administrative law judge to be cognizable as confidential business information under Commission rule 201.6(a), is to be given in camera treatment continuing after the date this investigation is terminated.
2. Counsel for the parties shall have in the hands of the administrative law judge those portions of the final initial and recommended determinations which contain bracketed confidential business information to be deleted from any public version of said determinations, no later than July 21, 2006. Any such bracketed version shall not be served via facsimile on the

administrative law judge. If no such bracketed version is received from a party, it will mean that the party has no objection to removing the confidential status, in its entirety, from these initial and recommended determinations.

3. The initial determination portion of the Final Initial and Recommended Determinations, issued pursuant to Commission rule 210.42(h)(2), shall become the determination of the Commission forty-five (45) days after the service thereof, unless the Commission, within that period shall have ordered its review or certain issues therein or by order has changed the effective date of the initial determination portion. The recommended determination portion, issued pursuant to Commission rule 210.42(a)(1)(ii), will be considered by the Commission in reaching a determination on remedy and bonding pursuant to Commission rule 210.50(a).

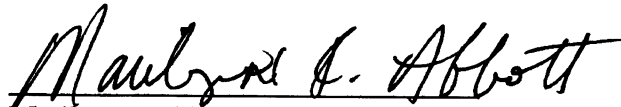
  
Paul J. Luckern  
Administrative Law Judge

Issued: July 3, 2006



**CERTIFICATE OF SERVICE**

I, Marilyn R. Abbott, hereby certify that the attached **Notice To The Parties** was served by hand upon Commission Investigative Attorney David H. Hollander, Jr., Esq. and upon the following parties via first class mail, and air mail where necessary, on July 5, 2006.



Marilyn R. Abbott, Secretary  
U.S. International Trade Commission  
500 E Street, SW - Room 112  
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**Certificate of Service page 2**

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**Certificate of Service page 3**

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**Certificate of Service page 4**

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**Certificate of Service page 5**

**Respondent:**

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**CERTAIN LAMINATED FLOOR PANELS**

**Investigation No. 337-TA-545**

**PUBLIC MAILING LIST**

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**(PARTIES NEED NOT SERVE COPIES ON LEXIS OR WEST PUBLISHING)**

**PUBLIC VERSION**

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

|                                |   |                              |
|--------------------------------|---|------------------------------|
| <hr/>                          | ) |                              |
| In the Matter of               | ) |                              |
|                                | ) |                              |
| CERTAIN LAMINATED FLOOR PANELS | ) | Investigation No. 337-TA-545 |
| <hr/>                          | ) |                              |

**Final Initial and Recommended Determinations**

This is the administrative law judge's Final Initial Determination, under Commission rule 210.42. The administrative law judge, after a review of the record developed, finds that there is jurisdiction; that the claims in issue of U.S. Patent Nos. 6,490,836 and 6,874,292 are not invalid; that the claims in issue of U.S. Patent No. 6,928,779 are invalid; that only asserted claims 10 and 18 of U.S. Patent No. 6,490,836 are infringed by the active respondents and respondent Yongan as alleged by complainants and that claim 23 of said patent is infringed by certain accused products of the active respondents and of respondent Yongan; that claim 1 of the '836 patent, is infringed by the defaulting respondents; that there is no equitable estoppel involving respondent Vöhringer; and that there is a domestic industry involving said patents. Thus, he finds a violation of section 337 of the Tariff Act of 1930, as amended, has occurred.

This is also the administrative law judge's Recommended Determination on remedy and bonding, pursuant to Commission rules 210.36(a) and 210.42(a)(1)(ii), should the Commission find a violation of section 337. The administrative law judge recommends that the Commission issue a general exclusion order, with a certification provision, directed to infringing laminated

floor panels and further issue certain cease and desist orders against defaulting domestic respondents. He also recommends that any bond, during the Presidential review period, be set at 100 percent of the entered value.



## APPEARANCES

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## ABBREVIATIONS

|                |  |
|----------------|--|
| <b>CBr</b>     | <b>Complainants' Post-hearing Brief</b>                                  |
| <b>CPFF</b>    | <b>Complainants' Proposed Finding</b>                                    |
| <b>CORFF</b>   | <b>Complainants' Objection To Respondent's Proposed Finding</b>          |
| <b>COSFF</b>   | <b>Complainants' Objection To Staff's Proposed Finding</b>               |
| <b>CPX</b>     | <b>Complainants' Physical Exhibit</b>                                    |
| <b>CRBr</b>    | <b>Complainants' Post-hearing Reply Brief</b>                            |
| <b>CRRFF</b>   | <b>Complainants' Proposed Rebuttal Finding to RFF</b>                    |
| <b>CRX</b>     | <b>Complainants' Rebuttal Exhibit</b>                                    |
| <b>CX</b>      | <b>Complainants' Exhibit</b>   |
| <b>ChBr</b>    | <b>Chinafloor Respondents' Post-hearing Brief</b>                        |
| <b>ChRBr</b>   | <b>Chinafloor Respondents' Post-hearing Reply Brief</b>                  |
| <b>GBr</b>     | <b>Greenberg Respondents' Post-hearing Brief</b>                         |
| <b>GRBr</b>    | <b>Greenberg Respondents' Post-hearing Reply Brief</b>                   |
| <b>GOSFF</b>   | <b>Greenberg Respondents' Objection To Staff's Proposed Finding</b>      |
| <b>GRSFF</b>   | <b>Greenberg Respondents' Rebuttal Finding</b>                           |
| <b>GOCFF</b>   | <b>Greenberg Respondents Objection To Complainants' Proposed Finding</b> |
| <b>GRCFF</b>   | <b>Greenberg Respondents' Rebuttal Finding</b>                           |
| <b>PSV</b>     | <b>PSV Respondents' Post-hearing Brief</b>                               |
| <b>PSVRBr</b>  | <b>PSV Respondents' Post-hearing Reply Brief</b>                         |
| <b>PSVOCFF</b> | <b>PSV Respondents' Objection To Complainant's Proposed Finding</b>      |

|                 |   |
|-----------------|---|
| <b>PSCOSPFF</b> | <b>PSV Respondents' Rebuttal Finding</b>                      |
| <b>PSVOSPFF</b> | <b>PSV Respondents' Objection To Staff's Proposed Finding</b> |
| <b>PSVRSPFF</b> | <b>PSV Respondents' Rebuttal Finding</b>                      |
| <b>YBr</b>      | <b>Yekalon Respondent's Post-hearing Brief</b>                |
| <b>YRBr</b>     | <b>Yekalon Respondent's Post-hearing Reply Brief</b>          |
| <b>JX</b>       | <b>Joint Exhibit</b>  |
| <b>RX</b>       | <b>Respondents' Exhibit</b>                                   |
| <b>RPX</b>      | <b>Respondents' Physical Exhibit</b>                          |
| <b>RDX</b>      | <b>Respondents' Demonstrative Exhibit</b>                     |
| <b>RFF</b>      | <b>Respondents' Proposed Finding</b>                          |
| <b>SBr</b>      | <b>Staff's Post-hearing Brief</b>                             |
| <b>SRBr</b>     | <b>Staff's Post-hearing Reply Brief</b>                       |
| <b>SPFF</b>     | <b>Staff's Proposed Finding</b>                               |
| <b>SRRFF</b>    | <b>Staff's Proposed Rebuttal Finding</b>                      |
| <b>Tr.</b>      | <b>Transcript Of Pre-hearing Conference and Hearing</b>       |



I. Procedural History

By notice, which issued on July 29, 2005, the Commission instituted an investigation, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation into the United States, or the sale within the United States after importation of certain laminated floor panels by reason of infringement of one or more of claims 1, 14, 17, 19, 20, 21, 37, 52, 65, and 66 of U.S. Patent No. 6,006,486 (the '486 patent) claims 1, 2, 10, 13, 18, 19, 22, 23, 24, and 27 of U.S. Patent No. 6,490,836 (the '836 patent) and claims 1-6 of U.S. Patent No. 6,874,292 (the '292 patent) and whether an industry in the United States exists as required by subsection(a)(2) of section 337.

The complaint was filed with the Commission on July 1, 2005, under section 337 of the Tariff Act of 1930, as amended, on behalf of Unilin Beheer B.V. of the Netherlands, Flooring Industries Ltd. of Ireland, and Unilin Flooring N.C. LLC of Thomasville, North Carolina (Unilin). Complainants requested that the Commission institute an investigation and, after the investigation, issue a permanent exclusion order and permanent cease and desist orders.

The following were named in the notice of investigation as respondents and were served with the complaint:

|   |   |
|---|---|
| 3E Business Enterprises Ltd.<br>5041 Manor St.<br>Vancouver BC V5R 3Y4, Canada  | Power Dekor Group Co., Ltd.<br>3/F Byfond Hotel, No. 1587<br>Zhangyang Rd.<br>Shanghai 200135 China |
| AMZ (Ghangzhou) Wooden Industrial Co., Ltd.<br>Amazon Industrial Garden<br>Pingbu Road Huadu<br>Guangzhou, Guangdong 510800 China | Quality Craft, Ltd.<br>#301 17750-65A Avenue<br>Surrey, BC V3S 5N4, Canada                          |

|  |   |
|--|---|
| Changzhou Dongjia Decorative Materials Co., Ltd.<br>South Cuiqiao Industrial Zone<br>Henglin, Changzhou, Jiangsu 213103<br>China   | R.A.H. Carpet Supplies, Inc.<br>551 Main Avenue<br>Wallington, NJ 07057   |
| Changzhou Saili Wood Co., Ltd.<br>Furong Town, Changzhou City<br>Jiangsu 213118, China   | Salvage Building Material, Inc.<br>951 N. Liberty Street<br>Winston Salem, NC 27101   |
| Changzhou Wuji Zhongxin Wood Co., Ltd.<br>#711 Building C, AnZhen-Foreign Trade Plaza<br>Hepingli Chaoyang District<br>Beijing 100013, China                                   | Shanghai Dekorman Flooring Co., Ltd.<br>(Shanghai Dekorman)<br>No. 198 Zhongxin Road<br>Tianma, Songjian District, Shanghai<br>201600 China |
| China Floors Co. Ltd.<br>No. 188 Bao Yuan 4 <sup>th</sup> Road<br>Huoxian Villiage JiangeQiao Town<br>Jinbao Industrial Park, Jia Ding District<br>Shanghai 201812 China       | Shanghai Zhengrun Industry<br>Development Co., Ltd.<br>No. 7735 Fanghuang Road<br>Shanghai 200000, China                                    |
| Dalton Carpet Liquidators, Inc.<br>d/b/a Dalton Flooring Liquidators<br>804 East Broad Street,<br>Gadsden, AL 35903  | Shengda Flooring Corp.<br>26-27/F Spectar Building<br>#42 Donghua Zhengjie Street<br>Chengdu City, China 610016                             |
| Fujian Yongan Forestry (Group) Joint<br>Stock Co., Ltd.<br>No. 13 Nige, Yongan City,<br>Fujian Province, China 366000  | Stalheim Industries Sdn Bhd<br>Lot 2994, Jalan Bukit Badong<br>45600 Batang Berjuntai<br>Selangor Darul Ehsan<br>Malaysia                   |
| HFC Horizon Flooring Ltd.<br>305 Holly Avenue<br>Columbus, OH 43212  | Stalheim (USA), Inc.<br>17360 Colima Road #332<br>Rowland Heights, CA 91748   |
| Huzhou Yongji Wooden Co., Ltd.<br>No. 18 Nianfeng Road<br>Nanxun, Huzhou, Zhejiang 313009<br>China   | Tsailin Floorings, Inc.<br>283, Building 3, #402 Siping Road<br>Hongkou Qu, Shanghai 200081 China   |
| Inter Source Trading Corporation<br>10F-N, Hongqiao Shijia Garden, No. 179<br>Zhongshan Road (W), Shanghai, China<br>and<br>201-3795 Myrtle St.<br>Burnaby, BC, Canada V5C 4E7 | Universal Floor Covering, Inc.<br>4500 Automall Parkway<br>Fremont, CA 94538  |

|  |  |
|--|--|
| Jiangsu Lodgi Wood Industry Co. Ltd.<br>7/F, Furi Building<br>169 Wuyi North Road<br>Fuzhou, China | Vegas Laminate Hardwood Floors LLC<br>4059 Renate Drive<br>Las Vegas, NV 89103   |
| Lodgi North America, Inc.<br>11131 Bird Road<br>Richmond, BC V6X 1N7<br>Canada                     | Vöhringer Wood Product (Shanghai)<br>(Vöhringer) Co., Ltd.<br>1950 Huhang Road<br>Fengxian District, Shanghai 201415<br>China              |
| Pacific Flooring Manufacture, Inc.<br>391 Foster City Blvd.<br>Foster City, CA 94404               | Yekalon Industry, Inc.<br>Suite 16A, Flat A, Jinxiu Building<br>Wenjin Middle Road<br>Shenzhen, Guangdong 518003<br>China                  |
| P.J. Flooring Distributor<br>1455 Monterey Pass Rd., Suite 105<br>Monterey Park, CA 91754          | Yingbin (Shunde-Foshan) Wood (Yingbin)<br>Industry Co., Ltd.<br>No. 163, Qichong Road<br>Dachong Town Zhongsha, Guangdong<br>528403, China |

The Notice of Investigation was published in the Federal Register on August 3, 2005 (70 Fed. Reg. 44694-95, No. 148). Order No. 3, which issued on August 3, 2005, set a target date of October 3, 2006. This meant that any final initial determination should be filed no later than July 3.

Order No. 4, which issued on September 19, 2005, granted complainants' Motion No. 545-9 to amend their complaint and notice of investigation by (1) adding as respondents Jiangsu Qianfeng Decoration Materials Co. Ltd. (QDM), a Chinese company having its principal place of business located at Cuiqiao Town, Dongmen, Changzhou Corporate, Jiangsu 213103 China, and Hansol Homedeco (Hansol), a South Korean company having its principal place of business located at 7th Floor Hansol Building, 736-1 Yeoksam-dong, Gangnam-gu, Seoul, 135-080, South Korea, (2) adding U.S. Patent No. 6,928,779 (the '779 patent), specifically claims 1, 5, 13, 17, 27 and 28 of the '779 patent, and (3) clarifying evidence used to support the existence of a domestic

industry. The Commission, in a notice dated October 17, determined not to review Order No. 4.

Order No. 8, which issued on November 17, 2005, granted complainants' Motion No. 545-11 for an initial determination terminating the investigation as to the '486 patent, claim 27 of the '836 patent and claims 27 and 28 of the '779 patent. In a notice dated December 20, the Commission determined not to review said order.

Order No. 17 was an initial determination granting complainants' Motion No. 545-22 that they satisfy the economic prong of the domestic industry requirement. The Commission in a notice dated April 6, 2006, determined not to review said orders.

Order No. 18, which issued on March 3, 2006, was an initial determination finding respondents 3E Business Enterprises Ltd., AMZ (Ghangzhou) Wooden Industrial Co., Ltd., Changzhou Dongjia Decorative Materials Co., Ltd., Dalton Carpet Liquidators, Inc., Huzhou Youngji Wooden Co., Ltd., Lodgi North America, Inc., Pacific Flooring Manufacturing, Inc., P.J. Flooring Distributor, R.A.H. Carpet Supplies, Inc., Salvage Building Material, Inc., Shanghai Zhengrun Industry Development Co., Ltd., Stalheim Industries Sdn Bhd, Stalheim (USA), Inc., Tsailin Floorings, Inc., Universal Floor Covering, Inc., and Vegas Laminate Hardwood Floors LLC, in default pursuant to Commission rule 210.16. Order No. 19, which issued on March 3, also found respondent QDM in default pursuant to Commission rule 210.16. The Commission, in a notice dated April 16, determined not to review said orders.

Order No. 21, which issued on March 9, 2006, granted complainants' Motion No. 545-28 to terminate the investigation as to respondent Inter Source Trading Corporation based on a settlement agreement. The Commission determined not to review said order in a notice dated April 14.

On April 3, 2006, Order No. 30 granted complainants' Motion No. 545-39 to terminate the investigation as to claims 13, 19, 22 and 24 of the '836 patent, claims 1, 2, 5 and 6 of the '292 patent and claims 1 and 13 of the '779 patent. The Commission determined not to review said order on April 24.

Order No 33, which issued on May 3, 2006, terminated the investigation as to respondent Quality Craft, Ltd. on the basis of a settlement agreement. The Commission on May 25 determined not to review said Order No. 33.

Prior to the hearing, there were filed a number of motions in limine. Those were Motion Nos. 545-40, 545-41, 545-42, 545-43, 545-44, and 545-45. Motion Nos. 545-40 and 545-41 relate to the allegation by respondent Vöhringer that complainants are equitably estopped from enforcing their glueless laminate flooring patents against Vöhringer. At the prehearing conference on April 3, 2006, said motions were denied subject to a possible deposition if Vöhringer requests the deposition. (Tr. at 59.)

Motion No. 545-42 was a motion by the PSV respondents<sup>1</sup> to preclude complainants from offering evidence or presenting testimony regarding infringement under the doctrine of equivalents. Complainants, in opposition, argued that their expert Joseph R. Loferski submitted an initial report stating his opinions that the PSV respondents' accused profiles infringed one or more of the asserted claims; that PSV respondents' expert Rice, in his rebuttal expert report

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<sup>1</sup> The PSV respondents are respondents Power Dekor Group Co., Ltd., Shengda Flooring Corp., and Vöhringer Wood Product (Shanghai) Co., Ltd. The Greenberg respondents are respondents Changzhou Saili Wood Co. Ltd., Changzhou Wujin Zhongxin Wood, Co. Ltd., Jiangsu Lodgi Woods Industry Co., Ltd., Yingbin-Nature (Guangdong) Wood Industry Co., Ltd. and Hansol Homedeco Co., Ltd. The Chinafloor respondents are respondents Chinafloors Timber (Shanghai) Co., Ltd. and Shanghai Dekorman Flooring Co., Ltd.

challenged the reliability of Loferski's methodology; that Rice's rebuttal offered no basis for the PSV respondents' "new" contention that their profiles do not literally infringe the "elastically bendable," "snap," "snap action," and "snap-together" elements of the '836 and '292 claims; that to the extent that Rice's "conjecture" on cracks in the panels may be considered on the PSV respondents' non-infringement position as to the '836 and '292 claims, the record is clear with reference to complainants' position on infringement under the doctrine of equivalents; and that Loferski, when asked at his deposition about cracks in the accused profiles, testified that even with cracks the accused panels perform "snap" coupling in substantially the same way to achieve substantially the same result as the claimed panels. Thus, complainants argued that the PSV respondents would not be prejudiced if the complainants "offered evidence or presented testimony on these issues at trial." The administrative law judge, at the prehearing conference, denied Motion No. 545-42 but only to the extent that complainants were given the opportunity to offer evidence in support of their contention raised in their opposition to Motion No. 545-42. (Tr. at 63.) Motion Nos. 545-43 and 545-45 were withdrawn. (Tr. at 92.) Motion No. 545-44 to preclude testimony from respondent Hansol's expert Harry F. Manbeck, Jr. was granted. (Tr. at 92.)

The hearing commenced on April 3, 2006, and continued on April 4, 5, 6, 7, 8, 10, and 11. All parties participated in the hearing. At the hearing, complainants asserted only claims 1, 2, 10, 18 and 23 of the '836 patent, claims 3 and 4 of the '292 patent, and claims 5 and 17 of the '779 patent. Post-hearing submissions have been filed. The matter is now ready for a final decision.

The Final Initial and Recommended Determinations herein are based on the record

compiled at the hearing and the exhibits admitted into evidence. The administrative law judge has also taken into account his observation of the witnesses who appeared before him during the hearing. Proposed findings of fact submitted by the parties not herein adopted, in the form submitted or in substance, are rejected as either not supported by the evidence or as involving immaterial matters and/or as irrelevant. Certain findings of fact included herein have references to supporting evidence in the record. Such references are intended to serve as guides to the testimony and exhibits supporting the finding of fact. They do not necessarily represent complete summaries of the evidence supporting said findings.

## II. Jurisdiction

The administrative law judge finds that the complaint and notice of investigation state a cause of action under section 337 of the Tariff Act of 1930, as amended. Importation of many of the accused products have been stipulated to. See JX-9. Also, many of the respondents have been found in default. See Procedural History, supra.

The Greenberg respondents did argue that there is no violation of section 337, as to respondent Yingbin, because complainants have not met their burden of establishing importation (GBr at 21-22.) The Chinafloor respondents argued that complainants have not established that the importation requirement of section 337 has been met with respect to respondent Shanghai Dekorman. (ChBr. at 3-4.)

Referring to respondent Yingbin, Yingbin manufactures two accused products: one known as “single locking” (RS 070 to RS 072) and the other as “double locking.” (RS 147-149; CFF 107-108 (undisputed).) Yingbin did bring to a 2005 Surfaces Trade Show in the United States certain laminated floor panels with the double locking profile for the purpose of using the

panels as the floor decoration at the exposition. (CX 225C at 14-17.) The Surfaces Trade Show is an important trade show in the flooring industry, attended by manufacturers, retailers, distributors, and others in the industry. (CFF 157.1 (undisputed).)<sup>2</sup>

As for respondent Shanghai Dekorman, the respondent manufactures two accused products: the “Double Click” product (RS 128-131 and 135-137) and the “Easy Lock” product (RS 144-146.) Shanghai Dekorman admits that it brought samples of the “Double Click” product into the United States for purposes of attending the Surfaces Trade Show in 2005.<sup>3</sup> (CFF 180 (undisputed).)

Importation of even a single sample for use in promotion, such as a trade show, has been held sufficient to satisfy the importation requirement. See Certain Abrasive Products, Inv. No. 337-TA-449, Initial Determination at 61 (February 8, 2002). Thus, the administrative law judge finds that complainants have established the importation requirement as to respondents Yingbin and Shanghai Dekorman.

Based on the foregoing, the administrative law judge finds that the Commission has in rem jurisdiction over the subject matter of this investigation. See Certain Automated Mechanical Transmission Systems for Medium-Duty and Heavy-Duty Trucks and Components Thereof, Inv. No 337-TA-503, Final Initial and Recommended Determination at 4, Notice of Commission Nonreview (February 24, 2005) (Transmissions). Also, counsel for the Greenberg respondents, the PSV respondents, the Chinafloor respondents and Yekalon appeared at the hearing. In

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<sup>2</sup> Yingbin denied bringing the “single lock” profile into the United States, which complainants do not dispute. (CRBr at 3.)

<sup>3</sup> Shanghai Dekorman denies bringing the “Easy Lock” profile into the United States, which complainants do not dispute. (SRBr at 4.)



addition respondent Yongan was represented by counsel for the Greenberg respondents up to April 5, 2006. (FF 50.) Hence, the Commission has in personam jurisdiction over those respondents. See Transmissions at 4.

III. Parties

See FF 1-50.

IV. Experts Who Testified Live At Hearing

See FF 51-68.

V. Yekalon's Motion No. 545-52 To Strike

On May 2, 2006, respondent Yekalan moved to strike certain testimony of complainants' expert Loferski from the evidentiary record. (Motion No. 545-52.)

Complainants, on May 16, 2006, opposed the pending motion.

No other party responded to Motion No. 545-52.

Yekalon, in support of Motion No. 545-52, argued that on April 11, 2006, Loferski offered the following testimony on rebuttal regarding Yekalon's new Engagement products in response to a question from Unilin's counsel:

Question: "Can a product be sold without a short side?" (Reisberg, Tr. at 2900-21:22) Answer: "Oh. I don't believe consumers would purchase the products if they had no short sides." (Loferski, Tr. at 2903-6:8) (hereinafter, "Loferski's Rebuttal Testimony").

It is argued that Loferski's Rebuttal Testimony is improper and should be stricken from the record because Loferski is not qualified to give expert testimony or predictions regarding marketing, sales, or consumer preferences, because Loferski is not a fact witness on these subjects, because Loferski's testimony on this subject came as a complete surprise to Yekalon,

and because such rebuttal testimony was completely beyond the scope of Loferski's testimony on cross-examination.

Complainants, in opposition, argued that the samples provided by Yekalon of the products developed during this investigation do not have short sides that are intended to be used on the completed product that ultimately will be sold; that Yekalon admits that Loferski could not assemble the short side of the sample panels provided to them according to Yekalon's own installation instructions; that it seems reasonable that customers will only buy panels that can be assembled, and thus, it is not clear why Yekalon even objects to Loferski's testimony saying that a customer would not buy floor panels that do not have short sides; that Loferski has been designing and making joints in wood and wood-based products for at least 26 years and over that time he has built thousands of joints; that Loferski has personally installed laminated flooring on at least five different occasions; that because of Loferski's experience, he knows whether panels must have short sides in order to be assembled; that Loferski has examined dozens of products in his capacity as an expert witness in this investigation and in a previous investigation viz. Certain Flooring Products, Inv. No. 337-TA-443. Hence, complainants argued that Loferski is aware that all of the panels he has examined contain both a long side and a short side, and is fully qualified to conclude that short side is a necessary component of a commercially sold floor panel.

Based on Loferski's background, Loferski has experience in examining joints in wood and wood-based materials. Moreover, Yekalon had ample opportunity to argue the weight to be given to the testimony in issue, as said testimony was relied on in any proposed finding. Hence, Motion No. 545-52 is denied.

## VI. Products In Issue

The products in issue are laminated floor panels which can be assembled without the use of glue by virtue of a cooperating tongue and groove configuration on the side edges of the panels. (SPFF 78 (undisputed).) The floor panels at issue are typically rectangular, with coupling parts on both the short and long sides. (SPFF 79 (undisputed).) The long side of the panel shown in Figure 1 of the '836 patent is identified by items 2 and 3, while the short side is identified by items 26-27. (SPFF 80 (undisputed).) Full size panels are typically 48 inches long, between 5 and 8 inches wide, and between 8 and 12 millimeters thick. (SPFF 81 (undisputed).)

The coupling joints in the products at issue generally have a tongue and groove configuration. (SPFF 82 (undisputed).) The "groove" side of the joint is illustrated by the portion of the panel shown on the left side of Fig. 23 of the '836 patent. (SPFF 83 (undisputed).) The "tongue" side of the joint is illustrated by the portion of the panel shown on the right side of Fig. 23 of the '836 patent. (SPFF 84 (undisputed).) The lower lip of the groove is identified as item 6 in Figure 23. (SPFF 85 (undisputed).) The shape of the coupling joints on the side edges of the panels is sometimes referred to as a profile. (SPFF 86 (undisputed).) The profile can be different for the short and long sides of the panels. (SPFF 87 (undisputed).)

The products at issue are designed to be installed "floating," meaning that they are not directly attached to the subfloor. (SPFF 88 (undisputed).) Typically the panels are placed on an underlayer of rubberized foam. (SPFF 89 (undisputed).) Laminated floor panels, also referred to as laminate flooring, typically have a core material, a decorative layer, a protective top layer, and a backing layer. (SPFF 90 (undisputed).) The core material of the products at issue is typically a wood-based medium- or high-density fiberboard, referred to as MDF or HDF. (SPFF 91 (undisputed).) Fiberboard is a material made from highly compressed ground wood particles and

binder material, pressed together into a board. (SPFF 92 (undisputed).) MDF has a density of about 750 kilograms per cubic meter. (SPFF 93 (undisputed).) HDF is more dense, between 850 and 900 kilograms per cubic meter. (SPFF 94 (undisputed).) MDF and HDF are well known in the art, although there is no precise standard differentiating MDF from HDF. (SPFF 95 (undisputed).)

## VII. The Patents And Claims In Issue

The '836 patent, the '292 patent and the '779 patent are all part of the same patent family, the last two patents being continuations of the application that became the '836 patent which was itself a continuation of the application that became U.S. Patent No. 6,006,486 (the '486 patent).

### A. The '836 Patent

The '836 patent, entitled "Floor Panel With Edge Connectors," was issued on December 10, 2002, and Messrs. Moriau, Cappelle, and Thiers are named as the inventors. (JX-1.) The '836 patent is assigned to Unilin, and is a continuation of application No. 08/872,044, filed on June 10, 1997, which became the '486 patent. (JX-1; JX-2.) For foreign priority, the 08/872,044 application relied on two applications filed in Belgium, the 09600527 application that was filed on June 11, 1996, and the 09700344 application that was filed on April 15, 1997. (JX-1; JX-2.)

The application that became the '836 patent was filed on December 23, 1999. (JX-1; JX-2.) The term of the '836 patent is subject to a terminal disclaimer and will expire on the same date as the '486 patent. (JX-1; JX-2.) The '836 patent has 30 claims. (JX-1.) Only claims 1, 2, 10, 18, and 23 are asserted. Claims 1, 2, 10 and 23 of the '836 patent are independent claims while claim 18 is dependent on claim 10. (JX-1.) Complainants claim priority to the second Belgium application of April 15, 1997 for claims 1 and 2 of the '836 patent. (RX-665C at 19.)

Complainants claim priority to the first Belgium application of June 11, 1996 for claims 10, 18 and 23 of the '836 patent. (RX-655C at 19.)

Asserted claims 1, 2, 10, 18 and 23 of the '836 patent are as follows:

1. A floor covering comprising

a hard floor panel having a substantially planar underside and at least two opposed side edges,

said side edges including complementary coupling parts configured to cooperate with identical cooperative complementary coupling parts of another one of said panel, said coupling parts comprising substantially a tongue and a groove extending along panel side edges generally parallel to the panel underside and including integrated mechanical locking elements,

said tongue, groove and locking elements formed in one piece with the panel,

said tongue, groove and locking elements arranged to prevent drifting apart of the floor panel when coupled by said coupling parts to another one of said floor panel in a direction perpendicular to the adjacent side edges of the coupled panels, and parallel to the underside of the panel;

a coupling part of said panel, when engaged with a complementary coupling part of another one of said panel, configured and arranged to produce a biasing force between such coupled panels tending to urge the panels towards each other;

at least one of said coupling parts including an elastically bendable portion having a relaxed unbent position, and which, when in a coupled condition, is at least partially bent out of its normal relaxed position and thereby provides said biasing force;

wherein the elastically bendable portion of said one of said coupling part comprises a lower lip defined at least in part by a lower side of the groove of said coupling parts, said lower lip cooperating with a mating portion of a tongue of a cooperating coupling part;

wherein said lip when bent extends in a downward direction relative to the panel underside when the panel is coupled by cooperative complementary coupling parts to another one of said panel;

wherein the panel comprises a core comprising a material selected from the group consisting of HDF and MDF board;

said lower lip is substantially formed of said core;

one of said locking elements comprises a recess in said lower lip, said recess having a lowermost

bottom area;

said groove having a deepest point within the panel;

and wherein said elastically bendable portion of the lower lip comprises a portion of said lower lip located between the deepest point of said groove and the lowermost bottom area of said recess;

wherein the bendable portion of the lower lip includes a side wall of said recess that slopes downwardly in a direction extending from a distally outer area of said lip towards a proximally inner area of said lip.

2. A floor covering comprising

a hard floor panel having a substantially planar underside and at least two opposed side edges,

said side edges including complementary coupling parts configured to cooperate with identical cooperative complementary coupling parts of another one of said panel, said coupling parts comprising substantially a tongue and a groove extending along panel side edges generally parallel to the panel underside and including integrated mechanical locking elements,

said tongue, groove and locking elements formed in one piece with the panel, said tongue, groove and locking elements arranged to prevent drifting apart of the floor panel when coupled by said coupling parts to another one of said floor panel in a direction perpendicular to the adjacent side edges of the coupled panels, and parallel to the underside of the panel,

a coupling part of said panel, when engaged with a complementary coupling part of another one of said panel, configured and arranged to produce a biasing force between such coupled panels tending to urge the panels towards each other;

at least one of said coupling parts including an elastically bendable portion having a relaxed unbent position, and which, when in a coupled condition, is at least partially bent out of its normal relaxed position and thereby provides said biasing force;

wherein said floor panel is rectangular and includes two pairs of opposed side edges;

said coupling parts and locking elements are provided on all side edges of the panel; and wherein said locking elements are provided on at least two side edges that are perpendicular to and meet each other whereby,

when the panel is coupled with complementary coupling parts of identical ones of said panel at all opposed edges, the panels are locked together by said locking elements at all coupled side edges;

wherein said coupling parts are configured and arranged to enable coupling of complementary coupling parts of identical ones of said panel to each other by rotation of one panel relative to the other,

said coupling parts configured such that upon rotation of one panel relative to the other panel the elastically bendable portion of one coupling part is bent;

and wherein at coupled side edges of the coupled panels the coupling parts are configured such that one panel is movable relative to the other by shifting the one relative to the other in a direction parallel to the coupled side edges;

said shifting of one panel relative to the other maintaining the bent condition of the elastically bendable portion of the lower lip while the panels are coupled.

10. A floor covering comprising

a laminated hard floor panel having a wood-based core material selected from the group consisting of High Density Fibreboard (HDF) and Medium Density Fibreboard (MDF),

said panel comprising a first pair and a second pair of opposed side edges,

said panel further comprising generally complementary coupling parts located at both of the pairs of said side edges,

said coupling parts comprising a tongue and a groove,

said tongue and groove when coupled along adjacent side edges of two ones of said panel comprising integral mechanical locking elements,

said coupling parts as well as said mechanical locking elements being integral and made in one piece with said core material,

said coupling parts together with said locking elements arranged so as to enable a locking in a direction perpendicular to the plane of the floor covering as well as in a direction perpendicular to the coupled side edges and parallel to a plane including the panels that are coupled,

wherein said coupling parts and the mechanical locking elements of at least said second pair of opposite side edges are configured such that two identical ones of said floor panel are coupled by shifting them laterally towards each other in a substantial planar fashion, and wherein the locking elements of said second pair of opposite side edges provide a snap-together coupling providing a snap-action during the coupling of two panels by shifting them laterally towards each other, said snap action being delivered substantially by said core material;

wherein said locking elements comprise a recess located in a lower lip extending at least to a side edge and defining at least in part a lower side of said groove; and a protrusion provided at a lower side of said tongue,

wherein the panels at the side edge comprising the groove, of at least one of the side edge of both pairs of the side edges, include an upper lip above the groove,

said upper lip defining at least in part an upper side of said groove,

and said upper lip terminating at a distal outer end, wherein said lower lip extends distally beyond the distal outer end of the upper lip,

and further wherein the recess is located in the lower lip in an area of the lower lip that is located at least partly beyond the distal outer end of the upper lip.

18. The floor covering according to claim 10

wherein at least one pair of the edges, the locking elements comprise inclined contact surfaces.

23. A floor covering comprising

a laminated hard floor panel having a wood-based core material selected from the group consisting of High Density Fibreboard (HDF) and Medium Density Fibreboard (MDF), said panel comprising a first pair and a second pair of opposed side edges,

said panel further comprising generally complementary coupling parts located at both of the pairs of said side edges,

said coupling parts comprising a tongue and a groove,

said tongue and groove when coupled along adjacent side edges of two ones of said panel comprising integral mechanical locking elements,

said coupling parts as well as said mechanical locking elements being integral and made in one piece with said core material,

said coupling parts together with said locking elements arranged so as to enable a locking in a direction perpendicular to the plane of the floor covering as well as in a direction perpendicular to the coupled side edges and parallel to a plane including the panels that are coupled,

wherein said coupling parts and the mechanical locking elements of at least said second pair of opposite side edges are configured such that two identical ones of said floor panel are coupled by shifting them laterally towards each other in a substantial planar fashion, and wherein the locking



elements of said second pair of opposite side edges provide a snap-together coupling providing a snap-action during the coupling of two panels by shifting them laterally towards each other, said snap action being delivered substantially by said core material;

At least one of said pairs of edges comprising a lower lip defining at least in part a bottom side of a groove of said coupling parts and extending distally beyond a respective groove opening, and wherein said locking elements comprise a protrusion extending from the lower side of a tongue of said pairs of edges and a cooperating recess in said lower lip,

said protrusion and recess fitting together when ones of said panel are coupled by said tongue and groove;

wherein, when a complementary tongue and groove are coupled, said protrusion and recess meet each other at contiguous contact surfaces at a common plane of tangency that with respect to a common plane of the coupled panels is inclined inwardly from a distally outer area towards a distally inner area at an angle less than 90 degree.

(JX-1.)

B. The '292 Patent

The '292 patent entitled "Floor Panels With Edge Connectors," was issued on April 5, 2005 and names Messrs. Moriau, Cappelle, and Thiers as the inventors. (JX-3.) The patent is assigned to Unilin Beheer B.V. Besloten Vennootschap, and is a continuation of application No. 09/471,014, now the '836 patent, which is a continuation of application No. 08/872,044 filed on January 10, 1997, which became the '486 patent. (JX-3; JX-4.) The application that became the '292 patent was filed on October 9, 2002, and was filed as application No. 10/266,667. (JX-3; JX-4.) For foreign priority, the application relied on two applications filed in Belgium, the 09600527 application that was filed on June 11, 1996, and the 09700344 application that was filed on April 15, 1997. (JX-3; JX-4.)

The '292 patent has 6 claims. (JX-3.) Only claims 3 and 4 are asserted. Claims 3 and 4 are dependent claims with claim 3 dependent on claim 1 and claim 4 dependent on claim 3.

(JX-3.) Complainants claim priority to the second Belgium application of April 15, 1997 for all

claims of the '292 patent. (RX-665C at 19.)

Asserted dependent claims 3 and 4 as well as independent claims 1 and 2 which claims 3 and 4 are dependent on, are as follows:

1. A floor covering panel comprising

a substantially planar under side and at least two opposed side edges;

said side edges including cooperative coupling parts configured to cooperate with identical cooperative complementary coupling parts of another one of said panel;

said coupling parts comprising substantially a tongue and a groove extending distally transversely along panel side edges including mechanical locking elements;

said tongue, groove and locking elements formed in one piece with the panel;

said tongue groove and locking elements cooperating to prevent drifting apart of the floor panel when coupled by said coupling parts to another one of said floor panel in directions perpendicular to the adjacent side edges of the coupled panels, and parallel to the undersides of the coupled panels;

a coupling part of said panel, when engaged with a cooperating coupling part of another one of said panel, urging the coupled panels towards each other;

at least one of said coupling parts including an elastically bendable portion having a relaxed unbent position, and which, when in a coupled condition, is at least slightly bent out of its normal relaxed unbent position to effect said urging of the coupled panels together.

2. The floor covering panel according to claim 1,

wherein the elastically bendable portion of said one of said coupling parts comprises a lower lip defining at least in part a lower side of the groove of said coupling parts, said lower lip cooperating with a mating portion of a tongue of a cooperating coupling part when the cooperating parts are coupled.

3. The floor covering panel according to claim 2,

wherein said lip when elastically bent extends in a downward direction relative to the panel underside when the panel is coupled by said coupling parts to another one of said panel.

4. The floor covering panel according to claim 3,

wherein the panel comprises a core comprising a material selected from the group consisting of HDF and MDF; a lower lip of a coupling parts is substantially formed of said core;

one of said locking elements comprises a recess in said lower lip, said recess having a lowermost bottom area;

said groove of said coupling parts having a deepest point within the panel; and

wherein said elastically bendable portion of the lower lip comprises a portion of said lower lip located between the deepest point of said groove and the lowermost bottom area of said recess. (JX-3.)

#### C. The '779 Patent

The '779 patent, entitled "Floor Panels With Edge Connectors," was issued on August 16, 2005 with Messrs. Moriau, Cappelle, and Thiers named as the inventors. (JX-5.) The patent is assigned to Unilin Beheer B.V. Besloten Vennootschap, and is a continuation of application No. 09/471,014, now the '836 patent, which is a continuation of application No. 08/872,044, filed on January 10, 1997, which became the '486 patent. (JX-5; JX-6.) The application that became the '779 patent was filed on October 9, 2002, and was application no. 10/265,657. (JX-5; JX-6.) For foreign priority, the application relied on two applications filed in Belgium; the 09600527 application that was filed on June 11, 1996, and the 09700344 application that was filed on April 15, 1997. (JX-5; JX-6.)

The '779 patent has 29 claims. (JX-5.) Only claims 5 and 17 are asserted. (JX-5; Order No. 30.) Complainants claim priority to the first Belgium application for the asserted claims of the '779 patent. (RX-665C at 19.) Claims 5 and 17 are both dependent claims with claim 5 dependent on claim 1 and claim 17 dependent on claim 13. (JX-5.)

Asserted dependent claims 5 and 17 as well as independent claims 1 and 13 which claims 5 and 17 respectively are dependent on, are as follows:

1. A floor covering panel comprising

laminated hard floor panel having a wood-based core material comprising a ground wood product and a binding agent unified to form a cured composite;

said floor panel having a decorative layer above said core material;

said floor panel having an upper side, an under side and a perimeter defining first and second pairs of opposed substantially parallel sides;

said first and second pairs of sides both being provided with coupling parts substantially in the form of a tongue and a groove the coupling parts further including locking elements;

said groove of at least said first pair of sides including an upper lip and a lower lip, said lower lip extending distally beyond the upper lip;

said coupling parts cooperating to establish a locking between coupled parts in a direction perpendicular to the plane of the panel as well as in a direction perpendicular to the side edges and parallel to a plane including the panel when the coupling parts of a plurality of ones of said panel are coupled;

said tongue, groove and locking elements being monolithically formed in said composite core;

said coupling parts and locking elements of at least said first pair of sides enabling coupling of two of such panels so that the panels are coupled without play in the plane of the coupled panels;

the coupling parts of said first pair of sides being engageable and coupled by rotational motion relative to each other;

said tongue of said first pair of sides including an upper tongue contact surface and a lower tongue contact surface and an outer peripheral portion of the tongue defined along and between said tongue contact surfaces;

said groove of said first pair of sides including corresponding upper and lower groove contact surfaces which engage the upper and lower tongue contact surfaces of said tongue upon coupling of said coupling parts;

said lower tongue and groove contact surfaces comprising said coupling parts and locking elements enabling coupling of two of such panels so that the panels are coupled without play in a plane including the coupled panels;

said coupling parts of said first pair of sides upon coupling defining a plurality of separate clearances adjacent at least a portion of said outer peripheral portion of said tongue between said

groove and said tongue;

said panel at said first pair of sides comprising at least one intermediate tongue contact surface on said tongue positioned along the outer peripheral portion of said tongue intermediate the upper and lower tongue contact surfaces;

said panel at said first pair of sides comprising at least one intermediate groove contact surface intermediate the upper and lower groove contact surfaces; and

said intermediate tongue and groove contact surfaces of two of said panels cooperating with each other upon coupling of two of said panels.

5. The floor covering panel according to claim 1, wherein the cured composite core comprises MDF/HDF.

13. A floor covering panel comprising

hard floor panel having a perimeter defining at least a first pair of opposed substantially parallel edges and substantially planar and parallel upper and lower sides;

said pair of edges being provided with complementary coupling parts substantially in the form of a tongue and groove extending distally along the length of said pair of edges and being formed in the panel material which is located between said planar upper and lower sides;

the coupling parts further including locking elements;

said coupling parts and locking elements cooperating upon coupling of said coupling parts such that coupled ones of said panel are locked in a direction perpendicular to the plane of the panel as well as in a direction perpendicular to the edges and parallel to a plane including the panel;

said groove having an upper lip and a lower lip, said lower lip extending distally beyond said upper lip;

said upper lip defining a first clearance below said upper side of said panel and defining an upper lip contact surface adjacent said clearance, said first clearance defining an upper chamber below said upper side and above said tongue upon coupling of cooperating coupling parts;

said lower lip having an inwardly and downwardly inclined lower lip contact surface formed therein;

said tongue having an upper tongue contact surface and a lower tongue contact surface located along the tongue periphery such that the upper and lower tongue contact surfaces respectively

abut the upper and lower lip contact surfaces when adjacent panels are coupled; and

at least one second chamber being defined between the tongue and groove in the area along the tongue periphery between the respective upper tongue contact surface and the lower tongue contact surface when adjacent panels are coupled.

17. The floor covering panel according to claim 13, wherein said floor panel is a laminate including an MDF/HDF core.

(JX-7.)

#### VIII. Person Of Ordinary Skill In The Art

The earlier U.S. application relating to the patents in issue was filed on June 10, 1997. A person of ordinary skill in the relevant art in the mid-90's would have a degree in wood science or engineering and would have some practical training or practical experiences in producing joinery in wood materials or alternatively could be a person who has had joint experience in the field of producing joinery in wood material for a long period of time such as three, four or five years. (Loferski, Tr. at 356-57.) The person also would understand the properties of wood and wood based composite materials as well as the mechanics by which the claimed joint(s) function. (Rice, Tr. at 2368-69.)

#### IX. New Matter And 35 U.S.C. § 112, ¶ 1 Allegations

The PSV respondents, referring to the claimed phrase "clearance," argued that asserted dependent claims 5 and 17 of the '779 patent, as well as independent claims 1 and 13 of the '779 patent, which said claims 5 and 17 are dependent on respectively, were not supported by the specification of the original application, and hence, said claims are invalid pursuant to 35 U.S.C. § 112, ¶ 1, for lack of a written description. Additionally, it is argued that said claims are invalid for impermissibly adding new matter pursuant to 35 U.S.C. § 132. (PSVBr at 90.) The

Greenberg respondents, also referring to the claimed term “clearance,” argued that said claims 1, 5, 13, and 17 of the ‘779 patent are invalid for adding new matter and for lack of a written description in the original application. (GBr at 71-82.)

The Greenberg respondents referring to the claimed phrase “common plane of tangency,” further argued that the asserted claim 23 of the ‘836 patent is invalid, for the same reasons that claims 1, 5, 13 and 17 of the ‘779 patent are invalid. (GRBr at 72-76.)

Complainants argued that the ‘779 patent and the ‘836 patent do not contain new matter. (CBr at 99-104.) Hence, complainants argued that the Greenberg respondents and the PSV respondents have not met their burden in establishing that claims 1, 5, 13, and 17 of the ‘779 patent and claim 23 of the ‘836 patent are not valid. (CBr at 104.)

The staff, as to the ‘779 patent, argued that the language of the asserted claims should be construed “so as not to exceed the scope of the original disclosure, and attempted to so construe said claims. (SBr at 48.) It was further argued that no new matter concerns are raised in the ‘836 patent, thus avoiding the new matter and 35 U.S.C. § 112, ¶1 allegations. (SBr at 39.)

The first paragraph of 35 U.S.C. § 112 requires, inter alia, that the specifications shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same. 35 U.S.C. § 112, ¶ 1. The Federal Circuit interprets this paragraph as placing two separate requirements on the patentee. Amgen, Inc. v. Hoechst Marion Roussel, Inc., 314 F.3d 1313, 1330 (Fed. Cir. 2003). The first is referred to as the written description requirement and the second is referred to as the enablement requirement. Id.

The written description requirement of § 112, ¶ 1 is separate and distinct from the enablement requirement. See Univ. of Rochester v. G.D. Searle & Co., Inc., 358 F.3d 916, 920 (Fed. Cir. 2004). To determine whether a patentee has complied with the written description requirement, the Federal Circuit has adopted the standard described in the PTO guidelines. Invitrogen Corp. v. Clontech Labs., Inc., 429 F.3d 1052, 1072 (Fed. Cir. 2005). Those guidelines require a:

show[ing] that an invention is complete by disclosure of sufficiently detailed, relevant identifying characteristics . . . i.e., complete or partial structure, other physical and/or chemical properties, functional characteristics when coupled with a known or disclosed correlation between function and structure, or some combination of such characteristics.

Guidelines for Examination of Patent Applications under 35 U.S.C. § 112, ¶ 1, written Description Requirement, 66 Fed. Reg. 1099, 1106 (Jan. 5, 2001).

The purpose of the written description requirement is broader than to merely explain how to make and use the invention. Vas-Cath, Inc. v. Makurkar, 935 F.2d 1555, 1563 (Fed. Cir. 1991). Thus, its purpose is to insure that the scope of the right to exclude, as set forth in the claims, does not overreach the scope of the inventor contribution to the field of art as described in the patent specification. Univ. of Rochester, 358 F.3d at 920 (citation omitted). In sum, the specification must describe the claimed invention so that one skilled in the art can recognize what is claimed. Enzo Biochem Inc. v. Gen-Probe, Inc., 323 F.3d 956, 968 (Fed. Cir. 2002). The claimed subject matter must be described in a way that would establish that the inventor was in possession of all of the limitations of the claimed invention, when the original application was filed. Univ. of Rochester, 358 F.3d at 926.



In addition to the written description requirement, there is a statutory prohibition against adding new matter to an application, viz. 35 U.S.C. § 132. Specifically, no amendment shall introduce new matter into the disclosure of the invention. Id. The prohibition against new matter together with the written description requirement, insures that the inventor fully possessed the subject matter claimed in the application when it was originally filed. Turbocare Div. of Demag Delaval Turbomachinery Corp. v. Gen. Elec. Co., 264 F.3d 1111 (Fed. Cir. 2001). In the Turbo case, the district court found that an amendment to a patent specification did not merely clarify what was already reasonably disclosed in the application, but rather constituted new matter. Hence, the district court held a claim invalid as not supported by the original specification. The Federal Circuit in turn upheld the district court's ruling that said claim was invalid "for failing to satisfy the written description requirement." Id. 264 F.3d at 1120.

The incorporation of the requirements of § 112 into § 132<sup>4</sup> insures that the inventor had possession of the later-claimed invention on the filing date of the earlier application. Id. See also In re Edwards, 568 F2d 1349, 1350, (CCPA 1978). While it is not required that the subsequent claims recite what is found in the prior specification in haec verba, In re Smith, 481 F2d 910, 914 (CCPA 1973), a full and complete description of the invention is required to demonstrate that the applicant was in fact in possession of said invention. The issue is not a question of whether one skilled in the art might be able to construct the patentee's device from the teachings of the disclosure but rather, whether the application necessarily discloses that

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<sup>4</sup> 35 U.S.C. § 120 relates to obtaining the benefit of an earlier filing date in the United States.

particular device. Martin v. Mayer, 823 F2d 500, 505 (Fed. Cir. 1987) citing Jepson v. Coleman, 314 F2d 533, 536 (CCPA 1963).

As was stated by the Court in the case of In re Ruschig, 154 USPQ 118, 122 (CCPA 1967):

It is an old custom in the woods to mark trails by making blaze marks on the trees. It is no help in finding a trail or in finding one's way through the woods where the trails have disappeared-or have not yet been made, which is more like the case here-to be confronted simply by a large number of unmarked trees. We are looking for blaze marks which single out particular trees. We see none.

While drawings and prior description can inherently, in some cases, support additional matter subsequently added to a specification, in order for a disclosure to be inherent, the missing descriptive matter must necessarily be present in the original application specification such that one skilled in the art would recognize such a disclosure. Turbo, 264 F.3d at 1119. Vague references to later claimed embodiments are insufficient to meet the support requirement of 35 USC §112 ¶ 1. Id. Specifically:

While the meaning of terms or diagrams in a disclosure is to be explained or interpreted from the vantage point of one skilled in the art, all the limitations must appear in the specification. The question is not whether a claimed invention is an obvious variant of that which is disclosed in the specification. Rather a prior application itself must describe an invention, and do so in sufficient detail that one skilled in the art can clearly conclude that the inventor invented the claimed invention as of the filing date sought.

Id. (Emphasis added).

The written description requirement, and its corollary new matter prohibition of 35 USC § 132 serve to ensure that the patent applicant was in full possession of the claimed subject matter on the earlier application filing date. Turbo, 264 F3d at 1118. It is axiomatic that an applicant requires a continuation in part to add new matter to a previous application and still get the benefit of the earlier application filing date. It is also axiomatic that an applicant cannot add

new matter in a continuation application because of 35 U.S.C. § 132.

A. Claims 5 And 17 Of The '779 Patent (Claimed Phrase "clearance")

Complainants' '779 patent resulted from Application Serial No. 10/265,657 (the '779 application). (RFF 1909 (undisputed).) Applicants filed the '779 application as a continuation of Application Serial No. 09/471,014 (the '836 application). (RFF 1909 (undisputed).) The 836 application was a continuation of application Serial No. 08/872,04 (the '486 application). (RFF 1891, 1903 (undisputed).) The '486 application, filed on June 10, 1997 (FF 69, 71, 72), claimed priority from two Belgian patent applications dated June 11, 1996 and April 15, 1997, respectively. (RFF 1892 (undisputed).) The '486 application contained an original specification with the same figures as the English translation of the Belgian patent specification, original claims, and also had an inventor declaration signed by the inventors on May 20, 1997. (RFF 1893, 1894 (undisputed); (FF 70.)

In a first restriction requirement dated March 16, 1998, the Examiner examining the '486 application identified five patentably distinct species of the claimed invention and directed applicants to elect a single disclosed species for prosecution. (FF 73.) In a response dated September 16, 1998, applicants elected the species shown in Figs. 22-25 of the '779 patent. (RFF 1896; FF 74.) In a second restriction requirement, the Examiner examining the '486 application directed applicants to designate for prosecution claims drawn to a floor covering or claims drawn to a method for manufacturing a floor panel. (RFF 1897; FF 75.) On May 10, 1999, applicants responded to an Office Action of November 9, 1998 by submitting a Substitute Specification and replacement claims 29-94. (CRRFF 1898; FF 76.) The '486 patent issued on December 28, 1999. (FF 77.)

When applicants filed the '836 application on December 23, 1999, as a continuation of the '486 application, applicants included the same Substitute Specification that had already been examined in the '486 application. (CRRFF 1905; FF 78-81.) On March 9, 2001, applicants filed a Second Substitute Specification, in clean form and markup form. (CRFF 1906.) Applicants did not file a new oath or declaration with the '836 application. (RFF 1908 (undisputed); FF 82.)

When applicants filed the '779 application, applicants did not submit a new oath or declaration with the '779 application. (RFF 1910 (undisputed); FF 83, 84.) Applicants used the original 1997 specification and drawings through an incorporation by reference. (CRRFF 1991; FF 85, 86.) This specification did not contain any references to the term "clearance." On October 8, 2002, applicants filed a preliminary amendment to amend the specification of the '779 application. (CRRFF 1991). In the preliminary amendment, applicants made the following relevant amendments to the specification:

"... [S]uch that an intermediate space or clearance 21 is created..."

"... [A]nd a recess or clearance 25 can be provided..."

"The recess 25 defines a chamber 25 ... the chamber 25 created between the tongue 9 and the upper edges 15, 16."

"... [A] recess or clearance 44 and a chamfer 45 are provided..."

"... The chamber at intermediate space S, the chamber 25 defined by recess 44, and clearance 21 are or may be essentially independent clearances or chambers when the tongue and groove elements are coupled . . ."

"... [D]ust chambers or clearances 81, or spaces 21 or chambers 25 or spaces S in Fig. 9."

Line 25' was added to Figure 4 to indicate a previously identified area of the panel (which the amended specification identified as a chamber or a clearance).

(JX-8.) (underlines show added language)

Before the October 8, 2002 preliminary amendment, the specification referenced three separate terms: (1) recess, (2) intermediate space (or space), and (3) dust chamber (or chamber).

(JX-8.) A recess is identified in Fig. 2 and Fig. 5 as a portion of the uncoupled panel containing the tongue. (JX-8.) The recess is only identified in the figures where the panel is in an uncoupled state. (JX-8.) In contrast, an intermediate space is identified in Figures 4 and 9 as a space between the tongue of a first panel and the groove of the second panel after when the panels are in their coupled state. (JX-8.) Additionally, an intermediate space is located to the left of the tongue in Figure 4 and below the tongue in Figure 9. (JX-8.) Said specification also refers to the intermediate space in Figure 9 as a space. (JX-8.) A dust chamber is located in Fig. 23 as a space between the panels in a coupled position, above the tongue. (JX-8.) The specification also indicates that intermediate space S creates a chamber in Figure 9. (JX-8.) Said specification, before the October 8, 2002 preliminary amendment, makes clear that a recess, a space/intermediate space, and a chamber/dust chamber are located in separate positions on the panel, and that a recess is only located on an uncoupled panel, while an intermediate space and a dust chamber is located on a coupled panel. (JX-8.) In Figure 4, said specification does not identify the space between the two coupling panels above the tongue of the right panel. (JX-8.) Said specification also does not mention the word “clearance” and does not indicate that a chamber exists in Figure 4. (JX-8.)

The following are the references to “recess” in the specification<sup>5</sup> before the October 8, 2002 preliminary amendment and claims of the ‘836 patent:

“[A] recess in said lower lip, said recess having a lowermost bottom area ... said elastically bendable portion of the lower lip comprises a portion of said lower lip located between the deepest point of said groove and the lowermost bottom area of said recess; wherein the bendable portion of the lower lip includes a side wall

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<sup>5</sup> For the purposes of this paragraph, the excerpts of the specification refer to the specification of the ‘836 patent, because said specification is the original specification that applicants incorporated by reference in its ‘779 application.

of said recess that slopes downwardly ..." (JX-1, at 14:30-36)

"[W]herein said locking elements comprise a recess located in a lower lip extending at least to a side edge ... wherein the recess is located in the lower lip in an area of the lower lip that is located ... beyond the distal outer end of the upper lip." (JX-1, at 17:42-55)

"[S]aid lower lip comprises an increasing thickness from the recess towards the innermost point of said groove." (JX-1, at 18:37-39)

"[A] cooperating recess in said lower lip, said protrusion and recess fitting together when ones of said panel are coupled by said tongue and groove; wherein, when a complementary tongue and groove are coupled, said protrusion and recess meet each other at contiguous contact surfaces ..." (JX-1, at 19:10-19)

"[A] cooperating recess in said lower lip, said protrusion and recess fitting together when ones of said panel are coupled by said tongue and groove ... the protrusion and recess include engageable complementary contact surfaces ..." (JX-1, at 19:59-65)

"[A] second locking element 13 (shown in FIG. 2), formed by a recess with a bent hollow or downwardly concave shape in the lower wall 14 of the groove 10." (JX-1, at 5:60-62)

"[A] chamfer 24 and lip 22 on a recess 25 can be provided ..." (JX-1, at 6:32-33)

"[A] protrusion of the lower side 35 of the tongue 31 which can be located in a recess 36 in a lower lip 43 extending distally from the lower wall 37 of the groove 32 ...the upward directed part or protrusion which defines the distally outer end of recess 36." (JX-1, at 6:53-58)

"Analogous to the chamfer 24 and recess 25, a recess 44 and a chamfer 45 are provided also at the edges 28-29." (JX-1, at 7:12-13)

(Emphasis added.)

The administrative law judge finds that both the claims of the '836 patent and the specification, before the October 8, 2002 preliminary amendment, define two types of recesses. The first type of recess is identified as recess 36 in Figure 5 of the '836 patent. (JX-1, at 5:60-62, 6:53-58, 14:30-36, 17:42-55, 18:37-39, 19:10-19, 19:59-65). This type of recess is located in the

lower lip portion of the grove panel. (Id.) The administrative law judge finds that this type of recess solely exists in an uncoupled panel. The second type of recess is identified as recess 25 in Figure 2 and recess 44 in Figure 5 of the '836 patent<sup>6</sup>. (JX-1, at 6:32-33, 7:12-13.) This type of recess is located at the edge of the tongue panel, above the tongue portion. (Id.) The administrative law judge finds that this type of recess also exists solely in an uncoupled panel

The following are references to “space” and “intermediate space” in the specification, before the October 8, 2002 preliminary amendment, and the claims of the '836 patent:

[T]he groove 10 and ... the tongue 9 ... preferably do not fit closely against each other, such that an intermediate space 21 is created between them into which possible dust remainders or such can be pushed away ...” (JX-6, at 6:13-16)

The intermediate space S forms a chamber which offers space for dust and the like ...” (JX-1, at 7:47-49)

[D]ust chambers 81 or spaces 21 as in FIG. 4, between all sides, directed laterally towards each other, of the engaged floor panels 1 ...” (JX-1, at 12:6-8.)

(Emphasis added.)

The following are references to “chamber,” and “dust chamber” in the original specification, before the October 8, 2002 preliminary amendment, and claims of the '836 patent:

The intermediate space S forms a chamber which offers space for dust and the like ...” (JX-1, at. 7:47-49)

[D]ust chambers 81 or spaces 21 as in FIG. 4, between all sides, directed laterally towards each other, of the engaged floor panels 1 ...” (JX-1, at 12:6-8)

(Emphasis added.)

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<sup>6</sup> Figures 2 and 5 represent slightly different tongue panels. Both of the recess references refer to the same portion of the two different tongue panels.

Based on the specification, before the October 8, 2002 preliminary amendment, the administrative law judge finds that: spaces are interchangeable with intermediate spaces; chambers are interchangeable with dust chambers<sup>7</sup>; spaces are interchangeable with chambers; and spaces or chambers can be located in two different places on the coupled panels. The first location is identified as space 21/chamber 81 in Figures 4 and 23 of the '836 patent. (JX-1, at 6:13-18, 12:6-11.) This type of space/chamber is located to the left of the tongue panel. (JX-1.) The second type of space/chamber is identified as intermediate space S (or simply a chamber) in Figure 9 of the '836 patent. This type of space/chamber is located below the tongue panel. (JX-1.) Finally, based on said specification, the administrative law judge finds that these space/chambers are defined by, and hence require, the coupling of panels.

With the October 8, 2002 preliminary amendment, the specification included the term "clearance." The amended specification detailed that a clearance can be a recess, a space/intermediate space, or a chamber/dust chamber. (JX-6, see Preliminary Amendment supra.) The administrative law judge finds that this is a new concept. Additionally, the amended specification detailed that the previously unidentified space, between the two panels above the tongue of the right panel, in Figure 4 is a chamber, "The recess 25 defines a chamber 24' (Fig. 4) when the floor panels are coupled, the chamber 25 created between the tongue 9 and the upper edges 15, 16." This type of space/chamber is located to the left of the tongue panel. Also, the

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<sup>7</sup> The specification also uses the term "chamfer." (JX-1.) Despite the similarities in the spellings of the term "chamber" and "chamfer," the administrative law judge does not interpret chamber to mean the same as chamfer, as the plain meaning of the terms are not identical (chamber: a compartment or enclosed space; cavity; chamfer: an oblique face formed at a corner of a board, post, etc.) and the specification does not associate the term "chamber" with "chamfer" or vice-versa. (Random House Dictionary at 223, JX-1.)



amended specification detailed that the intermediate space S in Fig. 9 creates a chamber (which is unidentified by the specification), “The chamber at intermediate space S, the chamber 25’ defined by recess 44 and clearance 21 are or may be essentially independent clearances or chambers when the tongue and groove elements are coupled as illustrated.” These also, the administrative law judge finds, are new concepts.

Complainants argued that the original specification supported the term “clearance” as defined by the amended specification. (CBr at 95). However, the administrative law judge finds nothing in the specification, before the October 8, 2002 preliminary amendment, that gives support for the conclusion that a clearance is a recess, a space/intermediate space, or a chamber/dust chamber. Said specification, before the October 8, 2002 preliminary amendment, indicated that a recess, a space/intermediate space, and a chamber/dust chamber were three different types of spaces, that were located in different places on the panel, and that a space/intermediate space and chamber/dust chamber required the panels to be coupled, while a recess did not. (JX-8.) Thus, the administrative law judge finds that one of ordinary skill in the art would not know by looking at said specification, before the October 8, 2002 preliminary amendment, that these three different types of spaces can be treated as the same. Additionally, there is nothing in the specification, before the October 8, 2002 preliminary amendment, to indicate that the space that is now identified in Fig. 4 as a chamber/clearance (25’), is either a chamber or a clearance. (JX-8.) To the contrary, the administrative law judge finds that a person of ordinary skill in the art would only know that 25’ is a clearance from the plain language of the added passage in the substitute specification that identifies 25’ as a chamber and the plain language of the added passage that says the chamber in Fig. 4 is a clearance. (JX-8). Similarly,

he finds nothing in the specification, before the October 8, 2002 preliminary amendment, which indicates that the chamber created by the intermediate space S, and the intermediate space and chamber identified in Figure 4, can all be treated as independent clearances. (JX-8.)

Additionally, the specification with the October 8, 2002 preliminary amendment states that the chamber 25' is created by the recesses of the uncoupled panels, identified in Figure 5, joining together. (JX-8, see preliminary amendment supra). However, the administrative law judge finds that a person of ordinary skill in the art would not know that the space identified as chamber 25' in the amended specification is created by the recesses of the uncoupled panels joining together from looking at the specification before the October 8, 2002 preliminary amendment.

The situation is worsened by the fact that the new matter added to the specification and the claims now support two separate meanings for the term "clearance." When the claim refers to "clearance," after the October 8, 2002 preliminary amendment, it can either refer to a recess which is an indentation, of an uncoupled panel, or it can refer to a space/intermediate space or chamber/dust chamber which is an open space between two coupled panels. Hence, the new matter requires one skilled in the art to interpret "clearance" differently depending on how it is used in the specific claim. Thus the use of "clearance" in claim 1 of the '779 patent has a completely different meaning than the use of "clearance" in claim 13 of the '779 patent. Considering that the administrative law judge finds no support in the original specification for the term "clearance," the administrative law judge finds no support in the original specification for two distinct meanings for the term "clearance."

A continuation application cannot introduce new matter. However, applicants introduced new matter by adding the term "clearance" and amending the specification to define the term

“clearance” to mean a recess, a space/intermediate space, or a chamber/dust chamber. Applicants also introduced new matter when they amended the specification to detail that the space identified in Figure 4 between the panels above the tongue is a chamber. The administrative law judge finds that applicants further introduced new matter when they amended the specification to state that the chamber created by the intermediate space in Figure 9 is an independent clearance.

Additionally on October 8, 2002, applicants drafted new claims to go along with the amended specification. (JX-6.) Applicants added new claims that used the term “clearance.” The relevant claims of the ‘779 application that contain the term “clearance” are claims 1, 5, 15, and 17<sup>8</sup>. (JX-6.) Claim 1 of the ‘779 application contained the following language, “... [a]t least one clearance between said tongue and said groove...” (JX-6.) Claim 5 of the ‘779 application contained the following language, “... [w]herein at least one clearance is defined by said engaged tongue and groove in an area between the respective intermediate tongue and groove contact surfaces and the lower tongue and groove contact surfaces of said engaged tongue and groove.” (JX-6.) Claim 15 of the ‘779 application contained the following language, “... [s]aid upper lip defining a first clearance ... said first clearance defining an upper chamber ...” (JX-6.) Claim 17 of the ‘779 application contained the following language, “... [w]herein said first clearance is a closed chamber...” (JX-6.)

On December 16, 2003, the Examiner issued an office action on the papers filed October 8, 2002 which, inter alia rejected claim 1 which ultimately became claim 1 of the ‘779 patent with further amendments. In the office action the Examiner allowed claim 15 which ultimately

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<sup>8</sup> Claims 2 and 3 of the ‘779 application were eventually canceled. Thus, claims 5, 13, and 15 of the ‘779 application eventually became claims 3, 11, and 13 of the ‘779 patent (with additional modifications).

became claim 13 of the '779 patent after further amendments. (JX-6 UNILIN-ITC-078588 to 593, FF 87.)

On March 15, 2004, applicants further amended claim 1 of the '779 application. Thus they deleted the phrase "at least one clearance between said tongue and said groove of coupling parts" and inserted, inter alia, the phrase "said coupling parts of said first pair of sides upon coupling defining a plurality of separate clearances adjacent at least a portion of said outer peripheral portion of said tongue between said groove and said tongue." (JX-6.) On March 15, 2004, applicants filed a reponse and an amendment to the office action of December 16, 2003. (JX-6; UNILIN-ITC-078600-13.) This response included claim 1 of the '779 patent (JX-6; Unilin-ITC-078603-04) and claim 13 of the '779 patent, designated on March 15, 2004 as claim 15. (JX-6; UNILIN-ITC-078607-08.) (FF 88.)

The original specification, that the '779 application incorporated by reference, did not mention clearances anywhere in the specification. (JX-6.) Moreover, for the reasons stated supra, the original specification did not support the "clearance" limitation as defined by the new matter. Without amending the original specification, the administrative law judge finds that the asserted claims of the '779 patent are found to be invalid for failure to provide a written description, as required by 35 U.S.C. § 112 ¶ 1. He finds that it is clear that applicants, by drafting claims 1, 5, 15, and 17, also added new matter to the '779 application by adding a "clearance" limitation. Applicants further made it worse by subsequently amending claim 1 to contain a "plurality of clearances" limitation. Thus, the administrative law judge finds that asserted claims 5 and 17 of the '779 patent are invalid because, in the absence of the new matter,

said claims fail to satisfy the written description requirement of 35 U.S.C. § 112, ¶ 1.<sup>9</sup>

B. Claim 23 Of The '836 Patent (Claimed Phrase “common plane of tangency”)

The Greenberg respondents argued that applicants amended the specification, changing the term “tangent line” to “common plane of tangency” (GBr at 75); and that applicants’ introduction of the term “common plane of tangency” to cover curved contact areas formed by surfaces with the same curvatures was new matter. (GBr at 75.) However, the administrative law judge has interpreted “common plane of tangency” to require only a linear or substantially linear contact surface between the coupled tongue and groove, i.e., the claimed phrase limited to contact surfaces that are either linear or substantially linear. (See Section X. D, infra). Since the administrative law judge has determined that “common plane of tangency” does not cover curved contact areas formed by surfaces with the same curvatures, he finds that applicants’ amendment did not introduce new matter, as the original term “tangent line” also covered only a linear or substantially linear contact surface between the coupled tongue and groove.<sup>10</sup> (see SPFF 316 (undisputed).) Hence, he finds that the Greenberg respondents have not established that claim 23 of the '836 patent is invalid for failing to satisfy the written description requirement of 35 U.S.C. § 112, ¶ 1 through the addition of new matter.

X. Claim Interpretation

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<sup>9</sup> The Greenberg respondents in a heading V (GBr at 68) concluded that asserted claims 5 and 17 of the '779 patent are invalid “for claiming an invention without an oath of an inventor.” However no argument is found in the post-hearing submissions of the Greenberg respondents to support said conclusion. Hence, the mere conclusion that the asserted claims of the '779 patent are invalid for claiming an invention without an oath of an inventor has not been considered.

<sup>10</sup> Applicants did not add new matter by changing the tangency concept from a “line” to a “plane” as the two-dimensional drawing of the line in the figure represented a plane in the actual three-dimensional panel. (SPFF 317 (undisputed).)

The parties have put in issue the following claimed phrases for interpretation: “floor covering” (all asserted claims), “biasing force” (claims 1 and 2 of the ‘836 patent), “elastically bendable portion” (claims 1 and 2 of the ‘836 patent and claims 3 and 4 of the ‘292 patent), “portion of the lower lip” (claims 1 and 2 of the ‘836 patent and claims 3 and 4 of the ‘292 patent), “shifting them laterally towards each other in a substantial planar fashion” (claims 10 and 23 of the ‘836 patent), “snap,” “snap-action,” and “snap-together” (claims 10, 18 and 23 of the ‘836 patent), “common plane of tangency” (claim 23 of the ‘836 patent), “clearance” (claims 5 and 17 of the ‘779 patent), “tongue” and “groove” (claim 1 of the ‘836 patent and claims 3 and 4 of the ‘292 patent),” lower lip bending as it relates to the claimed phrase “at least partially bent out of its normal relaxed position” (claim 1 of the ‘836 patent) and to the claimed phrase “at least slightly bent out of its normal relaxed position” (claims 3 and 4 of the ‘292 patent); and “relaxed unbent position” (claim 1 of the ‘836 patent)<sup>11</sup>.

A. The Claimed Phrase “floor covering”

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<sup>11</sup> Complainants, the PSV respondents and the Greenburg respondents agree that the claimed phrase “prevent drifting apart” in claims 1 and 2 of the ‘836 patent refers to counteracting one part moving away from another part (CFF 181 (undisputed)); that the claimed phrase “urging of the coupled panels together” (claims 3 and 4 of the ‘292 patent) means an active force is present that pushes the panels towards each other, and that the claimed phrase “tending to urge the panels towards each other” (claims 1 and 2 of the ‘836 patent) has the same meaning (CFF 182 (undisputed)); and that the claimed phrase “coupled by rotational motion” (claim 5 of the ‘779 patent) means that the “panels mated by rotating one panel relative to the other to engage their respective coupling parts.” (CFF183 (undisputed).) Neither the Chinafloors respondents nor the Yekalon respondents address CFF 181-3 in their rebuttal findings. Hence, said respondents are in agreement with the private parties as to CFF 181-3. The staff is further in agreement since the staff had no objection to CFF 181-3. It was also argued by the complainants, the Greenberg respondents, the PSV respondents, and the staff that the phrase “urging the coupled panels towards each other,” as used in claim 1 of the ‘292 patent, should be interpreted consistently with the definition of biasing force. (CFF 182, RFF 1178; RFF 37.1, SPFF 337.)

Complainants argued that “floor covering” is flooring of the class that consists of laminated floor panels and other kinds of hard floor panels, such as veneer parquet, prefabricated parquet, or other floor panels which can be compared to laminated flooring.” (CBr at 18; CFF183.1, CFF 183.2.) The Greenberg respondents argued that the term “floor” as used in all the asserted claims means the surface of a structure over which one travels.” (GRBr at 6; RFF1087) The PSV respondents argued that complainants’ proposed interpretation is over broad; and that the dictionary defines a floor as “the surface of a structure on which one travels <the - of a bridge>.” (PSVOCFF193.1, PSVRCFF183.1A). Neither the Yekalon respondents nor the Chinafloors respondents, in their proposed rebuttal findings, challenged complainants’ proposed interpretation. The staff agreed with complainants’ proposed interpretation. (SBr at 19; see also SPFF181-186.)

The claims in issue are directed to a floor “covering,” i.e., floor panels installed on an underlying floor. The specification of the ‘836 patent states that the invention is intended for “laminated floors, but generally it can also be applied for other kinds of floor covering, consisting of hard floor panels, such as veneer parquet, prefabricated parquet, or other floor panels which can be compared to laminated flooring.” (JX-1 at 1:13-17.) The specification also states that the floor panel can be of any shape, but preferably is an elongated rectangle as shown in Figure 1. (JX-1 at 5: 15-24.)

By the plain language, claim 1 of the ‘836 patent requires the panel to have a substantially planar underside and at least two opposed side edges. The “side edges” of the panel shown in Figure 1 are identified by items 2 and 3 (the long side edges) and 26 and 27 (the short side edges). (JX-1 at 5:25-26, at 6: 38-40, Fig. 1.) Moreover, the administrative law judge finds that

the specification of the '836 patent makes clear that the invention is directed to a specific type of floor covering. Also, he finds that the word "floor" appears in the asserted claims only in the context of the term "floor covering" or "floor panel."

Based on the foregoing, the administrative law judge interprets "floor covering" as meaning "flooring of the class that consists of laminated floor panels and other kinds of hard floor panels, such as veneer parquet, prefabricated parquet, or other floor panels which can be compared to laminated flooring."

B. The Claimed Phrases "biasing force" and "urging the coupled panels towards each other"

Complainants argued that "biasing force" is a force that is directed in a specific direction. (CBr at 19; CFF183.3, CFF183.4, CFF183.5.) The Greenberg respondents and the PSV respondents argued that "biasing force" should be defined as a tension force that causes coupled panels to be forced into contact with each other. (GBr at 6, RFF 1098; RFF 24.1.) The staff argued that a "biasing force" is a force that occurs on an angle. (SPFF 210 (undisputed).)

Each of independent claims 1 and 2 of the '836 patent has the language : "a coupling part of said [hard floor] panel , when engaged with a complementary coupling part of another one of said panel, configured and arranged to produce a biasing force between said coupled panels tending to urge the panels towards each other." Thus, the plain language of the claims requires that when the panels are in the coupled position, the coupling parts of the panels produce a biasing force tending to urge the panels together. (SPFF 208 (undisputed).) The phrase "biasing force" appears only in the claims and not in the specification of the '836 patent. (SPFF 209 (undisputed).) However, the specification does describe "locking elements which, in engaged condition with the panels in a common plane, exert a tension force upon each other, as a result of



which the engaged floor panels 1 are forced towards each other in compression.” (SPFF 211 (undisputed).) The specification’s description of a “tension force exerted by the locking elements, resulting in the panels being forced towards each other in compression, is essentially the same concept as the “biasing force.” (SPFF 212 (undisputed).) While SPFF 212 is undisputed, there is expert testimony by Rice that the ‘836 patent in its statement, referring to FIG. 23<sup>12</sup>, that “[t]he resultant bending V, as well as the tension force K, are indicated in the enlargement view of FIG. 23” (JX-1 at 10:7-9) is in error in misidentifying K as a tension force. Thus Rice testified:

THE WITNESS: . . . [F]igure 23 of the '836 patent was on the board the other day. And there was much discussion of the biasing force based on the statements in the patent, and I believe Your Honor had a number of questions related to that.

I would like to revisit that discussion just a little bit here, Your Honor.

This angle at the bottom of the lower lip, right interior of the farthest distal end, as it slopes downward, has two forces shown as K1 going inward and K pointing upward.

In courtroom testimony the other day, I heard this K1 vector here identified as the biasing force. In fact, sir, it is not a biasing force. Biasing forces in mechanics occur on biases. And the biasing force would be a vector from that bias coming out here, which has two components in its application. One, K1, and the other K. K is misidentified in the patent as a tension force. It is actually a compressive force of that lip pushing upward, resulting from tension in the lower lip.

But the biasing force is not shown on any diagram, but is discussed as developing because of the bend in the lower lip. And that would be out here.

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<sup>12</sup> FIG. 23, “on a larger scale, represents the coupling of two floor panels of FIG. 22” while “FIG. 22 represents a floor panel according to the invention.” (JX-1 at 5:5-9.)

JUDGE LUCKERN: Out here is where?

THE WITNESS: Out here on the bias, perpendicular or normal to that bias, directly out this way. That has several effects in this joint.

This joint couples because there is a coupling or touching here, a touching here and a force pushing these panels together and, in fact, urging them together to close that gap and to keep this joint from opening up. That's what the biasing force does.

So what I heard the other day is this line identified as a biasing force to urge the panels together and I believe to close that gap. And in fact, this is the biasing force on the bias. And it's resolved into two vector components, one of which keeps pressure on the lip here to keep this surface from rising upward. And the other one to keep the panels together and to keep a gap from opening up there.

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JUDGE LUCKERN: Is there a dictionary, technical dictionary definition for biasing force or not? If you wanted to -- I mean, I can look in the Webster's and see what biasing means and what force is. But is there any technical dictionary that was around in the mid-'90s that would define biasing force? I'm not trying to have this as a memory contest. Maybe you don't know.

THE WITNESS: I can't remember that directly. I do remember that being taught in mechanics classes many, many years ago, being told that forces that occur off angle or on angles like this, off perpendicular --

JUDGE LUCKERN: "Like this" doesn't -- put it in words.

THE WITNESS: That occur on angles or on the bias, are termed biasing forces. And in this case, the biasing force tends to operate as it's supposed to and biases the panels' movement toward each other. So a biasing force not only occurs on the bias in this case, that is an angle, or can be shown that way, but in fact creates a biasing of one panel moving toward another.

And it's developed, according to the patent teaching, by bending and curving that lower lip.

JUDGE LUCKERN: And when you say biasing or bias, how are you using those two words?

THE WITNESS: The first definition is a definition one would use in mechanics for biasing force. A force that occurs not on a flat surface or perpendicular to it but rather on an angle to the surface.

In this case, the biasing force tends to bias the panels, push them towards one another so they're not in a neutral position. And that develops, according to the patent teaching, by bending, curving that lower lip. If the panel breaks or fractures, it doesn't function as intended.

(Tr. at 2541-42, 2550-51(emphasis added).)<sup>13</sup> As said testimony indicates, and as supported by the plain language of the claims, the specification and expert testimony, the administrative law judge construes “biasing force” as a force that occurs on an angle and which has two vector components in its application and which force causes coupled panels to be forced into contact with each other.

C. The Claimed Phrases “elastically bendable portion,” “elastically bendable portion of the lower lip” and “relaxed unbent position”

Complainants argued that the terms “elastically bendable portion” and “elastically bendable portion of the lower lip” have identical meanings and should be treated interchangeably throughout claims 1 and 2 of the ‘836 patent and claims 3 and 4 of the ‘292 patent. (CBr at 23,

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<sup>13</sup> The PSV respondents’ expert Rice further testified that if a crack develops in the joint of the panels then coupling the panels may create a biasing force that does not cause the panels to be forced into contact with each other, but merely holds the joint together. (Rice, Tr. at 2545.) However, the administrative law judge finds that Rice failed to clarify what type of crack is required to affect the functionality of the biasing force. Additionally, the patent specification does not require an uncracked joint as a prerequisite for the bending of the lower lip to create a biasing force. (JX-1 at 10:10-15.)

32.) Thus according to complainants, any reference to “elastically bendable portion of the lower lip” should be construed in the same manner as “elastically bendable portion.” (CBr at 23.) Complainants also argued that the term “elastically bendable portion” means “a portion of a coupling part capable of returning toward its original position after bending.” (CBr at 21; CFF183.6-183.9.) Complainants further argued that there is no support to add an additional limitation that there can be no damage whatsoever to the panels when the bendable portion bends because the presence of small cracks in the panel core material when it undergoes the stress of coupling does not mean that the lower lip does not elastically bend. (CBr at 22; CFF 435.1-435.3.)

With respect to the location of the “elastically bendable portion,” complainants argued that the location be construed to comprise either all of the lower lip or just a portion of it. (CBr at 23.) Complainants argued that the intrinsic record supports this claim interpretation because Figure 25 of the ‘836 patent makes clear that the lower lip functions as a cantilever beam and thus, shows bending of the entire lower lip structure. (CBr at 23; CRBr at 43; CFF 183.15; CRRFF 46.3A; CRRFF 46.3C.) Complainants’ Loferski testified that according to the mechanics of cantilever beam, where there is a deflection at a point of contact, including the distal end, there is bending throughout the entire beam.<sup>14</sup> (CRBr at 43; CFF 435.1, CRRFF 1257A.)

The Greenberg respondents and the PSV respondents only interpret the term “elastically bendable” and do not distinguish between the terms “elastically bendable portion” and

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<sup>14</sup> The Random House College Dictionary (1980) at 385 defines “distal” as “situated away from the point of origin or attachment, as of a limb or bone; terminal.”

“elastically bendable portion of the lower lip.” (GBr at 7; PSVBr at 12.) The Greenberg respondents and the PSV respondents argued that “elastically bendable,” as found in claims 1 and 2 of the ‘836 patent, as well as found in claims 1 and 2 of the ‘292 patent, refers to the part of a structure made of a material capable of recovering size and shape after deformation and without fracture. (RFF 1119; RFF 27.1.) With respect to the location of the elastically bendable portion, the Greenberg respondents appear to give conflicting arguments. Initially, the Greenberg respondents appear to argue that claim 1 of the ‘836 patent requires that the location of the “elastically bendable portion” be the entire lower lip. (GBr at 7.)<sup>15</sup> However, subsequently, the Greenberg respondents appear to argue that claims 1 and 2 of the ‘836 patent and claims 3 and 4 of the ‘292 patent require that the location of the elastically bendable portion be between the deepest part of the groove and the lower most bottom area of the recess. (GBr at 38; RFF 1312-1314.) To support this argument, the Greenberg respondents, relying on Loferski Tr. at 742, 3051 and RDX 400.116, proposed the finding that, as defined by the ‘836 patent, if there is an elastically bendable portion of the lower lip, it must be demonstrated by showing bending of the lip between the deepest part of the groove and the lower most bottom area of the recess. (RFF 1257.) Addressing complainants’ cantilever beam argument, the Greenberg respondents argued that, as set forth in the patents-in-issue, the lower lip of the groove is supported by an underlayer and thus the lower lip is not a cantilever beam because it is supported on each end and hence equations that have been developed for cantilever beam would not apply. (JX-1, at 10:45-47; GRCFF 435-2B.) Likewise, with respect to the location of the elastically bendable portion, the

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<sup>15</sup> The Greenberg respondents do not initially to address the location of the “elastically bendable portion” in claim 2 of the ‘836 patent or claims 3 and 4 of the ‘292 patent. (GBr at 7-8.)

PSV respondents appear to give conflicting arguments. Initially, the PSV respondents argued that while claim 1 of the '836 patent requires that the elastically bendable portion must be located at the lower lip of the groove, claim 2 of the '836 patent contains no such limitation, and thus, the elastically bendable portion may be located on any part of the tongue or groove members.<sup>16</sup> (PSVBR at 13; RFF 25.4-25.6.) However, subsequently, the PSV respondents argued that, based on the '836 and '292 patents and complainants' expert's testimony, the elastically bendable portion, as recited in the asserted claims of the '836 and '292 patents, must be located between the deepest point of the groove and the vertical bottom of the recess for all of the claims-at-issue. (PSVBR at 46; PSV R Br at 31; RFF 46.96.) Respondent Yekalon agrees with the argument of the Greenberg respondents and PSV respondents that the elastically bendable portion of the lower lip must be demonstrated by showing bending in the region defined by the '836 patent and the '292 patent, i.e. between the deepest point of the groove and the vertical bottom of the recess. (YRBr at 25.)

The staff, like the Greenberg respondents and PSV respondents, only interpreted the term "elastically bendable." The staff's position is that "elastically bendable" requires the biasing force to be provided by a portion of one of the coupling parts that is elastically bent out of its relaxed unbent position. (SPFF 214.) The staff argued that respondents' interpretation is vague as to the meaning of "without fracture." (Objection to RFF 1119.) However, it did argue that "elastically bendable" would necessarily exclude fracturing that renders the bent portion of the coupling part incapable of returning toward its original position. (SRBr at 2.) With respect to the

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<sup>16</sup> The PSV respondents do not initially address the location of the "elastically bendable portion" with respect to claims 3 and 4 of the '292 patent. (PSVBr at 13.)

location of the elastically bendable portion, the staff appears to distinguish between the terms “elastically bendable portion” and “elastically bendable portion of the lower lip.” (SRBr at 24, 26.) With respect to claim 1 of the ‘836 patent, the staff argued that the location of the “elastically bendable portion” is the entire lower lip. (SRBr at 24; SPFF 221.) Regarding claim 2 of the ‘836 patent, the staff argued that the plain language of the claim requires the “location of the elastically bendable portion of the lower lip” to be between the deepest point of the groove, and the lowermost bottom area of the recess. (SRBr at 26; SPFF 241.) As to claim 3 of the ‘292 patent, the staff argued for the same location of the “elastically bendable portion” that it argued for with respect to claim 1 of the ‘836 patent (i.e. the entire lower lip). (SRBr at 41; SPFF 340.) Referring to claim 4 of the ‘292 patent, the staff argued for the same location of the “elastically bendable portion of the lip” that it argued for with respect to claim 1 of the ‘836 patent (i.e. between the deepest point of the groove and the lowermost bottom area of the recess).<sup>17</sup> (SRBr at 42-43; SPFF 350.) The staff does not rebut, and in fact agrees with, the Greenberg respondents’ proposed finding that the elastically bendable portion of the lower lip is located between the (horizontally) deepest point of the groove and the (vertical) bottom of the recess. (SRBr at 26; SPFF 242.)<sup>18</sup> The staff did argue that, because of the nature of the lower lip as a cantilever beam, that this finding does not prohibit the entire lower lip from being elastically bendable. (SRBr at

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<sup>17</sup> The staff does not construe the location of either “elastically bendable portion” or “elastically bendable portion of the lower lip” in claim 2 of the ‘836 patent.

<sup>18</sup> It is unclear whether the staff agrees with the Greenberg respondents and the PSV respondents that all claims-at-issue of the ‘836 and ‘292 patents require that the elastically bendable portion be located between the deepest point of the groove and the bottom of the recess, or merely the claims that the staff identifies as containing this limitation (i.e. claim 1 of the ‘836 patent and claim 4 of the ‘292 patent).

26-27; SPFF 243.)

Complainants argued that the claimed phrase “relaxed unbent position” means the same as the terms “normal relaxed position” and “normal relaxed unbent position,” i.e. initial position of the elastically bendable portions before the bending that occurs when the panels are coupled. (CRBr at 14.) The Yekalon respondents argued that said phrase means “a position coplanar to the planar underside of the panel that is maintained when the tongue does not act on the lower lip.” (YBr at 22.)

a. Claim 1 Of The ‘836 Patent

Claim 1 of the ‘836 patent, which is an independent claim, contains the following limitation: “at least one of said coupling parts including an elastically bendable portion having a relaxed unbent position and which, when in a coupled condition, is at least partially bent out of its normal relaxed position and thereby provides said biasing force.” (JX-1 at 14:13-16 (emphasis added).) The plain language of this limitation requires the biasing force to be provided by a portion of one of the coupling parts that is elastically bent out of its relaxed unbent position. (SPFF 214 (undisputed).) Moreover, the specification states that the tension (biasing) force that causes the panels to be forced towards each other is “realized preferably by providing the coupling parts with an elastically yieldable or bendable portion . . . which, in engaged position, is at least partially bent and in this way creates tension [biasing] force which results in the engaged floor panels being forced towards each other.” (SPFF 215 (undisputed).) It is also undisputed that the patent specification states: “HDF and MDF, show ideal features in order to realize a connection, such as mentioned above, as these material show the right features in respect to elastic deformation . . . whereby it is avoided that the floor panels come unlocked or



are damaged in an irreparable manner.” (JX 1, at 3:58-65; CFF183.8 (undisputed).) The specification further states:

The floor covering preferably is formed by joining the floor panels into each other free of glue. Hereby, the connections are of such nature that the floor panels can be disassembled without being damaged, such that, for example, when moving from one residence or location to another, they can be taken along in order to be placed down again. It is, however, clear that a glueing between tongue and groove is not excluded.

(JX-1, at 4:3-10.) Moreover, if the bent portion of the coupling part is incapable of returning towards its original position, then it cannot generate the biasing force. See supra. Therefore, the administrative law judge interprets “elastically bendable portion” as a portion of a coupling part capable of returning toward its original position after bending and which would necessarily exclude fracturing that renders the bent portion of the coupling part incapable of returning toward its original position.

RFF 1. As to the location of the elastically bendable portion, referring to complainants’ reliance on a cantilever beam, some five years after the application on which the ‘836 patent issued was filed on December 23, 1999, and referring to complainants’ argument that the location of the “elastically bendable portion” may comprise either all of the lower lip or just a portion of it, the administrative law judge finds absolutely nothing in either the ‘836 patent or the ‘292 patent that would allow one of ordinary skill in the art to know that the lower lip of the panel is a cantilever beam. (JX-1, JX-3.) The word “cantilever” is never used in the patent, nor are the mechanics of a cantilever beam described in the specification.

Additionally, the specification never described the mechanics of how the lower lip bends, beyond the mere fact that the lower lip does bend. Complainants’ expert’s contention that it

is clear from the figures in the patent (specifically Fig. 25 of the '836 patent) ignores the specification and the claim language. (CBr at 23; CRBr at 43; CFF 183.15; CRRFF 46.3A; CRRFF 46.3C; JX-1.) While complainants' expert testified that a cantilever beam by definition is a beam which is supported at one end and free at the other end, (Tr. at 346, 356-58) the specification stated that the floor covering is generally placed upon an underlayer that is not shown in any of the diagrams of the patent. (JX-1, at 10:45-47.) This would mean that the diagram actually shows the lower lip being supported at both ends, which runs contrary to the definition of a cantilever beam. Furthermore, the notion that the figures in the patent specification (e.g. Fig. 25) teach that the lower lip is a cantilever beam would make the limitation of the "elastically bendable portion of the lower lip" in claim 1 of the '836 patent redundant as claim 1 already defines the "elastically bendable portion" as consisting of "a lower lip." (JX-1; Loferski, Tr. at 603.) Thus, the additional limitation would not be a limitation at all but merely stating a fact. (JX-1; Loferski, Tr. at 603.)

Referring to the plain language of claim 1, claim 1 imposes two limitations on the elastically bendable portion by defining the terms "elastically bendable portion of ... one of [the] coupling parts" and "elastically bendable portion of the lower lip". (JX-1 at 14:17-20, 33-36.) The first limitation uses the term "elastically bendable portion of ... one of [the] coupling parts" and defines the term as "compris[ing] a lower lip defined at least in part by a lower side of the groove of [the] coupling parts." (JX-1 at 14:17-20.) Significantly, the second limitation uses the term "elastically bendable portion of the lower lip" as "compris[ing] a portion of said lower lip located between the deepest point of [the] groove and the lowermost bottom area of [the] recess." (JX-1 at 14:33-36.) The plain meaning of this claim language indicates that the location of the

“elastically bendable portion of the entire lower lip” is not the entire lip, but merely the portion of the lower lip between the deepest point of the groove and the lowermost bottom area of the recess. The Federal Circuit has stated that “[t]here is a “heavy presumption” that the terms used in claims “mean what they say and have the ordinary meaning that would be attributed to those words by persons skilled in the relevant art.” Super Guide Corp. v DirecTV Enters, Inc. 358 F.3d 870, 873 (Fed. Cir. 2004) (quoting Tex. Digital Sys., Inc. v. Telegenix, Inc., 308 F.3d 1193, 1202 (Fed. Cir. 2002)). The Court went on to state that “claim terms take on their ordinary and accustomed meanings unless the patentee demonstrated an intent to deviate from the ordinary and accustomed meaning of a claim term by redefining the term or by characterizing the invention in the intrinsic record using words or expressions of manifest exclusion or restriction, representing a clear disavowal of claim scope.” Id. (citations omitted). Finally, the Court stated that “the written description, however, is not a substitute for, nor can it be used to rewrite, the chosen claim language.” Id.; see also Inv. No. 337-TA-538 Comm’n. Op. at 6-7 (June 19, 2006). Thus, the administrative law judge finds that claim 1 of the ‘836 patent requires that the bending must occur in a portion that only encompasses the deepest point of the groove and the lowermost bottom area of the recess and cannot be shown in any area of the lower lip outside the portion between the groove’s deepest point and recess’s lowermost bottom area.

b. Claim 2 Of The ‘836 patent

Claim 2 of the ‘836 patent, which is an independent claim, also contains the following limitation, “at least one of said coupling parts including an elastically bendable portion having a relaxed unbent position, and which, when in a coupled condition, is at least partially bent out of its normal relaxed position and thus provides said biasing force.” (JX-1, at 14:61-64 (emphasis

added).) For the same reasons given for claim 1 of the '836 patent, the administrative law judge interprets "elastically bendable portion" as a portion of a coupling part capable of returning toward its original position after bending and which would necessarily exclude fracturing that renders the bent portion of the coupling part incapable of returning toward its original position. (See Section X. C. a.)

Claim 2 of the '836 patent goes on to reference the elastically bendable portion on two separate occasions: the first by stating that "the elastically bendable portion of one coupling part is bent;" and the second by stating "maintaining the bent condition of the elastically bendable portion of the lower lip [during shifting]." (JX-1, at 15:12-13, 18-20.) However, said claim 2 does not further define (or add limitations) to "elastically bendable portion," as claim 1 of the '836 patent did. (JX-1.) Since the specification provides support for a broad interpretation of "elastically bendable portion" that encompasses the entire lower lip, and said claim 2 makes no reference to the "elastically bendable portion of the entire lip" being only the portion of the lower lip between the identified groove, and recess of the panel, unlike claim 1 of the '836 patent, said claim 2 of the '836 patent contains only one elastically bendable portion limitation with respect to location: a portion that encompasses the entire lower lip. Therefore, the administrative law judge finds that a person of ordinary skill in the art would construe the elastically bendable portion to be located anywhere on the lower lip.

c. Claim 3 Of The '292 Patent

Claim 3 of the '292 patent is a dependent claim of claim 2 of the '292 patent (which claim 2 is not at issue in this case), which itself is a dependent claim of claim 1 of the '292 patent (which claim 1 is not at issue in this case). (JX-3.) Thus claim 3 incorporates all of the

limitations of claims 1 and 2 of the '292 patent. Claim 1 of the '292 patent contains the following limitation “at least one of said coupling parts including an elastically bendable portion having a relaxed unbent position, and which, when in a coupled condition, is at least slightly bent out of its normal relaxed unbent position to effect said urging of the coupled panels together.” (JX-3 at 14:24-28 (emphasis added).) The language of claim 1 of the '292 patent requiring “urging of the coupled panels together” is essentially similar to the “biasing force” language of claim 1 of the '836 patent. (SPFF 337 (undisputed).) The plain language of this limitation requires the urging of the coupled panels together (i.e. biasing force) to be provided by a portion of one of the coupling parts that is elastically bent out of its relaxed unbent position. (SPFF 214 (undisputed); SPFF 337 (undisputed).) For the same reasons given for claims 1 and 2 of the '836 patent, the administrative law judge interprets “elastically bendable portion” as a portion of a coupling part capable of returning toward its original position after bending and which would necessarily exclude fracturing that renders the bent portion of the coupling part incapable of returning toward its original position.

Claim 2 of the '292 patent imposes an additional limitation by defining the term “elastically bendable portion of . . . one of [the] coupling parts” as “compris[ing] a lower lip defining at least in part a lower side of the groove of [the] coupling parts. (JX-3 at 14:30-32.) The administrative law judge finds that the plain meaning of this claim language indicates that the location of the “elastically bendable portion” is the entire lower lip. The specification supports this interpretation of the location as it states “... [P]roviding the coupling parts with an elastically yieldable or bendable portion, in this case the lower lip, which, in engaged condition, is at least partially bent . . .” and “the bendable portion, in this case the lower lip, preferably is

provided . . .” (JX-3, at 10:3-5, 11-12.) These phrases support the broad construction that the location of the “elastically bendable portion” is anywhere on the lower lip. Claim 3 of the ‘292 patent does not add an additional limitation with respect to the location of the elastically bendable portion or even reference the phrase “elastically bendable portion of the lower lip.” (JX-3.) Therefore, claim 3 of the ‘292 patent only contains one limitation with respect to the location of the elastically bendable portion. Hence the administrative law judge finds that a person of ordinary skill in the art would interpret claim 3 of the ‘292 patent as requiring only that the elastically bendable portion reside anywhere on the lower lip.

d. Claim 4 Of The ‘292 Patent

Claim 4 of the ‘292 patent is dependent on claim 3 of the ‘292 patent. Thus, it incorporates all of the limitations of claim 3 of the ‘292 patent. For the same reasons given for claim 3 of the ‘292 patent, the administrative law judge interprets “elastically bendable portion” as a portion of a coupling part capable of returning toward its original position after bending and which would necessarily exclude fracturing that renders the bent portion of the coupling part incapable of returning toward its original position.( See Section X. C. c)

In addition to the limitation that the elastically bendable portion resides anywhere on the lower lip, claim 4 of the ‘292 patent adds an additional limitation by defining the phrase “elastically bendable portion of the lower lip” as “compris[ing] a portion of said lower lip located between the deepest point of [the] groove and the lowermost bottom area of [the] recess. (JX-3 at 14:49-52.) The plain meaning of this claim language indicates that the location of the “elastically bendable portion of the entire lower lip” is not the entire lip, but merely the portion of the lower lip between the groove’s deepest point and the recess’s lowermost bottom area. Thus, claim 4 of

the '292 patent contains two elastically bendable portion limitations with respect to location: (1) the bending must occur in a portion that encompasses the entire lower lip; and (2) the bending must occur in a portion that only encompasses the deepest point of the groove and the lowermost bottom area of the recess. Hence the administrative law judge, relying on Super Guide Corp., supra, finds that a person of ordinary skill in the art would interpret the elastically bendable portion to be located between the deepest point of the groove and the lower most bottom area of the recess.

D. The Claimed Phrase “common plane of tangency”

Complainants argued that the claimed phrase “common plane of tangency” means a plane that is tangent to the meeting point or an area where the protrusion of the tongue meets the lower lip contact surface.” (CBr at 27; CFF 183.20.) The Greenberg respondents and the PSV respondents argued that the phrases “tangent line” and “common plane of tangency,” as used in claim 23 of the '836 patent, mean the line, or plane that extends out from that line, through which a tangent could be drawn from the point, or surface, where the lower tongue surface and the upper surface of the lower lip of the groove surfaces meet, would not intersect either of those two surfaces. (RFF 1171; RFF 34.1.) It was also argued by the Greenberg respondents that the terms do not apply to the situation in which the two structures meet over the length of two curved surfaces. (RFF 1171.)

The staff argued that the claimed phrase in issue should be interpreted as the angle formed by a tangent line drawn between linear or substantially linear contact surfaces on the tongue and groove. (SBr at 38-9.) The staff supported its claim interpretation by noting that in the embodiments in the specification that illustrates the drawing of a common plane of tangency

the contact surfaces between the tongue and the groove establish a “ linear or substantially linear contact.” (SBr at 38.)

Claim 23 of the ‘836 patent concludes with the phrase “wherein, when a complementary tongue and groove are coupled, said protrusion and recess meet each other at contiguous contact surfaces at a common plane of tangency that with respect to a common lane of the coupled panels is inclined inwardly from a distally outer area towards a distally inner area at an angle less than 90°. (JX-1, at 19:13-19.)” The staff, in support of its interpretation, relied on SPFF 308-314, each of which was undisputed by all parties, including the complainants. Undisputed SPFF 310 shows that in FIGS. 7 and 23, the contiguous contact surfaces establishing the angle A are shown as linear. Undisputed SPFF 311 read “[i]n Figure 9, the contiguous surfaces establishing the angle A are curved, but the curvatures of the two surfaces are significantly different, resulting in what the patent explicitly describes as ‘substantially only a linear contact.’ Loferski, Tr. 518-19, 727; JX-1, 7:33-36, Fig. 9.” Complainants rely on the reference to “a” in the claimed phrase in issue and FIGS. 9 and 23 of the ‘836 patent to support their interpretation. (CRBr at 17.) The specification however, unequivocally states that “[a]s represented in FIG. 9, the locking elements 46-47 possibly can be configured in such a manner that substantially only a linear contact is obtained . . .” (JX-1 at 7:33-35 (emphasis added).) Moreover complainants’ reference to FIG. 23 makes specific reference to FIG. 9. See JX-1 at 11:50-53. The administrative law judge finds nothing in the specification of the ‘836 patent that would warrant the breadth that complainants have argued. Hence the administrative law judge interprets “common plane of tangency” as limited to contact surfaces that are either linear or substantially linear.

E. The Claimed Phrases “snap,” “snap-action,” And “snap-together” Coupling



Complainants argued that the claimed phrases in issue refer to a physical action that takes place when an elastically bendable portion of one panel bends during coupling in order to allow the joints to come together and after coupling returns towards its original position. (CBr at 26; CFF 389.) The Greenberg respondents and the PSV respondents argued that the terms “snap,” “snap-action,” and “snap-together,” as used in claims 10 and 23 of the ‘836 patent, mean that when two panels are coupled when structure on one panel is deformed, deflected or bent from its original position by structure on the mating panel and when panels are fully engaged the structure that was deformed, deflected or bent moves from its fully deformed, deflected or bent position back towards its original position and is not damaged or broken in the process. (RFF 1157; RFF 30.1.)

The staff argued that the claimed phrases in issue require the core material of the coupling components to bend or compress during the lateral joining of the two panels, and then return towards its original position when the locking elements are engaged. (SBr at 33-34, SPFF 286.) It argued that snap-action coupling can cause fractures to develop in the core material of the panel; that this type of split occurs because of the brittle nature of the material in the plane of the panel; that while a fracture that goes deep into the board could prevent the lower lip from returning towards its original position and thereby prevent the joint from functioning, smaller fractures do not prevent the joint from functioning; and that therefore the claimed phrase should not be construed to forbid any fracturing of the core material of the panel during lateral coupling (SBr at 34, SPFF 288-92.)

Claims 10 and 23 of the ‘836 patent has the limitation “wherein the locking elements of said second pair of opposite side edges provide a snap-together coupling providing a snap action

during the coupling of two panels by shifting them laterally towards each other, said snap action being delivered substantially by said core material.” It is undisputed that the limitation requires the core material of the coupling components to bend or compress during the lateral joining of the two panels, and then return, or “snap back,” towards its original position when the locking elements are engaged. (SPFF 286 (undisputed).) Moreover, the administrative law judge finds that the plain language of the limitation supports this finding. Complainants’ expert Loferski explained that “snap-action” is “where the one component of the joint deflects downward during the action of coupling and that same component then returns up somewhat to its, to a precoupling kind of state.” (Tr. at 473.) Similarly PSV’s expert Rice testified that snap-action occurs when during coupling, the lower lip bends and returns to a position partially bent out of its normal, uncoupled condition and “[t]hat return is referred to as the snap action, in my opinion.” (Tr. at 2421.)

The administrative law judge further finds that the “snap” coupling method is described in the specification (“To this aim, the locking elements 30 consist of snap-together connection with locking elements 33 and 44, which grip behind each other” (JX-1 at 6:49-51).) See also FIGS 6, 7. He also finds that the “snap” coupling method is illustrated in the embodiment of FIG. 25; that in this embodiment the “elastically bendable portion” is the lower lip 43 of the groove that is bent downward out of its original, uncoupled position by insertion of the protrusion of the tongue during coupling; that the dotted outline of the lower lip in FIG. 25 shows the bending with Vm showing the displacement of the bending; and that, as illustrated in FIG 25, the lower lip is returning to its initial unbent position once the protrusion of the tongue clears the distal end of the lower lip. (JX-1.)

Based on the plain language of the limitation in issue, the specification, and expert testimony, the administrative law judge interprets the claimed phrases “snap,” “snap-action,” and “snap-together” coupling as a physical action that takes place when an elastically bendable portion of one panel bends during coupling to allow the joint to come together and after coupling the bendable portion returns towards its original position when the locking elements are engaged.

With respect to respondents’ argument that the interpretation of said claim phrases in issue shall include “is not damaged or broken in the process”, there is undisputed testimony that a fracture that goes deep into the board could prevent the lower lip from returning towards its original position and thereby prevent the joint from functioning. (Thiers, Tr. at 102-05.) However, Thiers further testified that “[w]e have put 100 million of square feet of that kind of flooring and we never had any complaints about fractures in the grooves.” (Tr. at 104.) The administrative law judge finds nothing in the record that conflicts with this testimony. In addition, snap-action videos taken by Loferski show that even when a crack did form at the base of a groove, the lower lip still behaved in an elastic manner by springing back up. (Tr. at 759-60); CX-113; CX-921.) Moreover, in a sample that did form a crack at the base of the groove during snap joining, (RS 002), Loferski tested the integrity of the joint and determined that the split did not affect the functioning of the joint. (Tr. at 487-491, 755-56; CPX-110.) Thus, the administrative law judge interprets the claimed phrases as having the physical action, supra, and in that action not causing fractures that would prevent the joint from functioning, i.e. that the floor panels would not hold together anymore and there would not be a mechanical joining.

- F. The Claimed Phrase “shifting them laterally towards each other in a substantial planar fashion”

The claimed phrase is found in the following language of claims 10 and 23 (claim 18 is a claim dependent on claim 10): “wherein said coupling parts and the mechanical locking elements of at least said second pair of opposite side edges are configured such that two identical ones of said floor panels are coupled by shifting them laterally towards each other in a substantial planar fashion.”

Complainants, relying on testimony of Loferski (Tr. at 472,475), proposed that the claimed phrase in issue means to slide the panels towards each other essentially in a largely horizontal direction. (CFF 388.) The Greenberg respondents argued that the claimed phrase “shifting them laterally towards each other in a substantial planar fashion” means to slide one panel towards the other by easily pushing one toward another while both are in the same plane, but allowing the lower lip of the groove to be displaced out of the plane, below the planar surface of the mating panels. (RFF 1145.) The Greenberg respondents, relying on testimony of Loferski (Tr. at 635-36) and challenging CFF 388, argued that Loferski admitted that the snap-action claim limitation of claims 10, 18 and 23 require that the panels be in the same plane when shifted (GRCFF 387.2) and that Loferski did not know how much a panel can deviate from a plane vertically and still be substantially planar, relying on Tr. at 835. (GRCFF 387.2.) Neither the staff nor the PSV respondents had any objection to complainants’ CFF 388.

The staff argued that the plain language of the claim, as quoted supra, requires that for at least one set of edges (i.e., long or short), the coupling parts are configured to enable lateral coupling (SPFF 274); that in contrast to coupling by rotation, lateral coupling allows the panels to be joined when both the panels are flat on the floor (SPFF 275); and that the specification describes several embodiments having coupling parts that are capable of being coupled by means

of lateral movement. (SPFF 276; JX-1 at 6:46-49 (“locking elements are provided which allow for an engagement and interlocking by means of a lateral translation movement in direction T only, as represented in FIGS. 6 and 7”); JX-1 at 11:8-10 (citing FIG. 25).) It was also argued by the staff that the phrase “substantially planar” did not appear in the original patent application that the ‘836 patent claims priority to, but was added by way of an amended specification (SPFF 277); that the original disclosure described and illustrated lateral coupling; that a person of ordinary skill in the art would understand that during lateral coupling, the panels may be substantially but not perfectly planar (SPFF 279); and that therefore “substantially planar” allows for deviations from a purely co-planar relationship. (SBr at 31-2.)

Complainants, referring to the Greenberg respondents’ argument that the claims require that the “panels are in the same plane” during coupling, i.e. the only displacement out of the plane is bending of the lower lip, argued that the claims and the specification use the modifiers “substantial” or “substantially” which are typically construed to mean “approximate” or “largely;” and that thus the panels all moved towards each other in a largely or approximately horizontal fashion and they are not perfectly in plane. (CBr at 24).

Complainants, referring to the Greenberg respondents’ proposed construction requiring that during “snap-together,” coupling the panels are “easily push[ed] one toward another,” argued that this requirement is inconsistent with the specification’s disclosure that “snap” coupling sometimes require the use of tools. (CBr at 25.)

The plain language of the claimed phrase in dispute recites “shifting them laterally towards each other in a substantial planar fashion.” It does not recite shifting them laterally towards each other in a planar fashion. Hence, the administrative law judge finds that the use of

the word “substantial” is a meaningful modifier implying “approximate” and allows for deviations from a purely co-planar relationship. See Playtex Prods., Inc. v. Proctor & Gamble Co., 400 F. 3d 901, 907 (Fed. Cir. 2005); Liquid Dynamics Corp. v. Vaughn Co., Inc. 355 F. 3d 1361, 1368 (Fed. Cir. 2004). The administrative law judge finds no support for the argument of the Greenberg respondents that the term “substantial” is used to modify planar because the lower lip is out of the plane of two mating panels. (GRCFF 183.10B.) The Greenberg respondents rely on testimony of Loferski elicited in cross-examination:

Q. And the snap-action limitations are that the panels are required to be able to be snapped together by bringing them laterally in a substantially planar fashion. That is, that they have to be in the same plane when they are coupled by snap-action.

Is that correct?

A. I believe so, yes.

(Tr. at 636.) The above question, however was confusing in equating “substantially planar fashion” to “same plane.” Moreover Loferski’s answer is not definitive.

Based on the plain language of the claimed phrase in issue, the administrative law judge interprets the language as requiring that the panels slide towards each other essentially in a substantial planar fashion; and that there is no requirement in the claims nor in the specification that the one panel be “easily” pushed toward another panel while both are in a substantial planar fashion. Moreover, the administrative law judge does not interpret the claimed language as requiring that lateral coupling be accomplished without the use of tools. To the contrary the ‘836 patent does provide for the possible use of tools, e.g. when placing the panel under a door frame. (JX-1 at 11:22-28.)

- G. The Claimed Phrases “at least partially bent out of its normal relaxed position,” “normal relaxed position,” “relaxed unbent position,” And “at least slightly bent out of its normal relaxed unbent position”

Complainants argued that the phrases “relaxed unbent position” and “normal relaxed position” refer to the initial position of the elastically bendable portion before the panels are coupled. It is argued that the phrase “partially bent” means that at least part of the elastically bendable portion is changed from its initial position. (CBr at 30.) Referring to the claimed phrase “at least slightly bent out of its normal relaxed unbent position “ (claim 1 of the ‘292 patent) the Greenberg respondents define the words “slightly bent” to mean a structure that is deflected from its original position between .03 and .30 millimeters. (GBr at 16.) The PSV respondents argued that a deformation of the lower lip would need to exceed 0.2 millimeters to create a force strong enough to urge the panels together or create a biasing force. (PSVRCFF 354A.)

The staff does not agree with the Greenberg respondents’ contention that “partially bent” requires a bending of between .03 and .30 mm on the ground that the contention improperly seeks to import into the claim a limitation found in the specification’s detailed description of a preferred embodiment. (SBr at 24.)

The Yekalon respondent argued that complainants’ expert discounted any measurement of a lower lip bent less than 0.03 mm as non-infringing. (YBr at 16, RFF 581-82.) Complainants in turn argued that Loferski did not testify “that 0.03 mm is the minimum amount of deflection that would create a biasing force, but rather that it was the minimum amount of deflection on which he would base a conclusion of infringement for purposes of this case.” (CRRFF 581A.)

Yekalon further argued that the claimed phrase “relaxed unbent position” means “a

position coplanar to the planar underside of the panel that is maintained when the tongue does not act on the lower lip;" that the patent specification does not require or even suggest interpreting "relaxed unbent position" to mean "the initial position of the elastically bendable portion before the panels are coupled;" that referring to FIGS. 24 and 25 of the '836 patent Vm is described as the "maximum bending" of the lower lip that occurs when two panels are coupled, referring to JX-1 at 11:12-13; that the degree of bending Vm is clearly depicted as being the distance between the planar underside of the panel and the bent lower lip referring to FIGS 24-25; that by obvious implication, an "unbent" lower lip is coplanar to the planar underside of the panel; and that therefore a lower lip having a "relaxed unbent position" has a relaxed straight position which is coplanar to the planar underside of the panel. (YBr at 22-23.) In further support, Yekalon relied on its undisputed finding 620 that Loferski testified that the initial uncoupled relaxed position of the lower lip can be nonstraight and bent.

The administrative law judge finds that the plain language of the claimed phrase "at least one of said coupling parts including an elastically bendable portion having a relaxed unbent position and which, when in a coupled condition, is at least partially bent out of its normal position" as well as any other equivalent claimed phrases put in issue, means that after bending and once the panels are coupled, at least a portion of the elastically bendable portion remains changed from its initial, uncoupled position which is the "normal" or "relaxed unbent" position. Neither the plain language of the claims, nor the specification state a limitation that the lower lip, when in its unbent, relaxed position, must be coplanar to the planar underside of the panel.

With respect to the amount of bending, the specification merely explains that "an elastically yieldable or bendable portion, in this case the lower lip 43, which, in engaged



condition, is a least partially bent” with a “resultant bending V.” (JX-1 at 10:3-8.) In addition the specification states that during the engagement by means of the turning movement with the coupling parts partially engaged, a maximum bending V<sub>m</sub> results in the coupling parts, more particularly the lip 43, which bending V<sub>m</sub> is less pronounced, if not nonexistent, in comparison to the bending V<sub>m</sub> which results when the floor panels 1 are engaged by means of shifting them towards each other. (JX-1 at 11:11-17.) The specification, in referring to one example, does state that “[i]t is noted that the bending V is relatively small, for example, several hundredths up to several tenths of a millimeter, and does not have an influence upon the placement of the floor covering.” (JX-1 at 10:42-45, JX-3 at 10:47-50.) However, the administrative law judge does not find this language would lead one of ordinary skill in the art to limit the claimed phrases to a specific numerical amount of deflection.

Based on the plain language of the relevant claims and the supporting specification, the administrative law judge interprets the claimed phrase in issue as meaning that after bending and once the panels are coupled, at least a portion of the elastically bendable portion remains changed from its initial uncoupled position which is the “normal” or “relaxed” position. Moreover he does not interpret the claimed phrases as requiring (1) a specific numerical amount of deflection in view of the broad language, and/or (2) said elastically bendable portion’s initial uncoupled position to be coplanar to the planar underside of the panel.

#### H. The Claimed Phrases “tongue” And “groove”

Asserted independent claims 1 and 2 of the ‘836 patent have the claimed phrases “tongue” and “groove.” Also, asserted claims 3 and 4 of the ‘292 patent, through their dependency on claim 1 of the ‘292 patent, have said claimed phrases.

Complainants argued that “tongue” is “a protrusion extending distally from a side edge spaced inwardly from the top and bottom surfaces and including at least one locking element.” (CRBr at 24.) The Yekalon respondent argued that “tongue” be interpreted to mean “a coupling part extending from the edge of a board, where the coupling part provides primary coupling in the horizontal direction and primary locking in the vertical position.” (YBr at 12.) Complainants and Yekalon are in agreement that the claimed phrase “groove” means a coupling part that cooperates with a tongue to connect two panels together. (YBr at 15.)

Complainants rely on claim 10 of the ‘836 patent to support their claim interpretation that “tongue” includes a locking element. (CRBr at 24.) Complainants also argued that the specification explains that the tongue has an integrated locking element. (CRBr at 24.) However, claim 10 is dependent on independent claim 1 and the plain language of independent claim 1 clearly specifies that the locking element is separate from the tongue and the groove, and not inherent within the tongue: “... coupling parts comprising substantially a tongue and a groove ... and including integrated mechanical locking elements, [the] tongue, groove, and locking elements formed in one piece with the panel, [the] tongue, groove, and locking elements arranged to prevent drifting apart...” (JX-1 at 13:65 - 14:4.) The administrative law judge finds the portion of the specification that complainants point to, does not state that the locking element is inherent in the tongue but only indicates that the locking element is a protrusion that is located on the lower end of the tongue. (JX-1 at 10:13-16.) Complainants also point to the dictionary definition of tongue stating that a tongue including an integrated locking element is consistent with the general dictionary definition. (CFF 183.50.) However, complainants’ dictionary definition of “tongue” says nothing whatsoever about an integrated locking element. Complainants, relying on

inventor Thiers' testimony (Tr. at 43, 51) argued that one of ordinary skill in the art would have readily understood in 1996 that inventors had discovered a glueless joint with mechanical locking elements that could be formed in one piece with the panel. (CFF228.1, 229, 230, 231.1.) Thiers' testimony however is some eight years after the original application for the '836 patent was filed and only after complainants accused Yekalon's engagement profiles of infringement. Moreover, the plain language of the claim teaches that the tongue and locking elements are formed in one piece, not that a tongue inherently contains locking elements.

Complainants also argued that the claim language states that the "tongue" includes a locking element that enables locking vertically and horizontally. (CRBr at 24.) Complainants rely on claims 10 and 23 of the '836 patent to support their claim interpretation that "tongue" requires locking in the vertical and horizontal directions. (CRBr at 24.) However, claims 10 and 23 are dependent on independent claim 1. Additionally, for the tongue to include a locking element that enables horizontal locking, it would require the panels to be coupled vertically. However, the administrative law judge finds no support in the patents in issue for a vertical coupling of panels, but instead finds support only for horizontal coupling of the panels. (JX-1.)

Based on the foregoing, the administrative law judge interprets "tongue" to mean "a coupling part extending from the edge of a board, where the coupling part provides primary coupling in the horizontal direction and primary locking in the vertical direction" and "groove" to mean "a coupling part that cooperates with a tongue to connect two panels together."

#### I. The Claimed Phrase "clearance"

Complainants argued that the term "clearance," as found in the asserted claims of the '779 patent, means "space between surfaces of interlocking panels." (CBr at 34.) Complainants

argued that the specification states that clearances are between surfaces of the panel and that the specification includes numerous illustrations of clearances. (CBr at 34.) Complainants also argued that the proposed construction is consistent with the general usage of the word “clearance.” (CBr at 34.) Complainants pointed to the Webster’s definition of clearance, “2: the distance by which one object clears another or the clear space between them.” (CFF 183.37.) Complainants conceded that space must be intended to be a clearance and not a haphazard or random feature of the joint. (CBr at 35.) However, if a space is a regular feature of a product, complainants argued that it is still a clearance even if it is created by a manufacturing tolerance. (CBr at 36.) Complainants do not agree with the staff’s view that the ‘779 claims use the term “clearance” in two distinct ways. (CBr at 36.) Complainants argued that the term “clearance” only exists in the context of a coupled joint. (CBr at 36.)

The staff argued that the ‘779 patent uses “clearance” in two related but distinct ways. (SPFF 378.) It is argued that this is a case where the administrative law judge should depart from the standard rule that claim terms are used consistently throughout the patent, because it is clear from the specification and the prosecution history that the terms have different meanings at different portions of the claim. (SBr at 47.) The staff argued that in certain parts of the specification, the term “clearance is used to refer to “a gap, open space, or chamber in the profile of a coupled tongue and groove”. (SPFF 379; JX-5 at 7:59-61.) Elsewhere, the staff argued, the specification uses clearance as more or less synonymous with “recess,” i.e. “an indentation or cut-away portion of either the tongue or groove of an uncoupled joint.” (SPFF 380, JX-5 at 6:33-35.) When used in the latter sense, it is argued that the “clearance” exists in one portion of an uncoupled joint, with said clearance helping to define a “chamber” when the joint is coupled.

(SPFF 381.) The staff argued that claim 1 of the '779 patent uses the former interpretation of "clearance" to describe a gap, open space, or chamber between the coupled tongue and groove (SPFF 382), while claim 13 of the '779 patent uses the latter interpretation of "clearance" requiring a recess or the like in the upper lip of the groove side of an uncoupled panel, thereby creating a chamber in the profile when the panels are couples. (SPFF 404.)

Respondents argued that "clearance" means "a designed-in space, which must exceed normal machining tolerances, created between the mating surfaces of coupled panels when they are joined." (GBr at 17, PVBr at 6.) Respondents argued that the structure of the clearance must be such that it can be used as a place for "dust remainders or such." (RFF 1190, RFF 38.5, 38.6.) Respondents also argued that this leads to the conclusion that the clearances must serve a purpose and cannot merely be the result of normal machining tolerances during the manufacturing process. (GBr at 18, RFF 40.3, 40.6.) Respondents further argued that the specification and drawings require that the "clearances" be formed by milling additional structure away from the tongue and the groove so that spaces are formed. (GBr at 18, RFF 40.7.) Respondents also argued that Figures 4 and 23 of the specification show that clearances are something more than machine tolerances because the structure indicated must be cut away (RFF 1194, 1195, RFF 38.8, 38.11) and that the specification discloses that clearances are not machining tolerances because the specification describes the clearance as a recess that is formed when the panel is manufactured. (RFF 1196.) The Greenberg respondents disagree with the staff that complainants are entitled to different claim constructions because the facts in this case do not meet the requirements for the exception to the well settled rule that terms should mean the same in different claims. (GRBr at 26.)

The administrative law judge rejects complainants' and respondents' arguments that clearances are solely spaces created between the mating surfaces of coupled panels when they are joined. See Section IX, supra where he found that the specification, with the October 8, 2002 preliminary amendment, supports two mutually exclusive interpretations: one interpretation requiring the coupling of panels to create the space, and one interpretation that does not require the coupling of panels to create the space. He further found that the specification clearly states that a clearance is synonymous with the following terms: recess ("and a recess or clearance 25," "a recess or clearance 44,") space/intermediate space ("an intermediate space or clearance 21,") and chamber/dust chamber, ("dust chambers or clearances 81," "[chambers] may be essentially independent clearances or chambers"). (JX-5 at 6:34, 7:19-20, 6:18, 12:39, 7:59-62.) However, while the figures in the specification detail that intermediate spaces and chambers are gaps that reside in coupled panels, a recess is a gap that resides in a uncoupled panel. (JX-5.) He also found that the specification, with the October 8, 2002 preliminary amendment, also details that, upon coupling, the recess defines the chamber created by the coupling of panels ("The recess 25 defines a chamber 25' ... when the floor panels are coupled ...") (JX-5 at 6:39-41.) Thus a recess is not the same thing as a chamber,<sup>19</sup> even though they are both clearances because a recess does

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<sup>19</sup> Complainants argued that the term "chamber" means an enclosed space, which must exceed normal machining tolerances, created between the mating surfaces of coupled panels when they are joined. (CBr at 37-38.) The Greenberg respondents argued that the term "chamber" means an enclosed space, which must exceed normal machining tolerances, created between the mating surfaces of coupled panels when they are joined. (GBr at 21.) The PSV respondents argued that the term "chamber" is a clearance that is bounded on four sides by structure and excludes spaces created by manufacturing tolerances and includes spaces designed in the profiles in the particular places called for by the patent. (PSVBr at 10, RFF 42.2.) The only disputed issues as to the interpretation of "chamber" are: (a) whether a chamber is required to have four sides; and (b) whether a chamber is required to be bounded on all sides by structure. Respondents pointed to Loferski's testimony to support their argument that a chamber must be

not require coupling and a chamber does. The administrative law judge finds that claim 1 uses the term “clearance” to mean chamber or intermediate space and that it calls for “coupling parts ... upon coupling define a plurality of separate clearances adjacent at least a portion of [the] outer peripheral portion of said tongue between [the] groove and [the] tongue.” (JX-5, at 15:6-9.)

Therefore the administrative law judge finds that claim 1 refers to a chamber or intermediate space because that is the type of clearance that exists when the panels are coupled, whereas a recess only exists in an uncoupled panel. However, he finds that claim 13 uses the term to mean a recess. Claim 13 calls for an “upper lip defining a first clearance below said upper side of [the] panel ... [the] first clearance defining an upper chamber below said upper side and above [the] tongue upon coupling of cooperating coupling parts.” (JX-5 at 16:16-21). Since the clearance in claim 13 defines an upper chamber upon coupling, claim 13 refers to a recess that resides in an uncoupled panel and defines a chamber upon coupling of the panel with a corresponding panel.

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bounded on four sides by structure. (RFF 43.1, 43.2.) However, Loferski’s testimony stated that a clearance must be bounded on all sides by structure. (Loferski, Tr. at 506). Loferski never stated whether there is a limit to how many sides a chamber can have. (See generally Loferski Tr. ). Neither the claims nor the specification impose a limitation as to how many sides a chamber has. (JX-5.) In fact, the administrative law judge finds that the figures of the specification depict chambers of various shapes, each of them having a different amount of sides (e.g. Figures 9 and Figures 23). (JX-5.) With respect to PSV respondents’ argument that the chamber must be bounded on all sides by structure, complainants argued that the specification only supports a chamber being bounded by structure within the plane of the panel, and that respondents’ proposed interpretation would require that the space be bound by structure three-dimensionally as well as two-dimensionally. (CBr at 22-23.) Complainants argued that a hypothetical stacking of two panels with the profile of Figure 23 would result in the upper chambers identified in Figure 23 having surrounding space outside the plane of the panel. (CBr at 22-23.) The figures in the specification indicate that the clearance is not bounded by structure outside of the plane of the panel. (JX-5.) Therefore, the administrative law judge interprets “chamber” to mean “an enclosed space bounded by structure within the plane of the panel, created between the mating surfaces of coupled panels when they are joined, and is not created through normal machining tolerances.”

All parties agree that a clearance cannot be an unintentional haphazard space that appears in the panel during the manufacturing process without the manufacturer's intent. The issue that the parties disagree on is whether a manufacturer can intentionally create a space in the panel through the action of machining tolerances. Complainants argued that if respondents intentionally cause the space through election of certain machining tolerances, then the space is a clearance. (CBr at 36.) Respondents argued that if the space is a result of a machining tolerance, the space by definition is random and unintentional and not a clearance. (GBr at 17, PSV Br at 6.)

The situation that complainants describe would not be a normal machining tolerance. Complainants concede that normal manufacturing tolerances are unintentional and these random gaps would not be clearances. (CBr at 35, CFF 241.) The specification and claims also support the interpretation that the space must be intentionally created, and a normal machine tolerance is not intentional. (JX-5.) Therefore, the administrative law judge interprets the term "clearance" in claim 1 of the '779 patent to mean "an open space between two coupled panels, one panel containing a tongue, and one panel containing a groove, that is not created by normal machining tolerances" and interprets the term "clearance" in claim 13 of the '779 patent to mean "an indentation, of either the tongue panel or groove panel of an uncoupled joint, that is not created through normal machining tolerances."

## **XI. Infringement**

The following summary provided by complainants sets forth each of the active respondents, including respondent Yongan, the accused products they manufacture and a table



listing the claims in issue which such products are alleged to infringe:

| <b>Respondent</b>   | <b>Profile</b>                                 | <b>Infringed<br/>Claims<br/>'836</b> | <b>Infringed<br/>Claims<br/>'292</b> | <b>Infringed<br/>Claims<br/>'779</b> | <b>Claims in<br/>Suit Not<br/>Infringed</b>         |
|---|--|--------------------------------------|--------------------------------------|--------------------------------------|---|
| Changzhou Saili<br>Wood Co. Ltd.                          | Semi-Arc Locking<br>(RS 034-036)               | 1, 10, 18,<br>23                     | 3, 4                                 | 5, 17                                | '836 Patent,<br>Claim 2                             |
|   | Double-locking<br>(RS 064-66)                  | 1, 2, 10,<br>18, 23                  | 3, 4                                 | 17                                   | '779 Patent,<br>Claim 5                             |
| Changzhou Wujin<br>Zhongxin Wood Co.<br>Ltd.              | Arc-locking<br>8.2mm (RS 058-<br>60)           | 1, 2, 10,<br>18, 23                  | 3, 4                                 | 5, 17                                |   |
|   | Arc-locking 12mm<br>(RS 055-57)                | 1, 10, 18,<br>23                     | 3, 4                                 | 17                                   | '836 Patent,<br>Claim 2; '779<br>Patent, Claim<br>5 |
|   | Double-locking<br>(RS 118-120, RS<br>153-155)  | 1, 2, 10,<br>18, 23                  | 3, 4                                 | 5, 17                                |   |
|   | Single Locking<br>(RS 121-123, RS<br>156-158)  | 1, 2, 10,<br>18, 23                  | 3, 4                                 | 5, 17                                |   |
|   | Double Layer<br>Double Locking<br>(RS 159-162) | 1, 2, 10,<br>18, 23                  | 3, 4                                 | 5, 17                                |   |
| Fujian Yongan<br>Forestry (Group)<br>Joint Stock Co. Ltd. | Double-locking<br>(RS 061-063)                 | 1, 10, 18,<br>23                     | 3, 4                                 | 5, 17                                | '836 Patent,<br>Claim 2                             |
|   | Arc Locking<br>8.2mm (RS 052-<br>54)           | 1, 2, 23                             | 3, 4                                 | 5, 17                                | '836 Patent,<br>Claims 10 and<br>18                 |
|   | Arc Locking                                    | 1, 10, 18,<br><br>73                 | 3, 4                                 | 5, 17                                | '836 Patent,  |

|   |                                  |                  |      |       |                      |
|---|----------------------------------|------------------|------|-------|----------------------|
|   | 10mm (RS 043-45)                 | 23               |      |       | Claim 2              |
| Hansol Homedeco, Ltd.                             | Hansol Lock (RS 112-114)         | 1, 2, 10, 18, 23 | 3, 4 | 5, 17 |                      |
|   | Hansol Reve (RS 115-117)         | 1, 2, 10, 18, 23 | 3, 4 | 5, 17 |                      |
| Jiangsu Lodgi Woods Industry Co.                  | Arc-locking 8.2mm (RS 046-48)    | 1, 2, 10, 18, 23 | 3, 4 | 17    | '779 Patent, Claim 5 |
|   | Arc-locking 12mm (RS 049-51)     | 1, 10, 18, 23    | 3, 4 | 5, 17 | '836 Patent, Claim 2 |
|   | Double Locking (RS 079-81)       | 1, 2, 10, 18, 23 | 3, 4 | 5, 17 |                      |
|   | Double-deck locking (RS 067-069) | 1, 2, 10, 18, 23 | 3, 4 | 5, 17 |                      |
|   | Single locking (RS 150-152)      | 1, 10, 18, 23    | 3, 4 | 5, 17 | '836 Patent, Claim 2 |
| Yingbin-Nature (Guangdong) Wood Industry Co. Ltd. | Single-locking (RS 070-72)       | 1, 2, 10, 18, 23 | 3, 4 | 17    | '779 Patent, Claim 5 |
|   | Double-locking (RS 147-149)      | 1, 10, 18, 23    | 3, 4 | 5, 17 | '836 Patent, Claim 2 |
| Power Dekor Group Co. Ltd.                        | Type 1 (RS 019-021)              | 1, 2, 10, 18, 23 | 3, 4 | 5, 17 |                      |
| Shengda Flooring Corp.                            | Type 1 (RS 022-24)               | 1, 2, 10, 18, 23 | 3, 4 | 17    | '779 Patent, Claim 5 |
|   | Type 2 (RS 082-84)               | 1, 10, 18, 23    | 3, 4 | 5, 17 | '836 Patent, Claim 2 |

|  |                                |                  |      |       |  |
|--|--------------------------------|------------------|------|-------|--|
|  |                                |                  |      |       |  |
|  | Type 3 (RS 085-87)             | 1, 2, 10, 18, 23 | 3, 4 | 5, 17 |  |
| Vöhringer Wood Product (Shanghai) Co. Ltd. | Type A (RS 028-030)            | 1, 2, 23         | 3, 4 | 17    | '836 Patent, Claims 10 and 18; '779 Patent, Claim 5          |
|  | Type B (RS 013-015)            | 1, 10, 18, 23    | 3, 4 | 5, 17 | '836 Patent, Claim 2   |
|  | Type C (RS 016-018)            | 1, 2, 10, 18, 23 | 3, 4 | 17    | '779 Patent, Claim 5   |
|  | Lock 7                         | 1                | 3, 4 | 5     | '836 Patent, Claims 2, 10, 18 and 23; '779 Patent, Claim 17* |
| China Floors Co. Ltd.                      | Easy Click 7.3mm (RS 132-134)  | 1, 2, 10, 18, 23 | 3, 4 | 5, 17 |  |
|  | Easy Click 8.3mm (RS 138-140)  | 1, 2, 10, 18, 23 | 3, 4 | 17    | '779 Patent, Claim 5   |
|  | Easy Click 12.3mm (RS 141-143) | 1, 2, 10, 18, 23 | 3, 4 | 5, 17 |  |
|  | Art Plus 8.3mm (RS 037-039)    | 1, 2, 10, 18, 23 | 3, 4 | 5, 17 |  |
|  | Just Click 7 (RS 040-042)      | 1, 2, 10, 18, 23 | 3, 4 | 5, 17 |  |

|  |  |                     |      |       |  |
|--|--|---------------------|------|-------|--|
| Shanghai Dekorman<br>Flooring Co. Ltd. | Easy-Lock (RS<br>144-46)                             | 1, 10, 18,<br>23    | 3, 4 | 5, 17 | '836 Patent,<br>Claim 2  |
|  | Double-Click<br>System (RS128-<br>131, 135-137)      | 1, 2, 10,<br>18, 23 | 3, 4 | 5, 17 |  |
| Yekalon Industry,<br>Inc.              | Double Click<br>8.2mm (RS 001-<br>003, RS 010-012)   | 1, 2, 10,<br>18, 23 | 3, 4 | 5, 17 |  |
|  | Double Click<br>12.3mm (RS 109-<br>111)              | 1, 2, 10,<br>18, 23 | 3, 4 | 5, 17 |  |
|  | Big Click 12.3mm<br>(RS 007-009)                     | 1, 2, 10,<br>18, 23 | 3, 4 | 5, 17 |  |
|  | Modified Round<br>8.2mm (RS 004-<br>006, RS 025-027) | 1, 2, 10,<br>18, 23 | 3, 4 | 5, 17 |  |
|  | Modified Round<br>12.3mm (RS 031-<br>033)            | 1, 2, 10,<br>18, 23 | 3, 4 | 5, 17 |  |
|  | Engagement 1<br>(12mm)                               | 1                   | 3, 4 |       | '836 Patent,<br>Claims 2, 10,<br>18, and 23;<br>'779 Patent,<br>Claims 5 and<br>17 |
|  | Engagement 2<br>(12mm)                               | 1                   | 3, 4 |       | '836 Patent,<br>Claims 2, 10,<br>18, and 23;<br>'779 Patent,<br>Claims 5 and<br>17 |
|  | Engagement 1<br>(8mm)                                | 1                   | 3, 4 |       | '836 Patent,<br>Claims 2, 10,  |

|  |                       |   |      |  |  |
|--|-----------------------|---|------|--|--|
|  |                       |   |      |  | 18, and 23;<br>'779 Patent,<br>Claims 5 and<br>17                                  |
|  | Engagement 2<br>(8mm) | 1 | 3, 4 |  | '836 Patent,<br>Claims 2, 10,<br>18, and 23;<br>'779 Patent,<br>Claims 5 and<br>17 |

(CRBr at 28-31.) \*It would appear that complainants intended to refer to claim 17 in the non-infringed columns in view of their CBr. Hence the table supra was so modified to indicate that complainants are not alleging that claim 17 of the '779 patent is infringed.

Under the provisions of 35 U.S.C. § 271, liability for infringement arises if “whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor.” 35 U.S.C. § 271(a). This infringement of a patented invention is the usual meaning of the expression “direct infringement.” See Joy Techs., Inc. v. Flakt, Inc., 6 F.3d 770, 773 (Fed. Cir. 1993).

A determination of infringement requires a two-step analysis. First, the patent claim must be properly construed to determine its scope and meaning. Second, the claim as properly construed must be compared to the accused device or process. Zelinski v. Brunswick Corp., 185 F.3d 1311, 1315 (Fed. Cir. 1999), citing Markman v. Westview Instruments, Inc., 52 F.3d 967, 976 (Fed. Cir. 1995). Whereas claim construction is a matter of law and therefore, the exclusive province of the court, “whether a claim encompasses an accused device, either literally or under

the doctrine of equivalents, is a question of fact.” Zelinski, 185 F.3d at 1315, citing N. Am. Vaccine, Inc. v. Am. Cyanamid Co., 7 F.3d 1571, 1574 (Fed. Cir. 1993).

To prove literal infringement, the patentee must show, by a preponderance of the evidence, that the accused device contains every limitation in the asserted claims. WMS Gaming Inc. v. Int’l Game Tech., 184 F.3d 1339, 1350 (Fed. Cir. 1999), citing Mas-Hamilton Group v. LaGard, Inc., 156 F.3d 1206, 1211 (Fed. Cir. 1998). An accused device that does not literally infringe a claim may nonetheless infringe under the doctrine of equivalents if differences between the accused device and the claimed invention are “insubstantial.” Desper Prods. Inc. v. QSound Labs, Inc., 157 F.3d 1325, 1338 (Fed. Cir. 1998).<sup>20</sup> Equivalency of a claimed element to an element of an accused device is determined on an element-by-element basis at the time of infringement. Warner-Jenkinson Co. v. Hilton Davis Chem. Co., 520 U.S. 17, 40 (1997).

Complainants have the burden to establish infringement by a preponderance of the evidence. As for tests in prior litigations, in Turbo Machine Company v. Proctor & Schwartz, Inc. 241 F.Supp 723, 728 (E.D.Penn. 1965), the district court on consideration of patentees’ tests and alleged infringers’ tests found that “[neither] the evidence of the plaintiffs’ [nor] the defendants’ tests was completely convincing” and concluded that “bearing in mind that the burden of proof is upon the patent owner to prove infringement by the fair weight of the evidence, [the Court is] . . . unable to accept [patentees’ tests] . . . as sufficient to establish infringement.” In Andrew Corporation v. Gabriel Electronics, Inc., 847 F.2d 819, 824 (Fed. Cir. 1988), which involved infringement allegations by Andrew against Gabriel, two experts testified,

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<sup>20</sup> Complainants were permitted to offer evidence under the doctrine of equivalents relating to any cracks in the accused profiles. See Procedural History, supra.

one called by Gabriel and one by Andrew, which experts took contrary positions. The district court found both experts to be “competent” and “credible”. The court stated that it could not decide between the opposing positions of the experts, and that “the court has no basis for accepting either proposition over the other.” The court concluded that the evidence was “in equipoise,” and therefore that the plaintiff had not met its burden of proving infringement by a preponderant evidence. The Federal Circuit however, in sustaining the district court’s finding of non-infringement, stated:

A true equipoise of evidence may indeed defeat the party with the burden of proof, see Aero Spacelines, Inc. v. United States, 530 F.2d 324, 332, 208 Ct.Cl. 704 (1976); see also Wilson v. Omaha Indian Tribe, 442 U.S. 653, 669, 99 S.Ct. 2529, 2538, 61 L.Ed.2d 153 (1979), but there is no authority for holding evidence to be in equipoise for the sole reason that the court could not decide between conflicting experts. We agree with the statement in United States v. General Motors Corp., 561 F.2d 923, 933 (D.C.Cir.1977), cert. denied, 434 U.S. 1033, 98 S.Ct. 765, 54 L.Ed.2d 780 (1978):

The mere fact that experts disagree does not mean that the party with the burden of proof loses. The finder of fact has to make the effort to decide which side has the stronger case. This can be based on the demeanor of the witnesses (if so, the trial judge should say so) or the intellectual strength of the evidence and arguments based thereon.

(Gabriel, 847 F.2d at 824.)

In San Huan New Materials High Tech, Inc. v. I.T.C., 161 F.3d 1347, 1359 (Fed. Cir. 1998) in issue was an enforcement complaint against San Huan. In that case, San Huan had contracted with Durkee to test magnets in issue. Tests by complainant’s YBM showed infringement. The Federal Circuit, in affirming the Commission concluded:

The ALJ cited several factors that called into question the reliability of Durkee's test results. For example, the ALJ found that Durkee used samples that were significantly larger than recommended by Durkee's own standard testing protocol, and that these samples emitted carbon dioxide, saturating the infrared cell of the machine used to detect oxygen and resulting in artificially low oxygen content readings. The ALJ also found that Durkee retested magnets that it believed had tested "too high" for oxygen on the initial tests. San Huan does not refute that the oxygen analyzer used by YBM is as accurate as that used by Durkee.

On review, we conclude that substantial evidence supports the Commission's choice to rely on YBM's test results rather than Durkee's. See 5 U.S.C. § 706(2)(E); Tandon Corp. v. United States Int'l Trade Comm'n, 831 F.2d 1017, 1019, 4 USPQ2d 1283, 1284-1285 (Fed.Cir.1987).

161 F.3d at 1359. (emphasis added.)

Complainants' expert Loferski, who was qualified as an expert in the field of wood sciences and the design and operation of joints for wood products (FF 54) performed tests on accused products to support complainants' infringement allegations. Those tests included a visual inspection of the panels, bent lower lip test measurements to determine if there was a biasing force present that urged the panels together and to determine whether the lower lip was elastically bendable and whether the panels could be coupled by rotation, and snap action tests to determine whether the panels could be coupled by snap action by shifting the panels towards each other in a substantial planar fashion. (CBr at 49-51.) He also prepared micrographics of the coupled joints. (CBr at 51.) In addition experts of respondents performed certain tests in support of their denial of infringement. The tests performed are summarized, infra.

A. Tests Performed By Experts Of Complainants And Respondents

a. Loferski's Bent Lip Test



Loferski's bent lip test was to determine whether an accused product infringes claims 1 and 2 of the '836 patent and claims 3 and 4 of the '292 patent. (CBr at 49.) According to Loferski the bent lip test determines: (a) whether an accused product contains a lower lip that is elastically bendable; (b) the extent of bending of accused product's lower lip; and (c) whether a biasing force is present in an accused product. (CBr at 48; Tr. at 361-62; 382-87, 528-29.)

Loferski used a Mitutoyo gauge to perform his test. (Tr. at 370; CPX-600.) The Mitutoyo gauge is mounted on a steel block, which holds the gauge above the surface to be measured in a rigid fashion. (Tr. at 370; CPX-600.) Said gauge uses a spindle to measure the height of a particular point on the panel relative to the surface of the panel a small distance away on which the block rests. (Tr. at 434, 3049.) When the spindle of the Mitutoyo gauge measures the height of the lower lip of the bottom side of the (inverted) panel, the base of the gauge sits away from the lower lip. (Tr. at 2963-63.)

Loferski began the test by "zeroing" the gauge. (Tr. at 373.) Loferski then took a series of measurements for each sample product that he examined, on both the long and short sides, prior to coupling. (Tr. at 371-72, 715-18, CX-927, at 23-37.) With the panel inverted, Loferski measured the height of the distal end of the lower lip at three locations on each sample. (Tr. at 372-75.) These initial reference measurements were then recorded and later compared with measurements taken at the same locations after the joint was coupled. (Tr. at 375-79, 382; CX-927, at 21-23.) If the height of the lower lip was higher when the panel was coupled than in the uncoupled position, this was said to indicate that the lower lip had deflected downward when coupled. (Tr. at 377-78.) The difference between the before and after measurements was said to establish the amount of deflection relative to the bottom surface of the panel. (Tr. at 371-78, 768-

69, 2961.) Loferski used three measurement locations to compute the average difference between the before and after coupling measurements. (Tr. at 384-85, CX-1203.) If the comparison of the before and after measurements indicated deflection of 0.03 millimeters or more, Loferski concluded that the bent lip and biasing force claim limitations were satisfied. (Tr. at 387-88.) Loferski tested whether the bending of the lower lip in the coupled condition was elastic by uncoupling the panels and taking another set of measurements. (Tr. at 382-83.) If the post-uncoupling measurements were consistent with the initial measurements, this was said to indicate that the lower lip had essentially returned to its initial position and therefore that the bending that was detected in the coupled condition was elastic in nature. (Tr. at 383-87.)

To confirm the validity of his methods, Loferski obtained a Mitutoyo gauge that had a resolution of 0.001 mm, which was ten times greater than the original Mitutoyo Gauge he had used to make his measurements of the deflection of the lower lip. (Tr. at 417-55.) Loferski then performed a series of measurements using both his original Mitutoyo gauge and the 0.001 mm Mitutoyo gauge. (Tr. at 418-20.) Loferski took ten separate measurements at each of the three measurement locations he had used for determining deflection of the lower lip. (Tr. at 419-20.) Loferski calculated the average deflection of the lower lip using both the original gauge and the Mitutoyo 0.001 gauge. (Tr. at 417-25; CX-107.1.) Loferski repeated his original measurements, including measurement locations 2 mm and 5mm to the left and to the right of his original three measurement locations. (Tr. at 426-29.) Loferski further performed a test which was said to demonstrate that his measurement method for determining lower lip deflection is not affected by the slope of the panel. (Tr. at 431-36.) Finally, Loferski prepared a test sample that isolated a

section of a panel and removed the tongue from the corresponding panel. (Tr. at 438-39.)

Loferski used his method to test if his method would indicate any deflection of the lower lip.

b. Cao's Bent Lip Test

Cao, who was qualified as an expert for the Greenberg respondents (FF 58), measured the deformation of the lower lip by a non-contact measurement method using a displacement transducer device. (Tr. at 1021, 1031; RDX 400.9.) Figure 1 of RDX-400.99 is a schematic diagram illustrating the non-contact testing measuring method used by Cao. (Tr. at 1027, 1028; RDX-400.99.) The non-contact measurement method used a magnetic sensor which measures the distance between the sensor and a metallic material. (Tr. at 1031, 1034.) To perform his non-contact measurement test, Cao first attached on the bottom side of the lower lip a metallic membrane with a thickness of 0.02 millimeter, which provided a magnetic field for the displacement transducer to detect. (Tr. at 1035, 1938.) The transducer measured an area that is 6 mm wide and the metallic foil used for the transducer testing was more than 6 mm wide. (Tr. at 1501, 1502, 1504.) Cao testified that if a corner of the foil was bent, but not within the 6 mm testing parameter, the bending of the fold did not alter the testing results. (Tr. at 1502.)

Cao measured the back side of the panel so that the distance between the transducer was always 2 millimeters. (Tr. at 1505-06.) The panel sample was fixed to the work table decorative side up, with the lower lip of the groove hanging over the table edge and fixed the sensor underneath the groove side of the sample. Having both the panel and the sensor fixed to the work table meant that the same reference point was used for measurements. (Tr. at 1028; RDX-400.99.) Cao calibrated the device before taking measurements. (Tr. at 1038, 1039.) An electrical signal was sent through the sensor probe, which was amplified and then recorded in the

computer. (Tr. at 1036, 1037.) During the non-contact testing, the data sent by the transducer was continuously recorded by the computer, registering multiple data entries for each point that Cao measured with the transducer. (Tr. at 1040, 1506, 1508-09.) Cao took the first set of measurements before the panels were assembled and then another set after the panels were assembled by rotational coupling. (Tr. at 1040.)

Using the non-contact method, Cao tested panels of the Greenberg respondents. (Tr. at 1039.) The data from the non-contact testing method were gathered into a table shown in RDX 400.71 and then reported in Cao's supplemental expert report. (Tr. at 1040, RDX-400.71.) The bent lip displacement results measured by Cao's non-contact testing were much smaller than the results of Loferski's Mitutoyo tests. (Tr. at 1025, 1063; RDX 400.72.)

c. Lang's Bent Lip Test

The methodology of Lang, who was qualified as an expert for respondent Yekalon, (FF 65), included coupling test panels, positioning the Mitutoyo gauge on the underside of the panel including a lower lip (or lower hook) at a distance about 35 or 36 mm from the joint, taking multiple measurements while moving the test panels such that the Mitutoyo gauge was positioned at points successively closer to the joint, along a reference line perpendicular to the joint until the joint in the panels moved beyond the position of the Mitutoyo, recording the position of the panel underside at each point, plotting the data in graphical form, and analyzing the graphical data to determine the degree of lower lip bending. (Tr. at 2135-2148; RX-1037.) Lang moved the coupled test panels relative to the Mitutoyo gauge by mounting the panels on a microscope platform or object table which was capable of being precisely positioned in three directions relative to his stationary Mitutoyo gauge by using positioning knobs controlling the

object table. (Tr. at 2129-34.) Lang performed three replications of his measurements for each test sample. (Tr. at 2136.) Lang used three test samples for long sides and two test samples for short sides. (Tr. at 2136.) Subsequently, Lang performed regression analysis to eliminate slope error. (Tr. at 2135-48.)

d. Rice's Phantom Lip Test

Rice, who was qualified as an expert for the PSV respondents (FF 68) took a sample of one of the accused products of respondent Shengda (referred to as RS085 in Loferski's report) and removed the protrusion on the lower lip of the groove. (Tr. at 2467, 2485.) This meant that when the panel was coupled to another panel, there was no protrusion on the lower lip of the groove that would contact the lower surface of the tongue. Id. Rice also cut off the coupling structure of the tongue side of another panel sample. (Tr. at 2470, RX-172C; RPX-14.) The samples were placed on top of a piece of granite, called a surface plate, which is guaranteed flat within 0.0001 inch across its surface. (Tr. at 2469.)

Rice's system functioned by holding the panel flat, and also holding the gauge rigid, keeping the actual measurement point at the end of gauge back from the actual point being measured. (Tr. at 2471.) Without moving the panel on the precisely ground surface plate, Rice moved the transfer stand forward and took a measurement using a Mitutoyo device at the extreme edge of the distal lip; taking a measurement of 0.15 millimeters. (Tr. at 2472; RX-172C.) The reason for the recorded measurement of 0.15 mm was the basic unevenness of the panel, Rice testifying that a human hair is 0.100 mm in thickness, so it does not take much to make the gauge move up or down. (Tr. at 2472.) Another reason was the machining process of the panel, during which the pressures from the cutter in machining the lower lip cause some

permanent bending of the lower lip, which is called plastic deformation. (Tr. at 2472.) The 0.15 millimeters is accounted for by the plastic deformation caused by machining stress and the unevenness of the surface. (Tr. at 2472, 2473.)

Without moving the gauge or the transfer stand, Rice then coupled the second panel and took another measurement of 0.19 mm on the gauge. (Tr. at 2473.) According to Rice, the phantom lip test shows that when one holds the panel flat, as he did with the transfer stand which guarantees the flatness, the flexibility of the panel is such that small effects show up, such as the coupling of the panel producing a general bending of the entire panel. (Tr. at 2476.) According to Rice the general bending of the entire panel would have shown up as a bent lip under Loferski's test, despite the fact that whole coupling section was isolated and there was no bending of the lower lip. (Tr. at 2476.)

e. Rice's Paper Test

After zeroing the gauge on the panel sample, Rice placed a folded piece of notebook paper under the lip and measured 0.05 mm on the gauge. (Tr. at 2487.) According to Rice, the test showed the effect of the imperfection at the underside of the panel that can lead to an appearance of a bent lip, when in fact there is no bent lip possible if the panel has a weight holding it flat to the surface. (Tr. at 2487, 2488.)

f. Loferski's Snap Action Tests

Loferski performed two independent sets of snap action tests: (a) snap action test with a hammer and tapping block; and (b) snap action test with a pipe clamp to determine whether the panels could be coupled by snap action shifting the panels toward each other in a substantially planar fashion. (Tr. at 475-76, 479, 492.) Loferski assembled full-sized panels toward each other

using a hammer and tapping block. (Tr. at 492-98.) Loferski did not directly determine whether any cracks occurred in the full size panels that he so tested for snap action because the only way to do so would have been to cut open the panel. (Tr. at 2859-60.) In the independent snap action test with a pipe clamp, Loferski used a pipe clamp to move panel samples together so that he could video tape the session. (Tr. at 479-80.) Specifically, Loferski prepared 2 inch by 3 inch samples of the accused products. (Tr. at 447-78; CPX-110.) He then placed the samples on a small stage in front of a video camera, attached the samples to the stage with toggle clamps, and applied a lateral force to the panels with a pipe clamp. (Tr. at 478-80.) In some cases, perhaps 30% to 50% of the time, a fracture developed in the joint during Loferski's snap action testing. (Tr. at 482-91, 694-701, 838-39; RDX-38 to RDX-41.) The fractures ranged from 1 to 5 mm in length. (Tr. at 755-56, 838-39.) In some cases, the panels deviated from being precisely planar in the course of being snapped together laterally. (Tr. at 639-40, 841-43.)

g. Loferski's Analysis of Micrographs

Loferski analyzed the micrographs of the accused products for the following limitations: (a) common plane of tangency; (b) plurality of clearances; and (c) upper clearance.

Loferski calculated the common plane of tangency for each of the accused products based on an analysis of the micrographs. (Tr. at 520-21.) Loferski used a straight edge to draw a line on the micrographs that was tangent to the contact surface formed by the protrusion of the tongue and the recess of the groove, and then measured that angle relative to the bottom of the panel. (Tr. at 521.) In the cases where the contact surface was not substantially linear, Loferski drew a line that sloped inwardly and downwardly. (CBr at 67.)

Loferski determined the presence of plurality of clearances adjacent to an intermediate tongue contact by visual examination of the micrographs he prepared. (Tr. at 506-10.) Specifically, Loferski tested the accused products for clearances by preparing small samples of the products and taking back-lit photographs of the joined profiles in order to observe whether light was visible at various locations, thereby indicating the presence of a clearance. (Tr. at 506-11; CPX-201; CX-927; CX-103.) Loferski did not apply any special technical expertise in identifying “clearances” in the back-lit photographs he prepared. (Tr. at 688.) In some cases, Loferski identified the required plurality of clearances by virtue of a small amount of light showing through a back-lit photograph. (Tr. at 674-79, 683; CX-926, at 26.)

Loferski determined the presence of upper clearance by visual examination of the micrographs he prepared. (Tr. at 506-510.) Specifically, Loferski tested the accused products for clearances by preparing small samples of the products and taking back-lit photographs of the joined profiles in order to observe whether light was visible at various locations, thereby indicating the presence of a clearance. (Tr. at 506-11; CPX-201; CX-927; CX-103.) Loferski did not apply any special technical expertise in identifying “clearances” in the back-lit photographs he prepared. (Tr. at 688.) In some cases, Loferski identified the required plurality of clearances by virtue of a small amount of light showing through a back-lit photograph. (Tr. at 674-79, 683; CX-926, at 26.)

h. Lang’s Analysis of Micrographs

Lang also prepared micrographs of samples of the following products to determine presence of intermediate contact surfaces: Double Click 8.2mm (RS 001-003, RS 010-012), Double Click 12.3mm (RS 109-111), Big Click 12.3mm (RS 007-009), Modified Round 8.2mm



(RS 004-006, RS 025-027), Modified Round 12.3 mm (RS 031-033). (Lang, Tr. at 2166-74, RX-1029, RX-1030.) Lang prepared micrographs in the same way that Loferski did, with the only difference being that he used a different camera. (Lang, Tr. at 2154, 2224.)

**B. Respondent Yekalon's Engagement Products**

Complainants, as seen from the summary, supra, have accused respondent Yekalon's Engagement 1 and 2 products of infringing claim 1 of the '836 patent and claims 3 and 4 of the '292 patent.

Both respondent Yekalon and the staff argued that the Engagement 1 and 2 products do not infringe the asserted claims.

Complainants argued that the Yekalon Engagement products should not be part of the investigation because they are{

} (CBr at 80.) It is argued that{

} (CBr at 80-81.) It is also argued that the Yekalon Engagement products are{

} (CBr at 81, CFF 138, 138.1, 138.2.)

The Engagement 1 and Engagement 2 samples in the{

} (CRBr at 55, CFF 136-137,

YFF 505.) The Engagement 1 and Engagement 2 samples in{

} (CRBr at 55, YFF 507.)

Complainants rejected the argument that they can{

}

(CRBr at 56-57, CFF 569, CFF 583, CFF 745, CFF 211.1-10.)

In the alternative, complainants argued that Loferski's testing shows by a preponderance of the evidence that the Engagement 1 and Engagement 2 products{

} infringe claim 1 of the '836 patent and claims 3 and 4 of the '292 patent,{

} (CBr at 81, CFF 288-291.) It is argued by complainants that respondent Yekalon's expert Lang testified that the{

} (CRBr at 57-58); that Lang testified

that Yekalon's Engagement products{

} (CRBr at 58); that,

based on Loferski's testimony, a person of ordinary skill in the art would consider Yekalon's

Engagement 1 and 2 products{

} (CRBr at 58-59); and that{

} (CRBr at 59, RX-1013C, Lang, Tr. at 2209-2210.)

Respondent Yekalon argued that its Engagement 1 and 2 products should be included in the investigation because complainants have accused and continue to accuse Yekalon's Engagement 1 and 2 products of infringing the patents-in-issue, and because Yekalon's Engagement 1 and 2 products are{  
} under Commission case law. (YRBr at 3-5, 10.) Specifically it is argued that the fact that the Engagement 1,{ } and Engagement 2, { } products sold for importation into the United States{ } and the Engagement 1,{ } and Engagement 2, { }products sold for importation {

} (YRBr at 7-8, YFF 508, 519.) Yekalon pointed to the fact that Loferski{

} (YRBr at 8-9.)

Respondent Yekalon further argued that its Engagement 1 and Engagement 2 products are {  
} that one of ordinary skill in the art as of June 1996 would have known and recognized that{

}

Yekalon's Engagement products do not infringe claim 1 of the '836 patent and claims 3 and 4 of the '292 patent because Yekalon's Engagement products are{

} Loferski admitted that he had no knowledge of the circumstances of{

} (YBR at 8-9, YFF 553, 554.) It is also argued that under

{

} Yekalon's Engagement

products do not infringe claim 1 of the '836 patent and claims 3 and 4 of the '292 patent because

{

} (YBr at 22-23, YFF 621-627.)

The staff argued that there is sufficient evidence to warrant reaching a decision on the merits of complainants' infringement allegations, with respect to the Engagement products.

(SRBr at 7.) It is argued that{

}

(SRBr at 7.) It is also argued that the fact that complainants seek a general exclusion order is in

favor of reaching a decision as to whether the Engagement products infringe because, in the event a general exclusion order issues in the investigation, a decision as to the Engagement products would provide guidance to Customs as to whether these products will be considered infringing. (SRBr at 8.) Assuming that the Engagement products are part of the investigation, the staff argued that in light of the testimony of Yekalon's expert Lang and the undisputed differences between the Engagement products and the products shown in the '836 patent, complainants did not establish, by a preponderance of the evidence, that a person of ordinary skill in the art would consider Engagement profile products to be{

} (SBr at 57, SPFF 454.)

The administrative law judge finds that,{  
} the  
Engagement products is sufficiently well-defined to permit an appropriate infringement analysis to be performed because it is clear that respondent Yekalon's design{

} (Lang, Tr. at 2176-77; RX-1033C at

4.) Given Yekalon's design and the fact that complainants seek a general exclusion order, the administrative law judge finds that it is in the public interest to reach a decision on the merits of complainants' infringement allegation, with respect to the Engagement products.

The administrative law judge has interpreted "relaxed unbent portion" as well as any other equivalent claimed phrases put in issue to mean after bending and once the panels are coupled, at least a portion of the elastically bendable portion remains changed from its initial uncoupled position which is the "normal" or "relaxed" position. (See "Section X. G," supra). Hence, the administrative law judge finds that the fact that Loferski's tests showed that the

Engagement products’{

} However, the administrative law judge has also interpreted “tongue” to mean “a coupling part extending from the edge of a board, where the coupling part provides primary coupling in the horizontal direction and primary locking in the vertical direction.” (See Section X. H, supra). While Lang did testify that the Engagement products provide for{ }Lang also testified that{

}(Lang, Tr. at 2197-99.) Moreover, a person of ordinary skill in the art in 1996 would{

} (Lang, Tr. at 2200.) Hence, the administrative law judge finds that a person of ordinary skill in the art would know that Yekalon’s Engagement products{

} As a result the administrative law judge finds that Yekalon’s Engagement products{ }and hence that Loferski’s test cannot prove infringement by those products of claim 1 of the ‘836 patent and claims 3 and 4 of the ‘292 patent.

Based on the foregoing, the administrative law judge finds that complainants have not established, by a preponderance of evidence, that respondent Yekalon’s Engagement 1 and 2 products infringe claim 1 of the ‘836 patent or claims 3 and 4 of the ‘292 patent. Hence said Yekalon’s products are excluded from any further consideration by the administrative law judge.

C. Claims 1 and 2 Of The '836 Patent And Claims 3 And 4 Of The '292 Patent

Complainants, in support of their infringement allegations in the summary, supra, as to claims 1 and 2 of the '836 patent and claims 3 and 4 of the '292 patent argued that Loferski's bent lower lip tests established that said accused products contain a bent lower lip, an elastically bendable portion and biasing force.

The staff supported complainants' infringement allegations. The Greenberg respondents, PSV respondents, respondent Yekalon and the Chinafloor respondents argued that complainants have not established infringement.

The administrative law judge finds that complainants have not established, by a preponderance of the evidence, that the accused products in issue are infringed.

At the outset, respondents argued that: (a) Loferski's test is not taught by the patent; (b) Loferski's test is not generally accepted by peers; and (c) Loferski's test is not standard in the community. (GBr at 23, PSVRBr at 24.) The administrative law judge finds that the '836 patent does not teach a way to specifically test for a bent lower lip as the specification of said patent is silent with respect to details such as how to determine that the lower lip is bent as opposed to unbent after coupling and what measurement of lower lip displacement is sufficient to constitute a bent lower lip. (JX-1.) The administrative law judge finds that there is no consensus for how to show the existence of a bent lip in coupled panel. (Loferski, Tr. at 779, Brickman, Tr. at 2081.) The administrative law judge also finds that complainants did not introduce any evidence that Loferski's test was generally accepted by peers or standard in the community. The administrative law judge considers the fact that Loferski's test is not generally accepted by peers or standard in

the community when determining the reliability of the test and that fact goes against complainants as it indicates that reliability of said test has not been tested by peer critique.

Respondents argued that: (a) Loferski did not properly calibrate his gauge; (b) that he came into contact with the surface during the test which affected the test results; (c) that Loferski's methodology of moving the Mitutoyo device after each measurement and attempting to replace it in the same spot based on the human eye is flawed because Loferski's methodology is susceptible to factors such as manufacturing tolerance, imperfections on the surface, and unstable support for the sample and gauge; and (d) that Loferski failed to follow standard testing procedures. (GRBr at 40-41, 43, GBr at 37-38, 50, PSVBr at 48-50, PSVRBr at 38-39.)

Complainants argued that: (a) Loferski used a second Mitutoyo gauge, with a resolution ten times greater than the original Mitutoyo gauge, to perform subsequent measurements; (b) Loferski took ten separate measurements at each of three measurement locations; and (c) Loferski repeated his measurements 2mm and 5mm to the left and right of the three previous locations. (CBr at 52, CRBr at 35-36.) However, the administrative law judge finds that the fact that Loferski performed the same tests with a second gauge of higher resolution does not assure the reliability of his original tests because any problems with the original gauge or the methodology would not be solved by a gauge of higher resolution. (Loferski, Tr. at 2934.) Likewise, he finds that the fact that Loferski took ten separate measurements does not assure the reliability of his original tests because repeatability does not always equate to reliability. (RFF 46.74, Loferski, Tr. at 2934.) Finally, the administrative law judge finds that the fact that Loferski repeated his measurements 2mm and 5mm to the left and the right does not assure the reliability of his original tests because his subsequent tests are not sufficient to address the issue of manual placement due to the fact



that the gauge could have been placed in many other places besides the places that Loferski decided. (Loferski, Tr. at 580.) Hence, the administrative law judge finds that Loferski's subsequent tests do not assure the reliability of Loferski's original bent lip tests and the administrative law judge solely looks at the circumstances of the original bent lip tests to determine its reliability.

Respondents argued that Loferski improperly used a feeler gauge to check the calibration of his Mitutoyo gauge (PSVRBr at 38, RFF 46.60, 46.61); and that the feeler gauge was an improper gauge because the minimum measurement size is 0.05 mm, which is not precise enough for a measurement of this type. (GBr at 40-41, RFF 1363-1368.) Complainants responded that Loferski repeated his measurements with a second Mitutoyo gauge, with a resolution ten times greater than the original gauge, and that Loferski took ten separate measurements at each of the three locations and that these steps confirmed the accuracy of his Mitutoyo gauge. (CRBr at 35, CFF 496-504.) The respondents further argued that Loferski failed to check calibration of gauge before and after performing testing. (PSVBr at 50, RFF 46.107.) Complainants responded that Loferski did not recalibrate his gauge during his measurements because it would have destroyed his ability to get a relative measurement of the lower lip bending after panel coupling. (CRRFF 46.107C, 46.107D.) The respondents further argued that Loferski failed to use a standard of known accuracy when he did calibrate. (PSVBr at 50, RFF 46.108.) Complainants responded that the use of the feeler gauge to verify the accuracy of the Mitutoyo was correct because the feeler gauge was precise and contained a number of blades that varied in thickness from 0.05 mm to 1.00 mm. (CRRFF 46.108A, 45.108B, 46.108C, 46.108D.) The respondents further argued that Loferski failed to calibrate over a range. (PSVBr at 50, RFF

46.12.) Complainants responded that this did not show that Loferski's measurements were inaccurate given that Loferski repeated his measurements with a second Mitutoyo gauge. (CRRFF 46.12, CFF 496-504.)

The administrative law judge finds that Loferski's failure to use a known standard to calibrate his gauge weighs against complainants in considering the reliability of Loferski's bent lower lip test. Complainants cannot rely on the manufacturer's guarantee that the Mitutoyo gauge was calibrated, but instead must show that the tool its expert used to prove infringement is correctly calibrated, as complainants have the burden of showing infringement by a preponderance of the evidence. (Rice, Tr. at 2500.) Additionally, using a second gauge to verify the proper calibration of another gauge is not acceptable because there is no way to be certain that the second gauge is properly calibrated. (Rice, Tr. at 2509, 2511.) Thus, to properly calibrate a measuring tool one must calibrate against a standard, not a second gauge. (Rice, Tr. at 2509.) Additionally, it is unacceptable to use a feeler gauge to confirm the accuracy of the Mitutoyo gauge where the minimum measurement of the feeler gauge is 0.05 mm because the target measurement is only 0.03 mm and because the feeler gauge will not detect discrepancies less than 0.05 mm, yet those discrepancies can affect whether the lip displacement measure above 0.03 mm. (Rice, Tr. at 2506-07.) Complainants cannot deny the importance of a properly calibrated measuring tool because complainants attack Cao's calibration protocol throughout Cao's testing procedure while they fail to adequately address the deficiencies in Loferski's protocol. (CBr at 85, RFF 1362, CRRFF 1362B, Rice, Tr. at 2500.)

Respondents argued that Loferski's methodology of moving the Mitutoyo device after each measurement and attempting to replace in the same spot based on the human eye is flawed

because Loferski's methodology is susceptible to factors such as manufacturing tolerance, imperfections on the surface, and unstable support for the sample and the gauge. (GBr at 50, RFF 1317-1328, 1332-1334, 1416, 1419-1421.) Complainants responded that Loferski's measurements are relative measurements because it compares the height of the lower lip after panel coupling with the height before panel coupling and that any surface irregularity is canceled out in the calculation of the difference of heights. (CRRFF 1318A-D.) Additionally, complainants responded that Loferski was able to perform tests that showed small discrepancies in the placement of the Mitutoyo device which did not substantially affect the measurements. (CRBr at 35-36, CRFF 512-515, CX-107.3.) Complainants did not argue that Loferski's methodology is not susceptible to manufacturing tolerance or surface imperfections, but merely argued that because Loferski is making relative measurements by subtracting the pre-coupling height from the post-coupling height, the effect of any surface irregularities in the panel would be canceled out. (CRRFF 1321A-C.) However, the administrative law judge finds that complainants "relative measurement" argument is correct only if Loferski measured at the same place each time, because if he measured in a different place, he would be introducing a different surface irregularity and his subsequent calculation would not cancel out the effect of the surface irregularity. Complainants did not argue that Loferski, through using his eyes to replace the gauge, replaced it in the exact place, and did not contend that Loferski replaced the gauge a small distance away from its original spot. (CRRFF 1332A-C, 1333A-C, 1334A-C.) Complainants did introduce evidence consisting of Loferski's tests showing that measurements of 2mm and 5mm away from the panel area have a deviation of less than 0.03 mm. (CX-107.3.) However respondents argued that the pencil marks that Loferski used were 0.5 mm in length, and with the

width of the Mitutoyo gauge being only 0.02 mm, Loferski still was not returning to the exact same space within the pencil mark in his subsequent tests. (GRCFF 513, PSVRCFF 513.) The administrative law judge finds that respondents' criticisms of the reliability of said test are valid and that complainant's tests is unsuccessful in rebutting respondents' criticizing of the reliability of the test because: (1) complainants have not shown that Loferski returned to the exact same spot within the pencil mark; and (2) complainants have not shown that there is a correlation between the distance from the original measurement and the amount of deviation caused by a surface imperfection. (Loferski, Tr. at 426-48, 578-81.) In other words, he finds that there may be a greater deviation at 1mm from the original measurement than 2mm or 5mm. Therefore, the administrative law judge finds that Loferski's methodology of replacing the Mitutoyo gauge by eye weighs against the complainants in considering the reliability of Loferski's test.

Respondents introduced their own expert tests (Cao and Lang's tests) to establish non-infringement. The administrative law judge finds that respondents' tests do not suffer from the same flaws that affect the reliability of Loferski's tests. Specifically, Cao's test does not suffer from susceptibility to the movement of the gauge, or to surface variations. (Cao, Tr. at 1021, 1027, 1028, 1031, 1032, 1034, 1938.) Complainants point to the fact that Cao failed to provide evidence of calibration. (CBr at 85, CRRFF 1362B.) However, since complainants' expert's calibration techniques are suspect, this does not show that Loferski's tests should outweigh Cao's test. (Rice, Tr. at 2500.) Additionally, complainants point to the fact that Cao did not measure at the distal end of the lip. (CBr at 84.) However, complainant provided no evidence of any claim limitation that requires measurement of the elastically bendable portion at the distal end of the lower lip for any of the asserted claims. (See Section X. C, supra.)

Complainants argued that Cao was not an expert in performing the test he did, and that said test was not standard or customarily used in wood-products industries. (CRBr at 45, CFF 586.1, 588.) However, complainants failed to rebut Cao and Rice's testimony that the device used by Cao was well known in the industry and that Loferski was familiar with it. (GBr at 44, RFF 1402, 1407.) Additionally, while complainants argued that the fact that Loferski's test is not a standard test should not affect the reliability of Loferski's test, they argued that Cao's test should not be considered because Cao's test was not standard or customarily used in wood-products industries. (CRBr at 45.) Complainants argued that Cao failed to use identically sized round foils in measuring. (CBr at 85.) However, Cao testified that all of the foil pieces he used covered a circular area at least 6mm diameter, and that Cao was merely measuring the circular area within the 6mm diameter. (GBr at 42, RFF 1380, Cao, Tr. at 1501-04.) Thus, all of Cao's measurements used the same circular area. (GRBr at 61, GCFFF 602, Cao, Tr. at 1433-34.) Finally, complainants argued that Cao improperly took an average measure over at least a 6mm distance of the lower lip including parts of the lower lip that would be expected to bend the absolute least. (CRBr at 46.) However the specifications of the '836 and '292 patents do not specify how to determine the bending of the lower lip. (See JX-1, JX-3.)

With respect to the tests of Yekalon's expert Lang, said tests are not susceptible to movement of the gauge because Lang only took an initial set of measurements while the panel was coupled, and kept the gauge stationary as he moved the object table that contained the panel. (Tr. at 2135-2148.) While Lang admitted that his initial measurement was susceptible to surface variations in the panel, Lang performed a regression analysis to eliminate the slope error from the test results, a step that Loferski did not perform. (Tr. at 2135-2148.) Moreover Lang's

methodology did not require him to compare the relative position of lower lip before and after coupling because Lang's methodology involved taking multiple measurements while moving the test panels such that the Mitutoyo was positioned at points successively closer to the joint, along a reference line perpendicular to the joint until the joint in the panels moved beyond the position of the Mitutoyo, recording the position of the panel underside at each point, plotting the data in graphical form, and analyzing the graphical data to determine the degree of lower lip bending. (Lang, Tr. at 2135-2148.) Therefore, the administrative law judge gives more weight to Lang's test in determining whether complainants have met their burden of proving infringement by a preponderance of the evidence.

In conclusion, because there are questions of reliability regarding Loferski's tests, combined with Rice's expert testimony and Cao's and Lang's tests, the administrative law judge finds that Loferski's tests are insufficient to prove infringement. Thus the administrative law judge finds respondents have prevailed in establishing that complainants have failed to meet their burden, by a preponderance of the evidence, that respondents products, as set forth in the summary, supra, have infringed claims 1 and 2 of the '836 patent and claims 3 and 4 of the '292 patent. See Andrew Corp. v. Gabriel Electronics Inc. supra. See also Turbo Machine Co. v. Proctor & Schwartz, Inc., 241 F. Supp. 723 (E. D. Penn. 1965) (holding that while neither the evidence of either the plaintiffs' or defendants' tests were completely convincing, plaintiffs' tests were not sufficient to establish infringement); Eltech Syst. Co. v. PPG Indus., Inc., 903 F.2d 805 (Fed. Cir. 1990) (holding that plaintiff's tests were not sufficiently reliable to prove infringement and that defendant's evidence and defendants' expert testimony was more credible competent and convincing); J.T. Eaton & Co., Inc. v. Atlantic Paste & Glue Co., 106 F.3d 1563 (Fed. Cir.

1997) (holding that plaintiffs' tests were legally insufficient because it failed to replicate real-world scenarios); Exxon Corp. v. Dow Chem. Co., 24 F. Supp. 2d 688 (E. D. Texas 1998) (holding that defendants' evidence raised doubts about plaintiffs' testing methods and that plaintiffs failed to meet its burden of proving infringement); In re Gabapentin Patent Litigation, 393 F. Supp. 2d 278 (D. N. J. 2005) (holding that plaintiffs' tests were not sufficient to show quantitative limitation and thus to prove infringement); Abbott Labs v. Baxter Pharmaceutical Products, Inc., 2005 WL 2347221 (N.D.Ill. 2005) (holding that plaintiffs' infringement tests were insufficient to prove infringement due to unexplained inconsistencies between the tests disclosed in the patent and the plaintiffs' infringement tests).

As an independent ground as to why complainants have not established by a preponderance of the evidence that claim 1 of the '836 patent and claim 4 of the '292 patent is infringed by the accused products identified in the summary, supra, respondents argued that Loferski did not prove the existence of an elastically bendable portion. It is argued that Loferski did not measure the elastically bendable portion of the panel, as required by respondents' argued claim interpretation of "elastically bendable portion" in claim 1 of the '836 patent and claim 4 of the '836 patent, because Loferski measured at the most distal point on the lower lip instead of between the groove and the recess. (GBr at 38, PSVBr at 46, YRBr at 25.) Complainants relied on their argued claim interpretation of "elastically bendable portion" and argued that the location of the elastically bendable portion is anywhere on the lower lip because the patent teaches that the lower lip is a cantilever beam, and thus it was proper for Loferski to measure bending at the distal end of the lip as opposed to between the groove and the recess. (CBr at 43-44.) However, the administrative law judge interpreted claim 1 of the '836 patent and claim 4 of the '292 patent

to require that the elastically bendable portion of the panel be located between the groove and the recess (rejecting complainants' cantilever beam argument that the patent teaches that the entire lower lip is bendable). (See Section X. C supra). Thus, the administrative law judge finds that, with respect to claim 1 of the '836 patent and claim 4 of the '292 patent, a measurement at the distal end is not sufficient to show that there is bending in the elastically bendable portion (i.e. between the groove and the recess). It is undisputed that Loferski only measured bending at the distal end of the lip, not between the groove and the recess. (Loferski, Tr. at 808, 3048.) Because of the administrative law judge's interpretation of the location of the elastically bendable portion to be solely between the groove and recess and because Loferski only measured bending at the distal end of the lip, the administrative law judge finds that Loferski's test is not sufficient to establish an elastically bendable portion as required by claim 1 of the '836 patent and claim 4 of the '292 patent. Hence, the administrative law judge finds that Loferski's test is insufficient to prove, by a preponderance of the evidence, that respondents' products as set out in the summary, supra, infringe claim 1 of the '836 patent and claim 4 of the '292 patent.

As an independent ground as to why complainants have not established, by a preponderance of the evidence, that claim 2 of the '836 patent is infringed by the accused products identified in the summary, supra, respondents argued that Loferski's test does not prove the limitation of claim 2 of the '836 patent that requires that the panel "[maintain] the bent condition of the elastically bendable portion of the lower lip [during shifting of the panels.]" (GBr at 31, RFF 1356.) It is argued that Loferski never tested whether the lower lip maintained its bent condition after coupling while being shifted parallel to the coupled side edges as required by claim 2 of the '836 patent. (GBr at 31, RFF 1356-57.) Complainants relied on Loferski's



expert testimony that if a product has a bent lower lip in the coupled position, there would be no reason that it would not remain in the bent condition during lateral shifting of the panels. (SFF 541.) Complainants also relied on Loferski's testimony that while the panel is being shifted, there is no place the lower lip could go so that it would not be in a bent position. (Loferski, Tr. at 2856-57.)

Much like the presence of biasing force, the requirement that the bent lip stay in the bent position during lateral shifting of the coupled panels is a separate limitation of the '836 patent, and, thus, is separate from the bent lower lip limitation. (JX-1, at 15:18-20.) However, unlike how the '836 patent specifies that the presence of bent lower lip creates the biasing force, the administrative law judge finds that the '836 patent provides no support for the notion that a lower lip must remain in the bent position during lateral shifting of the coupled panels, or that the lower lip cannot move while the panel is being shifted. (JX-1.) Thus, unlike the presence of biasing force, the administrative law judge finds that the presence of a bent lip is not sufficient to establish the presence of the "lower lip remaining in the bent position" limitation, and that complainants must establish this limitation as part of their burden of proof of infringement. Therefore, the administrative law judge finds that Loferski's tests are deficient as they do not show whether the accused products' bent lip remains in the bent position during lateral shifting. (Loferski, Tr. at 652.) Hence, because Loferski failed to prove that the bent lip remains bent during lateral shifting of the coupled panels, Loferski's bent lip tests are insufficient to establish, by a preponderance of the evidence, infringement of claim 2 of the '836 patent.

#### D. Claims 10 And 18 Of The '836 Patent

The products of respondents accused of infringing claims 10 and 18 of the '836 patent are

set forth in the summary, supra. The staff supports the infringement allegations. The respondents deny that complainants have established infringement.

Claim 10 of the '836 patent requires, inter alia, that the claimed floor panel on at least one side be capable of being coupled by snap action by moving one panel laterally toward the other in a substantial planar direction. Claim 10 also requires that the lower lip of the groove extend beyond the outer end of the upper lip. Claim 10 does not require the presence of a bent lower lip creating a biasing force tending to urge the panels together. Claim 18 is dependent on claim 10 and requires in addition that the "locking elements comprise included contact surfaces." This claim element is not disputed by the respondents. Hence respondents' only infringement defense to claim 18 relates to independent claim 10.

Complainants, in support of their infringement allegation that the accused products identified in the summary, infra, infringe claims 10 and 18 of the '836 patent, rely on Loferski's pipe clamp test. Also as an independent ground, complainants rely on Loferski's hammer/tapping block test, with respect to certain (but not all of) respondents' products.<sup>21</sup>

#### 1. Pipe Clamp Test

Complainants argued that Loferski's pipe clamp test is a reliable test that proves the presence of "snap action coupling" and "lateral shifting in a substantial planar fashion" and thus

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<sup>21</sup> Complainants also argued that in case the administrative law judge interpreted the terms "elastically bendable portion," "snap," "snap action," or "snap together" to require a complete absence of any even minor features or if the administrative law judge determined that the splits at the base of the groove constitute such fracture or damage, then any accused product having said fracture infringes the affected limitation of the claims in suit under the doctrine of equivalents. (CBR at 77-80.) However, the administrative law judge has interpreted those terms to allow fractures as long as the fracture does not affect the functionality of the joint. (See Section X.C and Section X. E supra.) Thus, the administrative law judge finds that the doctrine of equivalents issue is moot.

proves that respondents' products infringe the '836 patent. It is argued that the patent specification allows for the use of tools to induce snap action coupling (CBr at 60, CFF 390-392, JX-1, col. 11:18-28); that claims 10, 18, and 23 of the '836 patent do not specify an amount of force (CBr at 41); and that Loferski conducted supplemental tests that showed the force of the pipe clamp was not excessive because it was less force than an installer's hand-held hammer. (CBr at 62, CFF 410-412.) It is argued that the small fractures that appeared in some of the products after snap-coupling did not appear in the lip, and thus did not affect the functioning of the joint. (CBr at 62-63, CFF 420, 425-429, CFF 432-435, S Br at 65, SFF 557-564.) The PSV respondents argued that the sensor used in the subsequent test to measure force was not an impact sensor, so it may not have registered accurately, and thus did not provide an accurate recording of the force used in both the pipe clamp test and the hammer test. (PSV Br at 62, RFF 51.11.) Finally, complainants argued that the '836 patent claims and specification do not call for panels to be assembled strictly within the same plane, but instead substantially within the same plane. (CBr at 62, CFF 386-387, 416, JX-1, at 11:5-10.)

The staff argued that in some cases the panels deviated from being precisely planar in the course of being snapped together laterally. However, it was argued that the degree of deviation was not substantial and was consistent with the concept of snap action described in the '836 patent. (SBr at 65, SPFF 564.)

Respondents argued that Loferski's pipe clamp test is not a reliable test and does not meet the burden of proof of the presence of snap-action coupling and lateral shifting in a substantially planar fashion, and thus does not meet the burden of proof of infringement. It is argued that nothing in the patent specification, file history or any installation instructions advises

a consumer to use pipe clamps to effectuate coupling (GBr at 54-55, RFF 1506, 1511, 1521, PSV Br at 60, RFF 49.4); that respondents' experts universally discredited the pipe clamp test and that the test is generally not accepted (GBr at 55, RFF 1506, 1511); that the pipe clamp improperly used "massive" force (GBr at 54, RFF 1504, 1505, 1523, PSV Br at 46, PSVRCFF 405D); and that Loferski's supplemental tests, showing that the force of the pipe clamp is comparable to the force of the hammer, is not reliable because Loferski measured force on the edge of the panel instead of at the point of coupling. (GRCFF410E, PSVR411C.) Respondents also argued that the test was unreliable because the tests fractured half of the respondents products, and Complainants cannot meet their burden with fractured samples. (GBr at 47, RFF 1492, PSV Br at 61, RFF 50.1, 50.2); that complainants cannot meet their burden with fractured samples because there was substantial evidence that fractures or cracks in the sample caused a material deformation at the crack and a compromise in the structure (GBr at 56, RFF 1496, PSV Br at 62, RFF 48.37, 50.25); and that this material deformation caused the locking elements of the panel to lose their function. (GBr at 56, RFF 1496, PSV Br at 62, RFF 48.37, 50.25.) It is also argued that Loferski only tested samples, not actual panels (GBr at 54); and that Loferski lifted the tongue side of one panel and placed it on top of the lip of the groove on the other panel to help the panels couple, and that "lateral shifting of panels in a substantially planar fashion" does not include lifting either panel off the surface. (GBr at 52, RFF 1127, 1131, PSV R Br at 44, RFF 51.20, 51.21.) In addition, the PSV respondents argued that the sensor used in the subsequent test to measure force was not an impact sensor, so it may not have registered accurately, and thus did not provide an accurate recording of the force used in both the pipe clamp test and the hammer test. (PSV Br at 62, RFF 51.11.)

The '836 patent specification does not specifically prohibit the uses of tools to couple the panels. In fact, the specification specifically allows the use of tools to snap the panels together through lateral shifting: "... the floor panel ..., possibly by means of tools, can be snapped into the adjacent floor panel by lateral sliding together." (JX-1 at 11:23-28.) The administrative law judge finds nothing in the patent specification which supports an exclusion of tools to induce coupling. Therefore, the administrative law judge rejects the argument that Loferski's test is unreliable because it uses a tool.

The administrative law judge has interpreted the term "snap action" to mean a physical action that takes place when an elastically bendable portion of one panel bends during coupling to allow the joint to come together and after coupling the bendable portion returns towards its original position when the locking elements are engaged and the physical action does not cause fractures that would prevent the joint from functioning. See Section X. E, supra. Thus, as long as the action does not cause a fracture that prevents the joint from functioning, the administrative law judge finds that it is irrelevant how much force is used to couple the panels together. Neither the claims in issue, nor the patent specification of the '836 patent, imposes a limitation of the maximum amount of force used to couple the panels. (JX-1.) Therefore, the administrative law judge finds that the only relevant factor regarding the force of Loferski's pipe clamp test is whether the force of the pipe clamp caused a fracture that prevented the panels' joints from functioning. Hence, the administrative law judge rejects the argument that Loferski's test is unreliable because it uses an improper amount of force.

The administrative judge further rejects the argument that Loferski's test is unreliable because Loferski used samples instead of floor panels because respondents have failed to show

that the use of a sample, as opposed to the entire floor panel, would affect the snap-action coupling of the panel<sup>22</sup>. Respondents cite no finding of fact to support their conclusion that the testing of 2 X 3 inch samples somehow makes Loferski's pipe clamp test invalid. See GBr at 54, GRBr at 43.

As for the presence of fractures, it is undisputed that Loferski's test caused fractures to appear in the panel in 30% - 50% of the products that Loferski tested. (SPFF 556 (undisputed).) However, because the administrative law judge interpreted snap action only to preclude fractures that would prevent the joint from functioning, he finds that the fractures do not affect the reliability of the test if the complainants are successful in showing that the cracks did not affect the functionality of the joint. Here, Loferski conducted supplemental tests that showed that the joints of the fractured panels still functioned despite the cracks in the panel. (Loferski, Tr. at 487-491.) In fact, Loferski coupled one of the cracked samples during the hearing to demonstrate that the joint was still functional. (Loferski, Tr. at 488-489.) Moreover, the expert testimony that respondents rely on to show that the cracks caused a material deformation in the structure do not show that the particular panels that Loferski tested on have lost their functionality in the joint component. (Loferski, Tr. at 651, 3061, 3062.) Therefore, the administrative law judge rejects

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<sup>22</sup> Respondents cite Zenith Laboratories, Inc. v. Bristol-Myers Squibb Co., 19 F.3d 1418, 1424, where the Federal Circuit reversed the District Court's decision ruling that Bristol failed to establish any infringing use because the District Court's finding of infringement was based on testimony which incorporated an improper comparison rather than a comparison of the accused product with the patent claim limitations. (GBr at 33.) However, Zenith is distinguishable from this case. In Zenith, the claim-at-issue specifically required a 37-line table or relative intensities exhibited by the chemical compound at various scan angles. Zenith, 19 F.3d at 1420. There, the court found the sample, as a matter of law, could not establish infringement of the claim, because the sample consisted of a table of only 30 lines of relative intensities, and only 22 lines were used to determine infringement. Id. at 1423-24. Here, respondents have not shown that a 2 X 3 inch panel sample, as a matter of law, is insufficient to establish the snap action requirement.

the argument that Loferski's test is unreliable because of any fracture.

The administrative law judge interpreted "substantially planar fashion" as allowing for deviations from a purely-co-planar relationship. (See Section X. F. supra) The patent specification also provides support for snap action that allows elevation of one of the panels during coupling as displayed in Figure 25. (JX-1.) Because the administrative law judge has interpreted "substantially planar fashion" as including deviations from a purely co-planar relationship, the administrative law judge rejects the argument that Loferski's test is unreliable because Loferski did not couple the panels in a substantially planar fashion. (See Section X. F supra.)

Based on the foregoing, the administrative law judge finds that complainants, through Loferski's pipe clamp test, have met their burden, by a preponderance of the evidence, in establishing that those tested products of respondents as set out in the summary, supra infringe claims 10 and 18 of the '836 patent.

## 2. Hammer/Tapping Block Test

Loferski performed the hammer/tapping block test on all of the accused products except for the following products: China Floors Easy Click 8.3 (RS 138-140); China Floors Just Click 7 (RS 040-042); Shanghai Dekorman Easy Lock (RS 144-146); Yekalon Big Click 12.3 (RS 007-009); Yekalon Engagement 1 (12mm); Yekalon Engagement 2 (12mm); Yekalon Engagement 1 (8mm); Yekalon Engagement 2 (8mm); Wujin Double-Locking (RS 118-120, RS 153-155); Lodgi Double-Locking (RS 079-081); Hansol Lock (RS 112-114); Shengda Type 1 (RS 022-024); Vöhringer Lock 7; and Vöhringer Type A (RS 028-030). (CX 910-918C, Tr At 492-93). Complainants argued that Loferski's hammer test is a reliable test that proves the presence of

“snap action coupling” and “lateral shifting in a substantial planar fashion” and thus proves that those respondents’ products which were tested by the hammer/tapping block test infringe the asserted claims of the ‘836 patent. Complainants argued that the patent specification allows for use of tools (CBr at 60, CFF 390-392, JX-1, at 11:18-28); and that the use of a hammer and tapping block is a standard way in which laminated floor panels are assembled, and is reflected in a numerous amount of respondents’ installation instructions. (CBr at 54, 61, CFF 395-400, CX398-398.9.)

The staff argued that Loferski used full size panels instead of samples for the hammer test (SBr at 66, SPFF 565); that the reason Loferski did not determine if there were fractures caused by the hammer is because Loferski would have to cut open the panel (SBr at 65, SPFF 566-567); and that the test did not affect the coupling functionality of the panels. (SBr at 65.)

Respondents argued that Loferski’s hammer test is not a reliable test. The Greenberg respondents argued that Loferski did not perform the hammer test on the Wujin “Double Locking,” Lodgi Wood “Double-Locking,” and Hansol “Hansol Lock” products (GR Br at 45, CFF 404); and argued that the patent specification or claims do not state that snap-action is to be performed by a hammer. (GBr at 55.) The PSV respondents argued that the test-in-issue is not reliable because Loferski did not videotape the hammer test and did not provide evidence of whether panels cracked during the hammer test. (PSV Br at 62, RFF 51.9, 51.10.) Respondents further argued that Loferski lifted the tongue side of one panel and placed it on top of the lip of the groove on the other panel to help the panels couple, and that “lateral shifting of panels in a substantially planar fashion” does not include lifting either panel off the surface. (GBr at 52, RFF 1127, 1131, PSV R Br at 44, RFF 51.20, 51.21.)



As was found with respect to the pipe clamp test, the administrative law judge finds that the '836 patent specification specifically allows the use of tools to snap the panels together through lateral shifting: "... the floor panel ..., possibly by means of tools, can be snapped into the adjacent floor panel by lateral sliding together." (JX-1 at 11:24-28.) Additionally, the administrative law judge finds that the use of a hammer and tapping block to couple the panels is standard in the industry. Complainants introduced numerous installation instruction manuals of the respondents that provide for the use of a hammer and tapping block to induce coupling. (CX-323, p. 2, CX-942; CX-161C at 5.1, CX-201C, p. 2, CRX 13, p. 5; CRX 14 at HANSOLL000152), CX-262C at PD000220, CRX5 at S001006, CX-301, CPX-351C, CX-332C.)

The administrative law judge rejects the respondents' argument that the test in issue is unreliable because it was not videotaped. Whether Loferski videotaped the test goes to the credibility of his testimony, not to the reliability of the test, as the test does not become more accurate when it is videotaped. The administrative law judge finds that respondents did not bring any evidence, as to why Loferski's testimony is not credible without videotape of the hammer/tapping block test. (See PSVBr at 62, PSVRBr at 45.) Therefore, he finds that with respect to the results of the hammer/tapping block test, Loferski's testimony is credible.

The administrative law judge's interpretation of "substantially planar fashion" allowed for deviations from a purely-co-planar relationship. (See Section X. F, supra.) The patent specification also provides support for snap action that allows elevation of one of the panels during coupling as displayed in Figure 25. (JX-1.) Hence, the administrative law judge rejects

the argument that Loferski's test is unreliable because Loferski did not couple the panels in a substantially planar fashion.

Based on the foregoing, the administrative law judge finds that complainants have met their burden, by a preponderance of the evidence, using the hammer/tapping block test, of proving that the following products have infringed claims 10 and 18 of the '836 patent: Saili Wood Semi-Arc Locking (RS 034-036); Saili Wood Double-locking (RS 064-066); Wujin Arc-locking 8.2mm (RS 058-060); Wujin Arc-locking 12mm (RS 055-057); Wujin Single Locking (RS 121-123, RS 156-158); Wujin Double Layer Double Locking (RS 159-162); Yongan Double Locking (RS 061-063); Yongan Arc Locking 10 mm (RS 043-045); Hansol Reve (RS 112-114); Lodgi Arc-locking 8.2mm (RS 046-048); Lodgi Arc-locking 12mm (RS 049-051); Lodgi Double-deck locking (RS 067-069); Lodgi Single locking (RS 150-152); Yingbin Single-locking (RS 070-072); Yingbin Double-locking (RS 147-149); Power Dekor Type 1 (RS 019-021); Shengda Type 1 (RS 022-024); Shengda Type 2 (RS 082-084); Shengda Type 3 (RS 085-087); Vohringer Type B (RS 013-015); Vohringer Type C (RS 016-018); China Floors Easy Click 7.3 mm (RS 132-134); China Floors Easy Click 12.3mm (RS 141-143); China Floors Art Plus 8.3mm (RS 037-039); Dekorman Double-Click System (RS 128-131, RS 135-137); Yekalon Double Click 8.2mm (RS 001-003, RS 010-012); Yekalon Double Click 12.3mm (RS 109-111); Yekalon Big Click 12.3mm (RS 007-009); Yekalon Modified Round 8.2mm (RS 004-006, RS 025-027); and Yekalon Modified Round 12.3mm (RS 031-033). In addition, the administrative law judge finds that complainants have established, by a preponderance of the evidence using the pipe clamp test, that all of the accused products of respondents as set forth in the summary, supra infringe claims 10 and 18 of the '836 patent.

E. Claim 23 Of The '836 Patent

The summary, supra, sets forth the accused products that are alleged by complainants to infringe claim 23 of the '836 patent. The staff supports the infringement allegations except for the following products that have planes of tangency that are not linear or substantially linear: China Floors Easy Click 7.3mm (RS132-134); China Floors Easy Click 8.3mm (RS138-140); China Floors Easy Click 12.3mm (RS141-143); China Floors Art Plus 8.3mm (RS049-051); Lodgi Arc-locking 12mm (RS049-051); and the Vohringer Type C (RS016-018.) (SPFF581). The respondents deny infringement.

Claim 23 is an independent claim that has many of the same claim elements as claim 10 of the '836 patent, including at least one pair of complementary coupling parts that can snap together. (JX-1 at 18:60-19:4). Thus, based on the findings set forth supra with respect to claim 10 of the '836 patent, the administrative law judge finds that complainants have established, by a preponderance of evidence, that the accused products have the “snap action coupling” and “lateral shifting in a substantial planar fashion” limitations as recited in claim 23.

Claim 23 in addition requires “said protrusion and recess meet each other at contiguous contact surfaces at a common plane of tangency that with respect to a common plane of the coupled panels is inclined inwardly from a distally outer area towards a distally inner area at an angle less than 90 degrees.” (JX-1, at 19:15-20.)

Complainants argued that based on Loferski’s calculations of the common plane of tangency for each of the accused products through an analysis of the micrographs, all of the accused products have a common plane of tangency less than 90 degrees. (CBR at 65, CFF 444-445, 447, CX 102.2.) Loferski drew a line indicating the calculated common plane of tangency

on the micrographs of all of the accused products, including products where the contact surfaces on both the long side and shorts sides have substantially the same curve. (CBr at 65-66, CFF 447, CX 102.2.) Relying on its argued claim interpretation, complainants argued that claim 23 covers all accused products set forth in the summary, supra, even where the “contiguous contact surface” where the common plane of tangency is drawn, is not linear or substantially linear. (CBr at 66.) It is also argued that Loferski’s calculation of a common plane of tangency less than 90 degrees, for products with a contiguous contact surface that is not linear or substantially linear, was not arbitrary because claim 23 provides guidance on where to draw the line signifying the common plane of tangency. (CBr at 67.) Specifically, it is argued that claim 23 states that the portion of the contiguous contact surface that must have a common plane of tangency less than 90 degrees is that portion which “is inclined inwardly from a distally outward area to a distally inward area.” (CBr at 67, JX-1, col 19:15-19.)

The staff argued that when the contact surfaces of the tongue and groove were not linear or substantially linear, such that multiple tangent lines could have been drawn, Loferski’s illustration of a tangent line was essentially arbitrary. (SBr at 67, SPFF 580-581.) The staff identified the products that had contact surfaces that were not linear or substantially linear. (See supra.) The staff argued that all of the remaining products had been shown to infringe by a preponderance of the evidence. (SBr at 68.)

Respondents relied on their argued claim construction to argue that in the case where the contiguous contact surface was not linear or substantially linear, Loferski arbitrarily picked a common plane of tangency. (GBr at 58, RFF 1536, PSV R Br at 55-56.) The Greenberg respondents argued that in addition to the products identified by the staff, the following products

contained contiguous contact surfaces that were not linear or substantially linear: Lodgi Arc Locking 8.2mm (RS 046-048); Lodgi Arc Locking 12mm (RS 049-051); Saili Woods Semi-Arc Locking 8.2 mm (RS 034-036); Wujin Arc-Locking 8.2mm (RS 058-060); Wujin Arc-Locking 12mm (RS 055-057); and Yingbin Arc Locking 8.2mm (RS 070-072.) (G Br 58, 62, RFF 1593 - 1891, GRSFF581, CH-103, CX-926.)

The administrative law judge has interpreted “common plane of tangency” as limited to contact surfaces that are either linear or substantially linear. (See Section X. D supra.)

Additionally, complainants did not challenge either the staff’s findings of fact or the respondents’ findings of fact that the previously mentioned accused products did not have contiguous contact surfaces that were linear or substantially linear. (CRSPFF 581, CRRFF 1593-1891; See supra).

Hence, the administrative law judge finds that Loferski’s common plane of tangency test is insufficient to prove infringement, by a preponderance of evidence, with respect to the following accused products that have contiguous contact surfaces (i.e. planes of tangency) that are not linear or substantially linear: China Floors Easy Click 7.3mm (RS 132-134); China Floors Easy Click 8.3mm (RS 138-140); China Floors Easy Click 12.3mm (RS 141-143); China Floors Art Plus 8.3mm (RS 037-039); Vöhringer Type C (RS 016-018); Yongan Arc Locking 8.2 mm (RS 0520054); Yongan Arc Locking 10 mm (RS 043-045) Lodgi Arc Locking 8.2mm (RS 046-048); Lodgi Arc Locking 12mm (RS 049-051); Saili Woods Semi-Arc Locking 8.2 mm (RS 034-036); Wujin Arc-Locking 8.2mm (RS 058-060); Wujin Arc-Locking 12mm (RS 055-057); and Yingbin Arc Locking 8.2mm (RS 070-072). Since respondents’ argument only applied to products with contiguous contact surfaces that were not linear or substantially linear, and since respondents failed to proffer any additional arguments, the administrative law judge finds that the

following products that have contiguous contact surfaces that are linear or substantially linear infringe claim 23 of the '836 patent: Saili Woods Double Locking (RS 064-066); Wujin Double-locking (RS 118-120, RS 153-155); Wujin Single Locking RS 121-123, RS 156-158); Wujin Double Layer Double Locking (RS 159-162); Yongan Double-locking (RS061-063); Hanson Lock (RS 112-114); Hanson Reve (RS 115-117); Lodgi Woods Double Locking (RS 079-081); Lodgi Woods Double-deck Locking (RS 067-069); Lodgi Woods Single Locking (RS 150-152); Yingbin Single-locking (RS 070-072); Yingbin Double-locking (RS 147-149); Power Dekor Type 1 (RS 019-021); Shengda Type 1 (RS 022-024); Shengda Type 2 (RS 082-084); Shengda Type 3 (RS 085-087); Vöhringer Type A (RS 028-030); Vöhringer Type B (RS 013-015); China Floors Just Click 7 (RS 040-042); Dekorman Easy-Lock (RS 144-146); Dekorman Double-Click System (RS 128-131, RS 135-137); Yekalon Double Click 8.2mm (RS 001-003, RS 010-012); Yekalon Double Click 12.3mm (RS 109-111); Yekalon Big Click 12.3mm (RS 007-009); Yekalon Modified Round 8.2mm (RS 004-006, RS 025-027); and Yekalon Modified Round 12.3mm (RS 031-033).

F. Claim 5 Of The '779 Patent

The summary, supra, sets forth the accused products that are alleged by complainants to infringe claim 5 of the '779 patent. The staff supports the infringement allegation with the exception of the following products: Saili Wood Semi-Arc Locking (RS034-036); China Floors Easy Click 7.3 mm (RS 132-134); Lodgi Arc-locking 12mm (RS049-051); Shanghai Dekorman Easy-Lock (RS 144-146); Vohringer Lock 7; and Yekalon Modified Round 8.2mm (RS004-006 and RS025-027.) (SPFF 603.) The respondents deny infringement.

The administrative law judge, in Section IX. A, supra, has found that the asserted claims

of the '779 patent are not valid because, in the absence of new matter, said claims fail to satisfy the written description requirement of 35 U.S.C. §112, ¶1. Hence, there can be no infringement of invalid claims. Assuming, however, that the Commission determines that said asserted claims are not invalid, then the administrative law judge finds that some of the accused products infringe claim 5 of the '779 patent.

Referring to the accused products in the summary, supra, and the asserted claim 5, see Section VII C, supra, only some of the accused products are accused of infringing claim 5 of the '779 patent. Claim 5, through its dependency on independent claim 1, has the limitation "said coupling parts and locking elements of at least said first pair of sides enabling coupling of two of such panels so that the panels are coupled without play in the plane of the coupled panels." Said limitation, by its plain language, requires an absence of play in the coupled joint on at least one side (i.e. either the short or long side).

The specification of the '779 patent does not explicitly define "play." (JX-5). However the specification does describe "play" as undesirable because it allows gaps to form between the floor panels. (JX-1, at 1:54-60, 2:21-29, 3:1-7; Brickman, Tr. at 2101.) The administrative law judge finds nothing in the specification which teaches prevention of shifting of the coupled panels alongside each other. To the contrary, the specification describes such shifting as an advantage of the invention. (JX-5, at 3:55-58.) In addition, there is testimony that "play" is present if there is some looseness in the joint, such that a gap can form at the surface due to movement of the panels away from each other. (Thiers, Tr. at 45-48, 722-25; Loferski, Tr. at 513-14; Rice, Tr. at 2553-54.) Also, a person of ordinary skill in the art would not consider movement in a direction parallel to the joined edges to be "play." (Loferski, Tr. at 702, 725.)

Loferski tested for the presence of play in the accused products by physically handling the coupled panels and attempting to pull them apart. (Tr. at 514-15.) The administrative law judge finds no evidence that any of the accused products have play in the direction perpendicular to the joined edges of the panels. (CX-127C; CX-102.5; Loferski, Tr. at 514-15; Brickman, Tr. at 2100-01.) Hence the administrative law judge finds that the absence of “play” as described in the specification, is met by all of the accused products.

The language of claim 1 require at least two separate “clearances” between the tongue and groove of the coupled joint, adjacent to the outer peripheral portion of the tongue i.e., the portion of the tongue that approaches the deepest part of the groove, beyond the upper and lower contact surfaces), as well as intermediate contact surfaces between the tongue and groove. Said claim language reads:

[S]aid coupling parts of said first pair of sides upon coupling defining a plurality of separate clearances adjacent at least a portion of said outer peripheral portion of said tongue between said groove and said tongue...

[S]aid panel at said first pair of sides comprising at least one intermediate tongue contact surface on said tongue positioned along the outer peripheral portion of said tongue intermediate the upper and lower tongue contact surfaces; said panel at said first pair of sides comprising at least one intermediate groove contact surface intermediate the upper and lower groove contact surfaces; and said intermediate tongue and groove contact surfaces of two of said panels cooperating with each other upon coupling of two of said panels.

(JX-5 at 15:6-20 (emphasis added).)

Loferski tested the accused products for clearances by preparing small samples of the products and taking back-lit photographs of the joined profiles in order to observe whether light



was visible at various locations, thereby indicating the presence of a clearance.<sup>23</sup> (Tr. at 506-11; CPX-201; CPX-927; CX-103.) Loferski did acknowledge, however, that in some of the photographs it is a “close call” whether the required “plurality of clearances” is present. (Tr. at 688.) In some cases Loferski identified the required “plurality of clearances” by virtue of a small amount of light showing through a back-lit photograph. (Tr. at 674-79, 683; CX-926, at 26.) Loferski could not rule out that some of the “clearances” he identified might be the result of variations in manufacturing tolerances. (Tr. at 684; See also Rice, Tr. at 2397-98.)

Additionally, Lang performed his own tests on the following Yekalon products: Double Click 8.2 mm (RS 001-003, RS 010-012), Double Click 12.3 mm (RS 109-111), Big Click 12.3 mm (RS 007-009), Modified Round 8.2 mm (RS 004-006, RS 025-027), and Modified Round 12.3 mm (RS 031-033). (Lang, Tr. at 2166-74.) Lang prepared micrographs of samples of those products in the same way that Loferski did, with the only difference being that Lang used a different camera than Loferski. (Lang, Tr. at 2154, 2224.) Lang concluded that neither the Yekalon’s Modified Round 8.2 mm or Modified Round 12.3 mm included an “intermediate tongue contact surface,” an “intermediate groove contact surface,” or a “plurality of clearances”

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<sup>23</sup> Respondent Yekalon asserted that Loferski’s clearance test also had the purpose of determining the presence or absence of intermediate contact surface. (YBr at 24-25, Lang, Tr. at 2166-2174, RX-1029-30, Loferski, Tr. at 507, CX-103.) Unlike the Greenberg respondents and the PSV respondents, respondent Yekalon does not assert that its products lack the required clearances, but instead Yekalon asserts that its products lack the required intermediate contact surfaces. (YBr at 24-25.) However, Yekalon also asserted that the ‘779 patent teaches that contact surfaces are defined by clearances. (YBr at 25, (JX-5).) Additionally Yekalon’s argument that Loferski’s tests did not show presence of intermediate contact surfaces relies solely on the conclusion argued by the Greenberg respondents and the PSV respondents that Loferski misidentified a manufacturing tolerance as a clearance. (YBr at 24-25.) Thus, the administrative law judge finds that his conclusions with respect to whether Loferski’s tests showed a presence of clearances also applies with respect to whether Loferski’s tests showed a presence of intermediate contact surfaces.

as recited in claim 5 of the '779 patent. (Lang, Tr. at 2166-74.)

The administrative law judge finds that no special expertise is required to identify “clearances” from the back-lit photographs that Loferski prepared. (Loferski, Tr. at 692-93.) After an analysis of the photographs, the administrative law judge finds that the following accused products lack well-defined clearances that exceed the amount of open space that can be attributable to machine tolerances: Saili Wood Semi-Arc Locking (RS034-036); China Floors Easy Click 7.3 mm (RS 132-134); Lodgi Arc-locking 12mm (RS049-051); Shanghai Dekorman Easy-Lock (RS 144-146); Vöhringer Lock 7; and Yekalon Modified Round 8.2mm (RS004-006 and RS025-027). He finds further that, after an analysis of the Loferski photographs, complainants have established, by a preponderance of the evidence, the presence of the required clearances in the following products: Wujin Arc-locking 8.2mm (RS 058-060); Wujin Double-locking (RS 118-120, RS 153-155); Wujin Single Locking (RS 121-123, RS 156-158); Wujin Double Layer Double Locking (RS 159-162); Yongan Double-locking (RS 061-063); Yongan Arc Locking 8.2 mm (RS-052-054); Yongan Arc Locking 10 mm (RS 043-045); Hansol Lock (RS 112-114); Hansol Reve (RS 115-117); Lodgi Double Locking (RS 079-081); Lodgi Double-deck locking (RS 067-069); Lodgi Single locking (RS 150-152); Yingbin Double-locking (RS 147-149); Power Dekor Type 1 (RS 019-021); Shengda Type 2 (RS 082-084); Shengda Type 3 (RS 085-087); Vohringer Type B (RS 013-015); China Floors Easy Click 12.3mm (RS 141-143); China Floor Art Plus 8.3mm (RS 037-039); China Floors Just Click 7 (RS 040-042); Shanghai Dekorman Double-Click System (RS 128-131, RS 135-137); Yekalon Double Click 8.2mm (RS 001-003, RS 010-012); Yekalon Double Click 12.3mm (RS 109-111); Yekalon Big Click 12.3mm; and Yekalon Modified Round 12.3mm (RS 031-033). Hence, the administrative law

judge finds that complainants have established, by a preponderance of the evidence, that those accused products infringe claim 5 of the '779 patent.

G. Claim 17 Of The '779 Patent

The summary, supra, sets forth the accused products that are alleged by complainants to infringe claim 17 of the '779 patent. The staff supports the infringement allegation with the exception of the following products: Saili Wood Semi-Arc Locking (RS 034-036); China Floors Easy Click 7.3 mm (RS 132-134); and China Floors Easy Click 12.3mm (RS 141-143). (SPFF 611.) The respondents deny infringement.

The administrative law judge, in Section IX. A, supra, has found that the asserted claims of the '779 patent are not valid because, in the absence of new matter, said claims fail to satisfy the written description requirement of 35 U.S.C. §112, ¶1. Hence, there can be no infringement of invalid claims. Assuming however that the Commission determines that said asserted claims are not invalid, then the administrative law judge finds that some of the accused products infringe claim 17 of the '779 patent.

Referring to the accused products in the summary, supra, and the asserted claim 17 of the '779 patent, see Section VII C. supra, claim 17, through its dependency on independent claim 13 requires a clearance in the upper lip of the groove. Thus, independent claim 13 has the following language: "said upper lip defining a first clearance below said upper side of said panel and defining an upper lip contact surface adjacent said clearance, said first clearance defining an upper chamber below said upper side and above said tongue upon coupling of cooperating coupling parts." (emphasis added.)

The administrative law judge finds that no special expertise is required to identify

“clearances” from the back-lit photographs that Loferski prepared. (Loferski, Tr. at 692-93.)

After further analysis of Loferski’s photographs, with respect to some of the accused products, the clearance identified by Loferski as satisfying the “clearance” limitation of claim 13 involves a recess in the tongue portion of the joint rather than the groove portion of the joint as required by the claimed language. (Cao, Tr. at 1213-15, 1221-22.) Hence, the administrative law judge finds that the following accused products lack the required clearance in the upper lip of an uncoupled joint: Saili Wood Semi-Arc Locking (RS 034-036); China Floors Easy Click 7.3 mm (RS 132-134); and China Floors Easy Click 12.3mm. (RS 141-143). He finds further that, after an analysis of the Loferski photographs, complainants have established, by a preponderance of the evidence, the presence of the required clearances in the following products: Saili Wood Double-locking (RS 064-066); Wujin Arc-locking 8.2mm (RS 058-060); Wujin Arc-locking 12mm (RS 055-057); Wujin Double-locking (RS 118-120, RS 153-155); Wujin Single Locking (RS 121-123, RS 156-158); Wujin Double Layer Double Locking (RS 159-162); Yongan Double Locking (RS 061-063); Yongan Arc Locking 8.2 mm (RS 052-054); Yongan Arc Locking 10 mm (RS 043-045); Hansol Lock (RS 112-114); Hansol Reve (RS 115-117); Lodgi Arc-locking 8.2mm (RS 046-048); Lodgi Arc-locking 12mm (RS 049-051); Lodgi Double Locking (RS 079-081); Lodgi Double-deck locking (RS 067-069); Lodgi Single locking (RS 150-152); Yingbin Single-locking (RS 070-072); Yingbin Double-locking (RS 147-149); Power Dekor Type 1 (RS 019-021); Shengda Type 1 (RS 022-024); Shengda Type 2 (RS 082-084); Shengda Type 3 (RS 085-087); Vohringer Type A (RS 028-030); Vohringer Type B (RS 013-015); Vohringer Type C (RS 016-018); China Floors Easy Click 8.3mm (RS 138-140); China Floors Art Plus 8.3mm (RS 037-039); China Floors Just Click 7 (RS 040-042); Shanghai Dekorman Easy-Lock (RS 144-146);

Shanghai Dekorman Double-Click System (RS 128-131, 135-137); Yekalon Double Click 8.2mm (RS 001-003, RS 010-012); Yekalon Double Click 12.3mm (RS 109-111); Yekalon Big Click 12.3mm (RS 007-009); Yekalon Modified Round 8.2mm (RS 004-006; RS 025-027); and Yekalon Modified Round 12.3mm (RS 031-033). Hence the administrative law judge finds that complainants have established by a preponderance of the evidence that those accused products infringe claim 17 of the '779 patent.

#### H. Defaulting Respondents

In determining what relief may be granted to complainants against the defaulting respondents, which defaulted pursuant to Commission rule 210.16, the administrative law judge presumes the facts alleged with respect to a particular defaulting respondent in the complaint to be true. See Commission rule 210.16(c); Certain Electrical Connectors and Products Containing Same, Inv. No. 337-TA-374, Commission Determination, 1996 WL 1056121 at fn.1 (Feb. 9 1996). In support of complainants' claims of infringement with respect to each of the named respondents in the amended complaint including the defaulting respondents, complainants made the following general allegations:

Upon information and belief, the accused laminated floor panels that have been imported, sold for importation, and/or sold after importation into the United States by certain of the proposed Respondents infringe directly claim 1, 14, 17, 19, 20, 21, 37, 52, 65, and 66 of the '486 patent, infringe directly claims 1, 2, 10, 13, 18, 19, 22, 23, 24, and 27 of the '836 patent, infringe directly claim 1-6 of the '292 patent, and infringe directly claims 1, 5, 13, 17, 27, and 28 of the '779 patent.

Amended Complaint, § 6.1 (emphasis added). Complainants, in their proposed findings do make reference to said general allegations. (See e.g. CFF54.1.) However said allegations only make

reference to “certain of the proposed respondents’ rather than tying the allegations to specific respondents. (See Amended complaint, § 6.1.)

Complainants, as to asserted claims 1, 10, 18 and 23 of the ‘836 patent and claims 3 and 4 of the ‘292 patent, did attach as exhibits to the complaint claim charts for claim 1 of the ‘836 patent which, along with the photographs labeled with reference numbers corresponding to the claim charts, provided factual infringement allegations as to claim 1 of the ‘836 patent with respect to each of the defaulting respondents. (FF 31-47.)<sup>24</sup> Hence, the administrative law judge finds that each of the defaulting respondents has infringed claim 1 of the ‘836 patent.

#### I. Respondent Yongan

Referring to respondent Yongan Forestry (Group) Joint Stock Co. Ltd. (Yongan) on April 5, 2006, Yongan notified the Commission that “it withdraws participation” from this investigation, “effective immediately upon filing of this notice.” Significantly, the withdrawal

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<sup>24</sup> For allegations directed against defaulting respondent 3E (FF 31), see Complaint, §6.2 and Exs 7, 102; against defaulting respondent AMZ (FF 32), see Complaint §6.3 and Exs. 9 and 103; against defaulting respondent Changzhou Donjia (FF 33), see Complaint §6.4 and Exs. 11 and 104; against defaulting respondent Dalton (FF 34), see Complaint §6.20 and Exs. 43 and 120; against defaulting respondent Huzhou Yongji (FF 35), see Complaint §6.8 and Exs. 19 and 108 ; against defaulting respondent Lodgi NA (FF 36), see Complaint §6.9 and Exs. 21 and 109; against defaulting respondent Pacific Flooring (FF 37), see Complaint §6.10 and Exs. 23 and 110; against defaulting respondent P.J. Flooring (FF 38), see Complaint §6.11 and Exs. 25 and 111; against defaulting respondent R.A.H. (FF 39), see Complaint §6.22 and Exs. 47 and 122; against defaulting respondent Salvage Building (FF 40), see Complaint §6.20 and Exs. 43 and 120; against defaulting respondent Shanghai Zhengrun (FF 41), see Complaint §6.14 and Exs. 31 and 114; against defaulting respondent Stalheim Industries (FF 42), see Complaint §6.15 and Exs. 33 and 115; against defaulting respondent Stalheim U.S.A.;. (FF 43), see Complaint §6.15 and Exs. 33 and 115; against defaulting respondent Tsailin (FF 44), see Complaint §6.16 and Exs. 35 and 116; against defaulting respondent Universal Flooring (FF 45), see Complaint §6.9 and Exs. 21 and 109; against defaulting respondent Vegas Laminate (FF 46), see Complaint §6.21 and Exs. 45 and 121; against defaulting respondent QDM (FF 47), see Complaint §6.23 and Ex. 125.

included a sworn statement from Wu Jingxian, the president of Yongan, indicating that “[t]he Respondent, understands all consequences of such withdrawal including but not limited to, the Respondent, will not be defended and consequently lose the case.” Furthermore, on April 10, 2006, Greenberg Traurig, LLP filed a notice of withdrawal of representation of Yongan, “effective as of the date of filing of Yongan’s prior notice, i.e., April 5, 2006.” (FF 48-50.) Complainants however had discovery from Yongan. Thus complainants, in their post-hearing submissions, accused Yongan of infringement of claims 1, 2 10, 18, and 23 of the ‘836 patent. (See Section XI. supra.) Therefore, the administrative law judge has treated Yongan as an active respondent. However, in view of the sworn statement of Yongan, filed on April 5, the administrative law judge is no longer serving documents on Yongan and thus has removed Yongan from the service list.

## XII. Validity

The PSV respondents argued that claim 1 of the ‘836 patent is obvious based on Terbrack et al, U. S. Patent No. 4,426,820 (RX-8) (Terbrack) in view of a Japanese patent Yoichi publication No. 8-109734 (RX-152) (Yoichi) (PSVBr at 72-74); that claim 2 of the ‘836 patent is anticipated based on Terbrack (PSV Br at 74-76); that each of claims 10, 18 and 23 of the ‘836 patent is obvious based on Yoichi in view of Terbrack. (PSVBr at 76-79.) It is argued that claim 3 of the ‘292 patent is anticipated by Terbrack (PSVBr at 82) and claim 4 of said patent is obvious based Terbrack in view of Yoichi. (PSVBr at 82-83.) PSV respondents further argued that claim 5 of the ‘779 patent is obvious on Yoichi in view of Terbrack or German Friedl unexamined patent application 4242530 A1 (RX9) (Friedl) (PSVBr at 83-84) and further is obvious based on Friedl in view of Yoichi (PSV Br at 83-85); and that claim 17 of the ‘779

patent is obvious based on Friedl in view of Yoichi. (PSVBr at 84-85.)

The Greenberg respondents argued that claims 1, 2, 10, 18 and 23 of the '836 patent and claims 3 and 4 of the '292 patent are anticipated by Japanese Konishi unexamined patent application H7-300979 (RX 153, RX 548) (Konishi); that claim 3 of the '292 patent is anticipated by each of Terbrack, Yoichi and Friedl; that claims 1, 2, 10, 18 and 23 of the '836 patent are obvious based on Japanese Hayashi patent application 03-169,967 (RX 102) (Hayashi) and Terbrack in view of Konishi; and that claims 18 and 23 of the '836 patent are obvious based on Terbrack and Hayashi in view of Martensson U. S. Patent No. 6,101,778 (RX-545). (GBr at 94-5.) It is also argued that claim 4 of the '292 patent is obvious over Terbrack in view of Konishi, or obvious over Friedl in view of Konishi, or obvious over Yoichi in view of Konishi. (GBr at 95.) Greenberg respondents further argued that claims 5 and 17 of the '779 patent are obvious over Terbrack, Friedl, or German Schroder patent DE 3343601 (RX-546) in view of Konishi; and that the "clearances" of the asserted claims of the '779 patent are inherently disclosed by Terbrack and also taught by Momberg U. S. Patent No. 890,436 (RX-550), Hayashi, Nelson U. S. Patent No. 5,618,602 (RX-109), Schroder, and Friedl. (GBr at 96-98.)<sup>25</sup>

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<sup>25</sup> The administrative law judge finds the filings of the Greenberg respondents regarding alleged invalidity based on prior art confusing. In the section heading of the brief at GBr at 96, they argued that claim 3 of the '292 patent is obvious over Terbrack in view of Konishi, Friedl in view of Konishi, or Yoichi in view of Konishi. Yet, in the body of its brief at GBr at 96, the Greenberg respondents argued that said claim 3 is anticipated by Konishi, Terbrack, Yoichi, and Friedl, citing findings of fact RFF 2000.341 -383. In said findings of fact, the Greenberg respondents argued anticipation for said claim 3 for each of the four references. In its initial brief, they also argued obviousness of claims 1 and 2 of the '836 patent based Terbrack and Hayashi in view of Konishi. (GBr at 94-95.) However, in their findings of fact, the Greenberg respondents appeared to be arguing anticipation for said claim 2 for each of the three references. (See RFF 2000.214 - 258.) In the section heading of the brief at GBr at 94, the Greenberg respondents argued that claims 10, 18 and 23 of the '836 patent are obvious over Konishi in view of Hayashi and Terbrack. However, the body of said brief at GBr at 94 states in part that said



Yekalon argued that the “three patents-in-suit are invalid , as established by the evidence and arguments presented in detail by the other Respondents.” (YBr at 25.) Chinafloor respondents “expressly adopt and rely on the arguments presented by the other Respondents relating to Complainants’ lack of proof of . . . the invalidity of the patents in suit.” (ChRBr at 1.)

Complainants argued that the prior art relied on by respondents does not anticipate or make obvious that asserted claims of the ‘826 , ‘292 and ‘779 patents. (CRBr at 79-90.)

In the staff’s view, respondents did not establish, by clear and convincing evidence, that claims 1 and 2 of the ‘836 patent claims 3 and 4 of the ‘292 patent, claims 10, 18 and 23 of the ‘836 patent and claims 5 and 17 of the ‘779 patent are anticipated or obvious in light of any prior art. (SBr at 75-79.)

A patent issued from the Patent Office bears the presumption of validity. 35 U.S.C. § 282. The party challenging a patent’s validity has the burden of overcoming this presumption by clear and convincing evidence. Advanced Display Sys., Inc. v. Kent State Univ., 212 F.3d 1272 (Fed. Cir. 2000). An analysis for anticipation under section 102 is a two-step inquiry. Power

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claims are obvious based on Terbrack and Hayashi, in view of Konishi and cites RFF 2000.149 - 258. Further, the section title of the findings for claim 10 just prior to RFF 2000.149 reads: “Claim 1 is Anticipated By Konishi and is Obvious Based on Terbrack and Hayashi, In View Of Konishi.” The administrative law judge finds no findings of fact corresponding to the Greenberg respondents’ argument that claims 10, 18 and 23 of the ‘836 patent are obvious based on Terbrack and Hayashi, in view of Konishi. In the brief, the Greenberg respondents argued that only claims 18 and 23 of the ‘836 patent are rendered obvious in view of Martensson, presumably based on Konishi, according to the section heading at GBr at 94. The body of said brief at GBr at 94, however, which refers to claim 10 of the ‘836 patent in addition to claims 18 and 23 of said patent, does not state exactly which prior art reference in combination with Martensson renders the claims in issue obvious. The brief merely states that Martensson teaches snapping (limitations of claims 10 and 18 and 23), and cites to RFF 2000.324 - 325, which refers to findings of fact only with respect to claim 23, not claims 10 and 18. Further, the section title of the findings for claim 23 just prior to RFF 2000.305 reads: “Claim 23 is Anticipated By Konishi and is Obvious Based on Terbrack and Martensson, In View Of Konishi.”

Mosfet Technologies, L.L.C. v. Siemens AG, 378 F.3d 1396, 1406 (Fed. Cir. 2004). The first step requires construing the claim, which is a question of law to be decided by the administrative law judge. Oakley, Inc. v. Sunglass Hut Int'l, 316 F.3d 1331, 1339 (Fed. Cir. 2003); Markman v. Westview Instruments, Inc., 52 F.3d 967, 970-71 (Fed. Cir. 1995). The second step requires a comparison of the properly construed claims to the prior art, which is a question of fact. Power Mosfet, 378 F.3d at 1406; Oakley, 316 F.3d at 1339.

A patent claim is invalid for anticipation if a prior art reference discloses, either expressly or inherently, all of the limitations of a claim. EMI Group N. Am., Inc. v. Cypress Semiconductor Corp., 268 F.3d 1342, 1350 (Fed. Cir. 2001) (citation omitted). As to any inherent disclosure of a prior art reference, the Federal Circuit has stated:

To serve as an anticipation when the reference is silent about the asserted inherent characteristic, such gap in the reference may be filled with recourse to extrinsic evidence. Such evidence must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill.

Metabolite Labs., Inc. v. Laboratory Corp. Of America Holdings, 370 F.3d 1354, 1367 (Fed. Cir. 2004).

Under 35 U.S.C. § 103, a patent is valid unless “the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.” The ultimate question of obviousness is a question of law, but “it is well understood that there are factual issues underlying the ultimate obviousness decision.” Richardson-Vicks Inc. v. The Upjohn Co., 122 F.3d 1476, 1479 (Fed. Cir. 1997); Lockwood v. American Airlines, Inc., 107 F.3d 1565, 1570 (Fed. Cir. 1997).

After construing the claims, the next “step in an obviousness inquiry is to determine whether the claimed invention would have been obvious as a legal matter, based on underlying factual inquiries including: (1) the scope and content of the prior art; (2) the level of ordinary skill in the art; (3) the differences between the claimed invention and the prior art; and (4) secondary considerations of nonobviousness, also known as ‘objective indicia of nonobviousness.’” Ruiz, 234 F.3d at 660; Graham v. John Deere Co., 383 U.S. 1, 17 (1966). Secondary considerations, also part of the Graham factors, include commercial success, long-felt but unresolved need, failure of others, copying, and unexpected results. Id.

With respect to the scope and content of the prior art, as the Federal Circuit stated in State Contracting & Engineering Corp. v. Condotte America, Inc., 346 F.3d 1057 (Fed. Cir. 2003), citing In re Clay, 966 F.2d 656, 658 (Fed. Cir.1992): “A prerequisite to making a finding on the scope and content of the prior art is to determine what prior art references are pertinent.” References within the statutory terms of 35 U.S.C. § 102 (anticipation) can qualify as prior art for an obviousness determination only when analogous to the claimed invention. In re Clay, 966 F.2d 656, 658 (Fed. Cir. 1992). The Federal Circuit restated the test for determining the scope and content of the prior art to be considered for obviousness purposes in In re Bigio as follows:

Two separate tests define the scope of analogous prior art: (1) whether the art is from the same field of endeavor, regardless of the problem addressed and, (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved. In re Deminski, 796 F.2d 436, 442 (Fed. Cir.1986); see also In re Wood, 599 F.2d 1032, 1036 (CCPA 1979).

In re Bigio, 381 F.3d 1320, 1325 (emphasis added); accord State Contracting, 346 F.3d at 1069.

One of ordinary skill in the art would have known of such art because such a person is a

hypothetical person who is presumed to be aware of all the pertinent prior art. Custom Accessories, Inc. v. Jeffrey-Allan Industries, Inc., 807 F.2d 955, 962 (Fed. Cir. 1992).

A. Anticipation: Asserted Claims 1 And 2 Of The '836 Patent And Asserted Claims 3 And 4 Of The '292 Patent

The PSV respondents have argued that claim 2 of the '836 patent and claim 3 of the '292 patent are anticipated by Terbrack while the Greenberg respondents argued that claim 3 of the '292 patent is anticipated by Terbrack.

Terbrack is a U.S. patent issued to Heinz and Josef Terbrack on February 24, 1984, and is entitled "Panel for a Composite Surface and a Method of Assembling Same" (RFF 66.1 (undisputed).) Terbrack discloses panels that are coupled by mating the tongue on one panel with the groove on an adjoining panel (RFF 66.2 (undisputed)), and that Terbrack teaches that adjoining panels are coupled by rotating the tongue on one panel into the groove of a second panel. (RFF 66.4 (undisputed).) Terbrack also discloses sports ground panels made of plastic. The background section of Terbrack describes the problem to be solved: "Conventional running courses or sports grounds of plastic are produced from individual sections" that are expensive and time consuming to weld together. (RX-8.) Terbrack solved this with plastic sports ground panels that can be coupled without welding. The Abstract of Terbrack states:

A panel interconnectable with like panels for use in forming a sports surface has a substantially rectangular and planar member and an edge connector at at least one set of opposite edges including a first locking member extending from the lower surface of the panel at one edge and having a groove extending inwards from the end thereof and towards the one edge and terminating below the upper surface. A second locking member extending from the upper surface of the panel at the other edge, has a projection configured to engage in the groove to mate with the first locking member at the one edge of an adjacent panel to align the

upper and lower surfaces of the panels. A plurality of these panels are advantageously assembled by the method according to the present invention to form a sports surface.

(RX-8, Abstract)

As indicated supra, asserted independent claim 2 of the '836 patent states in part:

a coupling part of said panel, when engaged with a complementary coupling part of another one of said panel, configured and arranged to produce a biasing force between such coupled panels tending to urge the panels towards each other;

at least one of said coupling parts including an elastically bendable portion having a relaxed unbent position, and which, when in a coupled condition, is at least partially bent out of its normal relaxed position and thereby provides said biasing force.

(JX-1 at 14 (emphasis added).) Similarly, non-asserted independent claim 1 of the '292 patent, on which asserted claim 3 depends, states in part:

a coupling part of said panel, when engaged with a cooperating coupling part of another one of said panel, urging the coupled panels towards each other;

at least one of said coupling parts including an elastically bendable portion having a relaxed unbent position, and which, when in a coupled condition, is at least slightly bent out of its normal relaxed unbent position to effect said urging of the coupled panels together.

(JX-3 at 14 (emphasis added).)

At the outset, Terbrack (RX-8) was disclosed to the Patent Office in connection with the prosecution of each of the patents in issue. (CFF 857 (undisputed); CFF 858 (undisputed).) Also critical to claim 2 of the '836 patent and claim 3 of the '292 patent is the claimed requirement that there be an elastically bendable portion that upon panel coupling is at least partially bent out of its normal relaxed position to provide a biasing force that urges the panels together.

Describing the embodiment shown in Figures 11 to 16, the specification of Terbrack

discloses:

FIG. 11 is a plan view of another panel 1, with the edge structures being shown in greater detail in FIGS. 12 to 16... As appears from the view, the inclined faces 39 and 43 are of different degrees of inclinations, such that the inclination of face 43 is steeper. In this manner, the side faces of recess 37 are imparted a wedge-shaped configuration which could be readily seen in faces 39 and 43 of the Figure were extended. Numeral 41 in FIG. 14 indicates a projection engaging into recess 41' of FIG. 15 when the panels are joined together. Upon joining, face 36 of FIG. 14 and face 36' of FIG. 15 are precisely matched to each other. The lower surface of the panel is shown at 33 in FIG. 14. Numeral 42 of FIG. 14 indicates that part which tightly or sealingly engages the complementary inclined face 41' of FIG. 15.

(RX-8 at 5 (emphasis added).) Thus, the specification shows that after coupling, face 36 of FIG. 14 and face 36' of FIG. 15 are precisely matched to each other, which would indicate that the lower lip (projection 41) of the groove of the Terbrack panels would not bend when coupled. Moreover, the administrative law judge finds no other figure in Terbrack that shows a bent lower lip after coupling and the specification of Terbrack does not disclose a bent lower lip after coupling. (RX-8.) Hence, Terbrack does not disclose a bent lower lip after coupling. Significantly, Cao conceded that no figure of Terbrack shows a bent lower lip after the panels are coupled. (Cao, Tr. at 1633-34.) Furthermore, the administrative law judge finds no figures in Terbrack which illustrate that the lower lip is elastically bendable, and there is no written disclosure in the Terbrack specification that the lower lip of the groove is elastically bendable. (RX-8.) Thus, Terbrack does not teach that the lower lip of the groove is elastically bendable. Additionally Terbrack shows that after coupling, the side edges cannot be displaced relative to each other. (RX-8, Certain Flooring Products, ITC Inv. No. 337-TA-443, Final Initial

Determination at 117-118 (November 2, 2001.)

Based on the foregoing, the administrative law judge finds that the PSV respondents and the Greenberg respondents have not established, by clear and convincing evidence, that Terbrack anticipates asserted claim 2 of the '836 patent and/or claim 3 of the '292 patent.

The Greenberg respondents argued that claims 1 and 2 of the '836 patent and claims 3 and 4 of the '292 patent are anticipated by Konishi. See supra.

On November 14, 1995 a Japanese Unexamined Patent Application published, entitled "Floor Material" and the named inventors were Konishi, et al. (RX 153.) Konishi discloses that the "invention relates to a laid floor material which is installed without using nails or adhesives." (RX 153 at 0001.) Konishi shows that with respect to the embodiment of claim 3, during the step of introducing the tongue into the groove, the bottom portion of the groove, which is made from a flexible sheet of rubber or elastic resin, deforms in response to the pressure of the tongue. In response to the deformation, the lower portion of the groove presses upward on the tongue as it completes coupling into the groove. (RX-548 at 4.)

At the outset, the Konishi reference, which is a Japanese unexamined patent application, number H7-300979 (RX 548, RX 153), was disclosed to the Patent Office in connection with the prosecution of each of the patents in issue. (CFF 755 (undisputed); CFF 756 (undisputed).) Also initial to claims 1 and 2 of the '836 patent and claims 3 and 4 of the '292 patent is the claimed requirement that there be an elastically bendable portion that upon panel coupling is at least partially bent out of its normal relaxed position to provide a biasing force that urges the panels together.

Konishi is titled "Floor Material" and discloses that flooring material "is formed from

wooden material such as a base material having a certain thickness, particle board, or MDF.”

(RX-548 at 3.) It makes reference to “(Claim 1)” and (Claim 2)” which describe single base flooring material, (RX-548 at 2) Konishi’s “(Claim 3)” reads:

A flooring material where the flooring material unit has a structure comprising layers of a flexible base material on the lower surface of the wooden material, and has a mating protrusion part of the above male part and a locking groove part of the female part of the flexible base material as well as locking groove parts on the upwards-facing locking hook and the down-wards-facing locking hook.

(RX-548 at 2).

Said Konishi claim 3 does have an elastically bendable coupling part. However it “is formed on the upper half 1a of wood, and on the lower half 1b of a flexible sheet.” (RX-548 at 4.) Konishi further teaches that the lower half of this embodiment, the flexible sheet, is a “sheeting material which can be elastically deformed as well as which has flexibility, such as a rubber or elastic resin sheet.” (RX-548 at 4.) The administrative law judge finds nothing in Konishi to suggest an elastically bendable portion that upon panel coupling is at least partially bent out of its normal relaxed position to provide a biasing force that urges the panels together.

As to Greenberg respondents’ argument that Figures 4, 6, and 7 of Konishi shows that when coupling occurs, the lower lip bends, the administrative law judge finds that Figure 6 does not show a bent lower lip since in Figure 6, the two panels are not yet coupled together. (RX-548.) The administrative law judge further finds that Figure 4 of Konishi does not show a bent lower lip since no lower lip can be seen in the drawing of Figure 4. (RX-548.) Moreover, there is no indication that the lower lip is bent in Figure 7. (RX-548.)

Based on the foregoing, the administrative law judge finds that the Greenberg



respondents have not established, by clear and convincing evidence, that the Konishi reference anticipates asserted claims 1 and 2 of the '836 patent and claims 3 and 4 of the '292 patent.

The Greenberg respondents have argued that claim 3 of the '292 patent is anticipated by Yoichi. See supra. The title of Yoichi is "Joint-part construction for a wooden flooring material." The Abstract of Yoichi states:

(Purpose) To provide a joint-part construction for wooden flooring materials which are not adversely affected by any upheaval movement in the joint part even if the wooden material 10 expands.

(RX-152 at 1.) Greenberg respondents rely on Figures 12 through 14 of Yoichi, arguing that "[w]hen the tongue is forced into the groove, both the upper and lower lips must bend in order for coupling to occur." (GRSFF654.)

Describing the "fourth example of embodiment," which is shown in Figures 12 through 14, Yoichi states:

The locking part 47 can be the same wooden material as the protrusion 41, or it can be formed of an elastic material such as rubber or a synthetic resin such that it can be easily mated into the receiving/locking groove 49.

When locking the locking part 47 into the receiving/locking groove 49, due to the presence of the slit 48, the locking part 47 will be compressed from above and below, and smoothly locking into the receiving/locking groove 49, after locking, it will return to its original shape, thereby fitting such that it will catch onto the receiving/locking groove 49. As shown in Figure 14, the depth dimension of the groove 42 is formed to be larger than the protrusion dimension of the protrusion 41.

(RX-152 at 4 (emphasis added).) Thus, the administrative law judge finds that Figures 12 through 14 of Yoichi teach that the locking part 47 will be compressed from above and below

due to the presence of the slit 48, and after locking, said locking part 47 will return to its original shape. Critical to claim 3 of the '292 patent is the claimed requirement that there be an elastically bendable portion that upon panel coupling is at least partially bent out of its normal relaxed position to provide a biasing force that urges the panels together. Moreover the administrative law judge has interpreted claim 3 as requiring after bending and once the panels are coupled, that at least a portion of the elastically bendable portion remains changed from its initial uncoupled position. However, Yoichi does not disclose said requirement since the locking part 47 of Yoichi "returns to its original shape," i.e., returns to "its normal relaxed position" after coupling.

Based on the foregoing, the administrative law judge finds that Greenberg respondents have not established, by clear and convincing evidence, that Yoichi anticipates asserted claim 3 of the '292 patent.

The Greenberg respondents argued that claim 3 of the '292 patent is anticipated by Friedl. Friedl, which is a German unexamined patent application, was disclosed to the Patent Office in connection with the prosecution of each of the patents in issue. (CFF 887 (undisputed); CFF 888 (undisputed).) The title of Friedl is "Building Elements for Walls, Ceilings or Roofs of Buildings." (RX-9.) Friedl discloses building elements "used for paneling, manufacturing and protecting buildings" as well as "for constructing roadways." (RX-9 at 1.) The administrative law judge construed "floor covering" of claim 3 to mean "flooring of the class that consists of laminated floor panels and other kind of hard floor panels, such as veneer parquet, prefabricated parquet, or other floor panels which can be compared to laminated flooring." Hence, he finds that Friedl does not disclose a floor covering.

The Greenberg respondents rely on the description of Figures 5d and 5e in Friedl in arguing that “Friedl teaches elastically bendable portion.” (GRSFF648.)

Describing Figures 5d and 5e, Friedl states in part:

In Figure 5d, the mounting is largely concluded... At this point in time, however, a gap 20 still gapes in the rear area and must yet be closed; furthermore it is necessary to secure the two elements in their positions. To this end, the additional building element 11' has two bead-like protrusions 18... However, the two elements can then be braced together by a concluding pressure so that a butt joint is formed in the rear area due to the elastic deformation of the protrusion 18 and the tongue is pushed further into the groove-like formation, ensuring a form-fitting connection but nevertheless leaving a certain play.

(RX-9 at 5 (emphasis added).) The language “but nevertheless leaving a certain play” shows that there remains certain amount of “play” after coupling.<sup>26</sup> Thus, although Friedl shows that during the coupling process there is elastic deformation of the protrusion 18 the administrative law judge finds that, Friedl does not show that there is continuous deformation after coupling, nor does he find any suggestion of a biasing force that urges the panels together.

Based on the foregoing, the administrative law judge finds that the Greenberg respondents have not established, by clear and convincing evidence, that Friedl anticipates asserted claim 3 of the '292 patent.

B. Anticipation: Asserted Claims 10, 18 and 23 of the '836 Patent

The Greenberg respondents also argued that claims 10, 18 and 23 of the '836 patent are anticipated by Konishi. (See supra.) It is argued that regarding “the key snap action limitations” of claim 10, Konishi’s Figure 2 teaches snapping. (Id.)

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<sup>26</sup> The specification describes “play” as undesirable because it allows gaps to form between the floor panels. See JX-1 at 1: 54:60; 2:21-29; 3:1-7; Brickman, Tr. at 2101.

As indicated supra, each of the asserted independent claims 10 and 23 states in part:

wherein said coupling parts and the mechanical locking elements of at least said second pair of opposite side edges are configured such that two identical ones of said floor panel are coupled by shifting them laterally towards each other in a substantial planar fashion, and wherein the locking elements of said second pair of opposite side edges provide a snap-together coupling providing a snap-action during the coupling of two panels by shifting them laterally towards each other, said snap action being delivered substantially by said core material.

(JX-1 at 17-19 (emphasis added).)

Critical to claims 10, 18 and 23 are a “snap,” “snap-action,” and “snap-together” coupling, which the administrative law judge has construed, as a physical action that takes place when an elastically bendable portion of one panel bends during coupling to allow the joint to come together and after coupling the bendable portion returns towards its original position when the locking elements are engaged, and also a requirement as to “shifting them (the coupling parts) laterally towards each other in a substantial planar fashion,” which has been construed as requiring that the panels slide towards each other essentially in a substantial planar fashion; that there is no requirement that the one panel be “easily” pushed toward another panel while both are in a substantial planar fashion.

Konishi’s specification details that each panel has a female part and a male part. (RX-548 at 0007). Konishi’s specification identifies six key components of the panel (three for the male part of the panel, three for the female part of the panel) that provide for the fitting of two panels:

The female part is ... comprised of a groove 2a which is opened towards the front side... a mating groove part 2d which is opened on the upper side towards the front side... The male part is

comprised of the protrusion 3a ... that could be mated with the horizontal groove 2a of the above female part ... the mating protrusion part 3c that can be mated with the mating groove part 2d of the above female part.

...

Also, in the parallel short sides of the flooring material unit, the upwards-facing locking hook 4 that is formed on one side edge surface, ... and the downwards-facing locking hook 5 that is on the other side edge part...

(RX-548 at 0015-0016 (emphasis added).) Konishi's specification explains that the joining process requires the angling of one of the panels before joining, and the subsequent evening out of the angled panel to produce three key couplings that make up the joining process:

This installation operation consists of, as shown in Figures 4 through 6, mating the protrusion 3a of the male part 3 into the opening edge of the groove 2a of the female part 2 in the flooring material 1 of the previous row while holding the flooring material 1 to be installed at a slope towards the width direction and sloped towards the lower side such that the male part 3 side will be the lower sloped edge, and at the same time, by moving it towards the longitudinal direction along said groove 2a, the downwards-facing locking hook 5 of the short side that is formed at an angle to the male part 3 is located in opposition to the upwards-facing locking hook 4 of the previously installed flooring material unit 1.

While settling the flooring material unit 1 to be installed from this sloped state down in the horizontal direction, by inserting the protrusion 3a of the male part 3 into the groove 2a of the female part 2 of the already installed flooring material unit 1, the leading edge locking protrusion part 5c of the downwards-facing locking hook 5 will gradually mate with the groove 4b of the upwards-facing locking hook 4 of the previously installed flooring material unit 1 towards the back edge side from the front edge side, and at the same time, the mating protrusion part 3c on the lower surface of the male part 3 will mate with the mating groove part 2d of the female part 2, and in this state, the flooring material unit 1 will be installed on the flooring base material A.

(RX-548 at 0019-0020 (emphasis added).)

The administrative law judge finds that Konishi's specification requires: (1) coupling within the plane of the panel (through the horizontal coupling of the groove of the female part and the protrusion of the male part) by angling the male panel and moving it to an appropriate position; and (2) coupling outside of the plane of the panel (through two vertical couplings: (a) the vertical coupling of the upwards-facing mating groove part of the female part and the downwards-facing mating protruding part of the male part located on the long side of the panel; and (b) the vertical coupling of the upwards-facing locking hook of the female part and the downwards-facing locking hook of the male part located on the short side of the panel) by gradually evening the male panel until it is coplanar with the female panel. Additionally, the administrative law judge also finds that the panels described by Konishi cannot be coupled by laterally shifting the panels together because the joining process requires the angling of the male panel to facilitate the horizontal coupling and the appropriate placing of the male panel to facilitate the vertical coupling.

While the claims in issue of the '836 patent allows for non-planar coupling as long as it is still substantially planar, the invention does not require coupling in a non-planar fashion through the requirement of vertical coupling. (JX-1 at 17:34-35, 38-39; 18:63-64; 19:1-2). Additionally, while said claims permit slight angling of the panels, they do not require said angling through the requirement of vertical coupling. (JX-1.) In contrast, the panels described by Konishi require coupling in a non-planar fashion through the requirement of vertical coupling and the panels described by Konishi cannot be coupled by laterally shifting the panels together and must be coupled by angling and careful placement of the panels, thus preventing lateral shifting of the panels. (RX-548 at 0019-0020.) Hence, the administrative law judge finds that Konishi does not

teach “snap action” because based on Konishi’s specification there is no way to laterally couple the panels due to the angling of one of the panels required by the two previously-described vertical couplings. Based on the foregoing, the administrative law judge finds that the Greenberg respondents have not established, by clear and convincing evidence, that Konishi anticipates asserted claims 10, 18 and 23 of the ’836 patent.

C. Obviousness: Asserted Claims 1 And 2 Of The ’836 Patent And Asserted Claim 4 Of The ’292 Patent

PSV respondents have argued that claim 1 of the ’836 patent and claim 4 of the ’292 patent are obvious based on Terbrack in view of Yoichi while the Greenberg respondents have argued that claims 1 and 2 of the ’836 patent are obvious based on Terbrack and Hayashi in view of Konishi and that claim 4 of the ’292 patent is obvious over Terbrack in view of Konishi or obvious over Friedl in view of Konishi or obvious over Yoichi in view of Konishi. (See supra.) The Greenberg respondents also have argued that claims 1 and 2 of the ’836 patent are obvious based on Terbrack and Hayashi in view of Konishi and that claim 4 of the ’292 patent is obvious over Terbrack in view of Konishi or obvious over Friedl in view of Konishi or obvious over Yoichi in view of Konishi. (See supra.)

The PSV respondents in their obviousness argument, based on the combination of Terbrack in view of Yoichi, argued that Figures 13 and 14 of Yoichi disclose a “biasing force” created between the upper and lower surfaces of the tongue and groove; and that even if Terbrack does not lead a person of ordinary skill in the art to believe that HDF and MDF could be substituted for the plastic panels disclosed therein, there are other references that teach the use of HDF and MDF for floor panels, including Yoichi, which can be combined with Terbrack.

(PSVBr at 73-4.) The administrative law judge has found supra, that each of Terbrack, Yoichi, Konishi and Friedl lacks the critical requirement of an elastically bendable portion that upon panel coupling is at least partially bent out of its normal relaxed position to provide a biasing force that urges the panels together, as required by claims 1 and 2 of the '836 patent and claim 4 of the '292 patent.

Referring to Hayashi, at the outset, Hayashi was disclosed to the Patent Office in connection with the prosecution of each of the patents in issue. (CFF 788 (undisputed); CFF 789 (undisputed).) Greenberg respondents rely on Cao's testimony in arguing that Figures 1 and 2 of Hayashi, together with the text of Hayashi, show a bent lower lip. (RFF2000.179.)

The title of Hayashi is "Floating Floor Material," and as the title suggests, Hayashi is directed to a "floating floor material that is floated on the ground under a floor, characterized in that it is formed by laminating a thin wooden decorative panel 2 onto the surface layer of a flexible sheet-shaped base material 1." (RX-547 at 2.)

Describing the coupling parts shown in Figure 1, Hayashi explains:

In addition, when connecting the lower side 4b of the engagement recessed portion 4 elastically deforms downward in conjunction with the engagement of the engagement protrusion portion 3, and after engagement, the lower side 4b returns to its original state to pursue reliable disengagement prevention.

(RX-547 at 3 (emphasis added).) Hence, Hayashi teaches that although during the coupling process the lower side 4b elastically deforms downward, said lower side 4b returns to its original state after coupling. It follows that Hayashi does not disclose an elastically bendable portion that upon panel coupling is at least partially bent out of its normal relaxed position to provide a biasing force that urges the panels together, which is critical to claims 1 and 2 of the '836 patent.



Furthermore, the administrative law judge finds no other figures which teach, disclose or suggest that the lower lip of the groove is bent after coupling and that the specification of Hayashi does not teach, disclose or suggest a bent lower lip after coupling. (RX-547.)

Based on the foregoing, the administrative law judge finds that any combination of prior art argued by the PSV respondents and the Greenberg respondents does not establish, by clear and convincing evidence, that claims 1 and 2 of the '836 patent and claim 4 of the '292 patent are obvious under 35 U.S.C. § 103.

D. Obviousness: Asserted Claims 10, 18 and 23 of the '836 Patent and Asserted Claims 5 and 17 of the '779 Patent

The PSV respondents have argued that each of claims 10, 18 and 23 of the '836 patent are obvious based on Yoichi in view of Terbrack; that claim 5 of the '779 patent is obvious based on Yoichi in view of Terbrack or Friedl and further is obvious based on Friedl in view of Yoichi; and that claim 17 of the '779 patent is obvious based on Friedl in view of Yoichi<sup>27</sup> while the Greenberg respondents have argued that claims 10, 18 and 23 of the '836 patent are obvious based on Terbrack and Hayashi in view of Konishi; that claims 18 and 23 of the '836 patent are obvious based on Terbrack and Hayashi in view of Martensson; that claims 5 and 17 of the '779 patent are obvious over Terbrack, Schroder, or Friedl, in view of Konishi; and that the “clearances” of the asserted claims of the '779 patent are inherently disclosed by Terbrack and also taught by Momberg, Hayashi, Nelson, Schroder, and Friedl. (See supra.)

Each of the asserted claims 10, 18 and 23 of the '836 patent require a core material

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<sup>27</sup> The administrative law judge has already found that the asserted claims of the '779 are not valid for failing to satisfy the requirement of 35 U.S.C. § 112 ¶ 1 because of new matter. Hence, his treatment of said claims in this section assumes arguendo the validity of those claims.

selected from the group consisting of High Density Fiberboard (HDF) and Medium Density Fiberboard (MDF). Each of the asserted claims 5 and 17 of the '779 patent require that the cured composite core comprises MDF/HDF. Fiberboard is a board that has been pressed together and it exists from wood fibers that have been created by defibrating wood chips and by adding glue with those wood fibers and then pressing them together to boards. (Thiers, Tr. at 50.) A traditional MDF board has a density of about 750 kilograms per cubic meter while HDF has a higher density which as a rule is between 850 and 900 kilograms per cubic meter. (Id.)

As to Yoichi, the administrative law judge finds that Yoichi does not disclose a laminated hard floor panel, as required by the asserted claims 10, 18 and 23 of the '836 patent. Additionally, in the fourth embodiment of Yoichi, which is the only one with locking elements, Yoichi does not teach coupling parts or locking elements made of MDF or HDF. Yoichi does teach in its first embodiment, which has a tongue and groove profile and no locking elements, that the "wooden flooring material 10 can be formed of various types of fiber boards such as hardboard or MDF." (RX-152 at 3.) However, for the fourth embodiment, which includes the locking elements, said locking elements are wooden or formed from rubber or synthetic resin. Moreover, as conceded by PSV respondents, Yoichi does not teach a recess located in an area of the lower lip that is located at least partly beyond the distal outer end of the upper lip, which is a required element of the asserted claims 10 and 18 of the '836 patent. (PSVBr at 76.)

Referring to Terbrack, Terbrack teaches a sports ground surface preferably made of plastic. Moreover, Terbrack does not disclose a laminated hard floor panel or locking elements made of MDF or HDF, as required by the asserted claims 10, 18 and 23 of the '836 patent. (RX-8.) Furthermore, Terbrack shows rotational coupling of panels. (RX-8, Figures 17-20, 24-26.)

Hence, Terbrack does not teach coupling by lateral shifting in a substantial planar fashion or a “snap-together coupling providing a snap-action,” which are requirements of asserted claims 10, 18 and 23 of the ‘836 patent.

Greenberg respondents have argued that claims 10, 18 and 23 of the ‘836 patent are obvious based on Terbrack and Hayashi in view of Konishi.

Referring to Konishi, the administrative law judge incorporates his findings set forth supra, in rejecting the arguments of Greenberg respondents that claims 10, 18 and 23 of the ‘836 patent are anticipated by Konishi. As to Konishi, the administrative law judge further incorporates his findings as set forth supra in rejecting the argument of Greenberg respondents that claims 1 and 2 of the ‘836 patent and claims 3 and 4 of the ‘292 patent are anticipated by Konishi. Moreover, Konishi does not teach a laminated panel or a decorative layer as required by the asserted claims 5 and 17 of the ‘779 patent. Further, Konishi does not teach vertical locking on the short sides. (RX-548.) Hence, Konishi does not teach “first and second pairs of sides both being provided with coupling parts substantially in the form of a tongue and a groove the coupling parts further including locking elements” as required by the asserted claim 5 of the ‘779 patent. Likewise, Konishi does not teach the “pair of edges being provided with complementary coupling parts” which coupling parts further include “locking elements” as required by claim 17 of the ‘779 patent.

As to Hayashi, all parties agree that Hayashi teaches laterally shifting the panels together in a substantially planar fashion to get a snap-action as required by claims 10, 18 and 23 of the ‘836 patent. (RFF2000.215.1 (undisputed).) However, Hayashi does not disclose locking elements capable of snap-action made of MDF or HDF, as required by claims 10, 18 and 23 of

the '836 patent. Rather, Hayashi teaches a floor panel that is composed of a thin "wooden decorative panel such as plywood (sliced single panels)" that is laminated on to a "flexible sheet-shaped base material 1 made of synthetic resin." (RX-547 at 2.)

Referring to Martensson, at the outset, Martensson is not prior art to the '836 patent in issue because Martensson's §102(e) date post dates the foreign priority dates of the '836 patent, June 11, 1996 and April 15, 1997. (JX-1.)<sup>28</sup> The earliest date that Martensson could be prior art is its 35 U.S.C. §102(e) date, which is August 28, 1997.

Further, Martensson teaches making its panels from water-tight materials, such as thermoplastic, thermosetting laminate, aluminum or a chipboard or particle board impregnated with a thermoplastic. (RX-545 at 2.) Martensson teaches that "a board produced by pressing wood particles or wood chips impregnated with a thermoplastic" is a "non water absorbing base." (RX-545, col. 3:20-22). However, MDF and HDF are not water-tight. (Thiers, Tr. at 49, 63-64; Rice, Tr. at 2669.) All parties agree that if exposed to water, MDF or HDF will swell (CFF986 (undisputed)) and that MDF is a very moisture sensitive product. (CFF 980 (undisputed).) Hence, the administrative law judge finds that Martensson does not teach that the panels may be made from MDF or HDF as required by the asserted claims 18 and 23 of the '836 patent.

Moreover, Martensson does not teach the mechanical locking elements being integral and made in one piece with the core material, as required by the asserted claims 18 and 23 of the '836 patent. The description of the embodiments of Martensson as shown in Figures 2 and 3, disclose the locking elements being distinct from the cores of the panels. (RX-545 at 2-4.) Thus, Martensson does not teach snap-action being delivered substantially by the core material nor that

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<sup>28</sup> Greenberg respondents did not refute this in their reply brief.

the coupling parts may be made from MDF or HDF, as required by the asserted claims 18 and 23 of the '836 patent.

With respect to Friedl, the administrative law judge incorporates his findings set forth supra, in rejecting the arguments of Greenberg respondents that claim 3 of the '292 patent is anticipated by Friedl. Additionally, the administrative law judge finds that Friedl does not teach a floor covering that is laminated or having a decorative layer, as required by the asserted claims 5 and 17 of the '779 patent. (RX-9.) Rather, Friedl teaches that its building elements are made from plastic, aluminum or steel, not a ground wood product. (RX-9 at 3.) Friedl also teaches that its joints have "a certain play" after coupling. (RX-9 at 5.)

With respect to Schroder, it is undisputed that Schroder was cited to the Examiner during the prosecution history of the asserted patents. (SPFF 676 (undisputed).) Schroder teaches coupling through the use of rods that are not part of the core material of the panel. (RX-546; Brickman, Tr. at 1882.) Additionally, Schroder teaches that there is no tongue on the short side of the floor panels. Schroder explains: "The simplified joint arrangement 200 shown in Fig. 4 serves this purpose and includes a profile rod 10 shown in Fig. 1 and 2 and a profile rod in 10" which is differentiated from the profile rod 10' in that it does not have a tongue 15 gripping the undercut 17." (RX-546 at 10.) Hence, Schroeder does not teach "first and second pairs of sides both being provided with coupling parts substantially in the form of a tongue and a groove the coupling parts further including locking elements" as required by the asserted claim 5 of the '779 patent. (RX-546.) Further, the asserted claims 5 and 17 of the '779 require the coupling parts and locking elements to be formed in the panel material. However, Schroder's coupling parts and locking elements are not formed in the core material. (RX-546.)

Greenberg respondents have argued that the “clearances” of claims 5 and 17 of the ‘779 patent are inherently disclosed by Terbrack and also taught by Momberg, Hayashi, Nelson, Schroder, and Friedl. (See supra.) It is unclear whether the Greenberg respondents are taking the position that said claims are rendered obvious or anticipated by said patents.

In any event, it is undisputed that Momberg is directed to a wood floor component with a traditional tongue and groove that is attached to the underfloor with a nail (SPFF 665 (undisputed)); that Momberg does not teach integrating mechanical locking elements that prevent the panels from drifting apart (SPFF 666 (undisputed)); that Momberg does not teach the use of MDF/HDF (SPFF 667 (undisputed)); that Momberg does not teach locking elements on all four sides of the panel (SPFF 668 (undisputed)); that Momberg does not teach coupling by rotation (SPFF 669 (undisputed)); that Momberg does not teach a lower lip that extends beyond the upper lip (SPFF 670 (undisputed)); that Momberg does not teach a laminated floor panel with a decorative layer (SPFF 671 (undisputed)); and that Momberg does not teach an intermediate contact surface between the tongue and groove (SPFF 672 (undisputed)). Hence, the administrative law judge finds that Momberg does not disclose numerous required elements of the asserted claims 5 and 17 of the ‘779 patent.

As to Nelson, it is undisputed that Nelson does not teach an intermediate contact surface between the tongue and groove. (SPFF 674 (undisputed).) The Abstract of Nelson states:

Disclosed is laminate flooring and other articles with tongues and grooves for joining sections of the flooring or articles and a method of making the tongue and groove joints. The lower surfaces of the tongues and grooves are indexing surfaces for aligning the wear surfaces of the flooring sections. The tongues and grooves are made such that when the tongue is fully inserted into the groove, a continuous space is formed between the upper surface of the

tongue and groove. The grooved edges are cut at an acute angle to the surface. This provides a space between the upper surfaces of the tongue and groove and between the edge surfaces above the tongues and grooves toward the wear surfaces of the flooring sections. Glue in the joint, upon curing, resists penetration of moisture and increases the strength of the joint.

(RX-109, Abstract.) The Abstract shows that Nelson is directed to a glue-joint tongue and groove laminated flooring. However, Nelson does not disclose locking elements as required by the asserted claims 5 and 17 of the '779 patent. Moreover, Nelson does not teach the use of MDF/HDF as required by said asserted claims. (RX-109.)

Based on the foregoing, the administrative law judge finds that each of PSV respondents and Greenberg respondents have not established, by clear and convincing evidence, that the asserted claims 10, 18 and 23 of the '836 patent and asserted claims 5 and 17 of the '779 patent are obvious under 35 U.S.C. § 103. To establish obviousness, the patent challenger must demonstrate, by clear and convincing evidence, that "there is a reason, suggestion, or motivation in the prior art that would lead one of ordinary skill in the art to combine the references, and that would also suggest a reasonable likelihood of success." Ruiz v. A.B. Chance Co., 234 F.3d 654, 664-65 (Fed. Cir. 2000) (Ruiz). The Federal Circuit has rejected "broad conclusory statements regarding the teaching of multiple references" so as to guard against "the subtle but powerful attraction of a hindsight-based obviousness analysis." In re Dembiczak, 175 F.3d 994, 999 (Fed. Cir. 1999). Rather, the administrative law judge finds the primary and secondary references lacking critical limitations of the claimed subject matter in issue. Moreover, he finds that respondents' attempt to combine said prior art was based solely on hindsight.

E. Obviousness: Secondary Considerations





} (Thiers, Tr. at 141:14-142:7;

CX- 828C.) Also some of the licenses entered into by complainants are{

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(Thiers, Tr. at 142:8-143:3; CX-803C.)

### XIII. Equitable Estoppel And Respondent Vöhringer

Respondent Vöhringer argued that despite Vöhringer's vigilance in seeking meetings with Unilin, vigilance in attending those meetings, and vigilance in seeking a patent license from Unilin, Unilin never favored Vöhringer with a long-promised patent-license proposal; that even two years after Unilin knew that Vöhringer was exporting its glueless laminate flooring product into the United States, Unilin continued with its "empty promises" of providing this license proposal; that Vöhringer quite reasonably inferred, based on this conduct and Unilin's apparent disinterest, that Unilin had no intent of licensing or enforcing its patents against Vöhringer.

(PSVBr at 91.) It is also argued that when coupled with Vöhringer extensive capital investments and marketing plan, the facts adduced at trial make a compelling case for equitable estoppel; and that when the facts are considered in the context of Vöhringer's non-stop efforts to act "in a proper way, including by curtailing its production of glueless laminate flooring upon hearing of this lawsuit," and in the context of Unilin's utter disdain and neglect of Vöhringer's effort, that Unilin is estopped from enforcing its glueless laminate patents against Vöhringer. (*Id.*)

Respondent Vöhringer further argued that Unilin's misleading conduct was two-fold: that first, there was the misleading conduct of repeatedly promising Vöhringer a license agreement whose terms, except for the amount of the agreed-upon reduced royalty for China, were accepted by Vöhringer; and second, that there was Unilin's failure, even after learning of importation into the

United States of alleged infringing product by Vöhringer, to inform Vöhringer that no license would be sent and that Unilin would enforce its patents against Vöhringer. (PSVRBr at 77.)

Complainants argued that Vöhringer has not cited a single case establishing that an unfulfilled promise to send a license proposal can satisfy the first element of A.C. Aukerman Co. v. R. L. Chaides Constr. Co., 960 F.2d 1020, 1042 (Fed. Cir. 1992) (en banc), which requires a misleading statement; and that by its nature, a promise to send a license proposal cannot; that the mere statement of an intent to send a proposal does not vest rights on its recipient. (CRBr at 100.) It is also argued that Vöhringer's argument is not supported by the record evidence; that Vöhringer's argument rests on its assertion that "[b]y late 2003, after having been repeatedly promised a license proposal by Unilin, but not receiving one, Vöhringer came to believe that Unilin was not serious about enforcing its patents against Vöhringer"; that however, the undisputed documentary evidence shows that Unilin told Vöhringer in a meeting held on August 19, 2003 that it would continue license negotiations only after its ITC case was resolved; and that up through at least August 19, 2003, Vöhringer had no reason to believe that Unilin was not intending to enforce its patent rights. (Id. at 100-01.) Complainants further argued that they do not have a pattern of misleading potential licensees, and had no motivation to mislead Vöhringer; that they simply participated in friendly, but unsuccessful, license negotiations; and that nothing that happened during those negotiations warrants the forfeiture of complainants' patent rights. (Id. at 104.)

The staff argued that the evidence does not establish Vöhringer's entitlement to an equitable estoppel defense; that the facts do not "support an inference that [Unilin] did not intend to press an infringement claim against" Vöhringer; that Vöhringer began its allegedly infringing

conduct in March 2003 in reliance on its subjective belief that Unilin would grant it a license, but it had no enforceable promise nor any assurance that Unilin would not take action against Vöhringer if no license agreement was agreed upon; and that thus, Vöhringer proceeded at its own risk. (SBr at 87.) Also, the staff noted that Unilin's period of inaction in the face of Vöhringer's allegedly infringing conduct was quite short, extending from only March 2003 to the enforcement steps that it began to take in July 2004; and that two of the patents asserted did not even issue until 2005. (Id.)

The standard for equitable estoppel based on misleading conduct is set forth in Aukerman at 1042. As explained by Aukerman, a party raising the equitable estoppel defense must show misleading conduct, reliance, and material prejudice. Vöhringer's burden of proof in connection with all three factors of the estoppel defense is a preponderance of the evidence. (Aukerman at 1046.) Additionally, even where all three elements are established, "any other evidence and facts respecting the equities of the parties" must be considered, and the court may exercise discretion in deciding whether to allow the defense of equitable estoppel to bar the suit. (Id. at 1043.)

The "misleading conduct" must communicate to a reasonable person that the patent holder did not intend to enforce its rights. The court explained:

The first element of equitable estoppel concerns the statements or conduct of the patentee which must "communicate something in a misleading way." The "something" with which this case, as well as the vast majority of equitable estoppel cases in the patent field is concerned, is that the accused infringer will not be disturbed by the plaintiff patentee in the activities in which the former is currently engaged. The patentee's conduct must have supported an inference that the patentee did not intend to press an infringement claim against the alleged infringer.

(Aukerman at 1042 (emphasis added).) The misleading conduct can be either an affirmative act

or an inaction, if combined with other factors that give rise to the inference that “the claim against the defendant is abandoned.” (Id.)

The accused infringer must also show that “in fact, it substantially relied on the misleading conduct of the patentee in connection with taking some action.” (Id. at 1043.) To show reliance, “the infringer must have had a relationship or communication with the plaintiff which lulls the infringer into a sense of security...” (Id.) Finally, the Aukerman test requires the accused infringer to establish “that it would be materially prejudiced if the patentee is now permitted to proceed.” (Id. at 1042.)

Vöhringer relied on a series of license negotiations conducted with Unilin to support its equitable estoppel defense. Unilin has been involved in many meetings with potential licensees, and not every meeting resulted in a license. (Thiers, Tr. at 146.) It is undisputed that Unilin has no formal strategy or written policy concerning licensing, but its usual practice has been to send license proposals to potential licensees. (SPFF 703-704 (undisputed).) For example, Unilin sent license proposals to Respondent Power Dekor after a meeting that took place in 2002. (SPFF 705 (undisputed).) No license agreement was reached between Power Dekor and Unilin. (SPFF 706 (undisputed).)

Representatives of Unilin and Vöhringer met to discuss a possible license at least five times. (SPFF 707 (undisputed).) At the time of the first meeting in March 2001, Vöhringer was making traditional glued tongue and groove flooring, which was rapidly becoming obsolete in the marketplace. (SPFF 708-09 (undisputed).) The initial meeting, which was set up by Jurgen Vöhringer with Mr. De Cock of Unilin, was fairly short, about 45 minutes. (SPFF 710-11 (undisputed).) Jurgen Vöhringer did not request a license from Unilin at the initial meeting

because they “did not intend to manufacture in 2001 the glueless system” and the uncertainty regarding the ownership of the patents in issue (Vöhringer, Tr. at 2269-70.) However, he told Unilin that they wanted to make glueless flooring in the future and that this was “something we have to negotiate.” (*Id.*) Additionally, Vöhringer was aware of litigation between Unilin and other manufacturers relating to patent rights, and it did not want to take a license from Unilin in view of the possibility that Unilin might be unsuccessful in that litigation.<sup>29</sup> (SPFF 713 (undisputed).)

Unilin’s second meeting with representatives of Vöhringer took place in August 2001. (SPFF 715 (undisputed).) Jurgen Vöhringer did not attend the second meeting, but testified about it based on a conversation immediately after the meeting with Vöhringer representatives who did attend the meeting. (SPFF 716 (undisputed).) The second meeting lasted about two hours, during which time the Vöhringer representatives received a good explanation of Unilin’s patents. (SPFF 717-18 (undisputed).) Vöhringer and Unilin discussed a special license arrangement with respect to China, distinct from Unilin’s standard license terms. (SPFF 719 (undisputed).) Unilin had no licensees in China, and was exploring the idea of enforcing its patents in China, which it believed would not be easy. (SPFF 720-21 (undisputed).) Specifically, Unilin was trying to find one company to license in China so that Unilin could work with that company to enforce its patents in China against others. (SPFF 722 (undisputed).) Unilin’s impression, however, was that Vöhringer was more interested in obtaining a simple license. (Thiers, Tr. at 151, 213; CRX-60C.) Unilin also believed that Vöhringer was interested in a

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<sup>29</sup> Unilin has been involved in numerous lawsuits in Europe against alleged infringers of its patents, and has generally been successful. (SPFF 714 (undisputed).)

license to import into the United States, but Unilin preferred to give a manufacturing license that required payment based on the volume of manufactured product regardless of where it was sold. (Thiers, Tr. at 152, 203-05; RX-199C.) Unilin's impression was that Vöhringer did not want a license for China because nobody else in China was paying a license fee. (Thiers, Tr. at 203, 213-14; RX-199C.) Mr. Vöhringer testified that the only point of disagreement between Unilin and Vöhringer concerned the license fee to be paid for China. (Vöhringer, Tr. at 2301-02.) Vöhringer's understanding was that Unilin was going to send a license proposal to it, but no proposal was ever sent. (Vöhringer, Tr. at 2276-77, 2279.) Unilin prepared and retained a written summary of the discussion, dated August 21, shown in CRX 60C. (CFF 1047 (undisputed).)

A third meeting between Unilin and Vöhringer took place in September 2001 in a hotel lobby in Beijing. (SPFF 728 (undisputed).) Jurgen Vöhringer did not attend the third meeting, but testified about it based on conversations with Volker Gaiser, the chief executive officer of Vöhringer, who did attend the meeting. (Vöhringer, Tr. at 2259, 2279.) Jurgen Vöhringer asked Gaiser to attend the evidentiary hearing in this investigation in order to testify as a live witness, but he refused to come. (SPFF 730 (undisputed).) Mr. Vöhringer testified that the third meeting involved further discussions about Unilin's licensing strategy and the Chinese market. (SPFF 731 (undisputed).)

There were no meetings between Unilin and Vöhringer in 2002, and there was never any written correspondence between Unilin and Vöhringer regarding license negotiations. (SPFF 732, 739 (undisputed).) Nevertheless, Mr. Vöhringer testified that he was confident in late 2002 that Unilin would give Vöhringer a license, and so Vöhringer ordered tooling for making a glueless

laminate floor product. (SPFF 733-34 (undisputed).) Vöhringer first manufactured a glueless laminate flooring product in March 2003, and first shipped the product to the United States in April 2003. (SPFF 736 (undisputed).) Vöhringer proceeded without obtaining a license from Unilin because it was confident that Unilin wanted to negotiate a license with it. (SPFF 737 (undisputed).)

For the fourth meeting, Vöhringer met again with Unilin in August 2003. (SPFF 741 (undisputed).) Jurgen Vöhringer believed that Unilin knew by this time that Vöhringer was exporting its glueless product, called the “click system,” to the United States. (Vöhringer, Tr. at 2287-89.) Vöhringer understood from the August 2003 meeting that Unilin first wanted to end its dispute with Berry, and then Unilin would send a license proposal to Vöhringer. (Vöhringer, Tr. at 2289-90.) Unilin’s Thiers summarized the fourth meeting between Unilin and Vöhringer in an email to Unilin’s Tack dated August 20, 2003. (RFF 82.108 (undisputed); RX-199C at 3.) The email (RX-199C at 3) shows that Thiers wrote to Tack that Unilin agreed to get in touch with Vöhringer as soon as the ITC flooring products investigation was decided. (“Agreement: we get back in touch as soon as the ITC decision has been made.”) By the end of 2003, Vöhringer allegedly came to believe that Unilin was not going to send a license proposal to Vöhringer. (Vöhringer, Tr. at 2290.) Mr. Vöhringer also testified that Mr. Gaiser concluded that Unilin was not going to sue Vöhringer because Unilin knew of Vöhringer’s activities and had not sued it thus far. (Vöhringer, Tr. at 2290-91, 2322.)

A fifth meeting between Vöhringer and Unilin took place in March 2004. (SPFF 746 (undisputed).) According to Mr. Vöhringer, who did not attend the meeting, Unilin indicated at the March 2004 meeting that it would be sending a proposal to Vöhringer. (SPFF 747

(undisputed).) No proposal was ever sent to Vöhringer, nor was there any further contact between the companies. (SPFF 748 (undisputed).)

In 2003, Unilin was aware that glue-less floor panel products from China were coming to the United States, in minor quantities. (Thiers, Tr. at 206-07.) In 2003, Unilin had bigger priorities than trying to stop minor quantities of infringing products from China being brought to the United States. (SPFF 750 (undisputed).) By 2004, however, Unilin became aware of an increasing volume of glue-less floor panel products coming to the United States from China, including Vöhringer products. (Thiers, Tr. at 152-53.) In June 2004, Unilin sent a cease and desist letter to a company named Floor and Décor, regarding Vöhringer products and the Unilin patents. (CX 880; Vohringer, Tr. at 2328-29.) {

} in November 2004, Unilin filed suit against Ken Voss International, Inc. (Ken Voss), a Florida corporation that was allegedly importing and selling infringing floor panels manufactured by Vöhringer.<sup>30</sup> (SPFF 753-54 (undisputed).) Jurgen Vöhringer was informed that Unilin sued Ken Voss. (CFF 1080.1 (undisputed).) In fact, employees of respondent Vöhringer had direct contact with Ken Voss (CFF 1080.2 (undisputed).)

It is undisputed that representatives of Unilin and Vöhringer met to discuss a possible license at least five times and over a period of three years. (SPFF 707 (undisputed).) However, these meetings were ultimately unsuccessful in producing a license agreement between Unilin and Vöhringer. It is also undisputed that Vöhringer first manufactured a glueless laminate flooring product in March 2003, and first shipped the product to the United States in April 2003.

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<sup>30</sup> Unilin settled its litigation with Ken Voss. (SPFF 755 (undisputed).)



(SPFF 736 (undisputed).) It is also not denied that Vöhringer proceeded without obtaining a license from Unilin because it was confident that Unilin wanted to negotiate a license with it. (SPFF 737 (undisputed).) Thus, Vöhringer began its allegedly infringing conduct in March 2003 in reliance on its subjective belief that Unilin would grant it a license and proceeded at its own risk.

It is undisputed that Jurgen Vöhringer, Vöhringer's only witness testifying on the estoppel issue, testified that Unilin made no promise to send a proposal at the end of the first meeting. (CFF 1042 (undisputed).) As indicated, supra, with respect to the second meeting, which Jurgen Vöhringer did not attend (Vöhringer, Tr. at 2310), Unilin prepared and retained a written summary of the discussion, dated August 21, 2001, shown in CRX 60C. (CFF 1047 (undisputed).) {

} It is not denied that Vöhringer never sent a draft licensing proposal of any kind to Unilin. (CFF 1031, 1050.1 (undisputed).) As noted, supra, Jurgen Vöhringer did not attend the third meeting or the fifth meeting. (Vöhringer, Tr. at 2279-80; 2291-92.)

As indicated, supra, the email dated August 20, 2003 summarizing the fourth meeting between Unilin and Vöhringer (RX-199C at 3), shows that Thiers wrote to Tack that Unilin agreed to get in touch with Vöhringer as soon as the ITC flooring products investigation was decided.<sup>31</sup> However, the administrative law judge finds that getting back in touch does not

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<sup>31</sup> Thus, up through at least August of 2003, Vöhringer had no reason to believe that Unilin was not intending to enforce its patent rights.

suggest that an agreed license is imminent or assured. Respondent Vöhringer argued that complainants promised to send it a proposal for a license. (PSVBr at 91.) Respondent Vöhringer has cited no authority to the effect that a promise to send a license proposal communicates to a reasonable person that he is free to infringe the promisor's patent rights. Moreover, there is no documentary evidence that Unilin ever promised to give Vöhringer a license, and no evidence that Unilin gave Vöhringer any assurance that it would not sue if Vöhringer proceeded without a license agreement being reached. Hence, the administrative law judge finds that the record does not "support an inference that [Unilin] did not intend to press an infringement claim against" Vöhringer. (Auckerman, at 1042.)

Silence by the patentee can qualify as "misleading action" if accompanied by other factors "indicating that the silence was sufficiently misleading to amount to bad faith," (ABB Robotics, Inc. V. GMFanuc Robotics Co., 52 F.3d 1062, 1064 (nearly five years of silence after initial accusation of infringement, coupled with the ongoing relationship between the patentee and the accused infringer in other areas of business, led accused infringer to reasonably conclude that patentee did not intend to enforce patent at issue against it).) However, the Federal Circuit has also held that "attempts to negotiate licenses . . . followed by a period of silence does not, in itself, constitute the necessary misleading conduct." (Meyers v. Asics Corp., 974 F.2d 1304, 1308 (Fed. Cir. 1992).) Additionally, Unilin's period of inaction in the face of Vöhringer's allegedly infringing conduct was from March 2003 to the enforcement steps that it began to take in July 2004, a period of only sixteen months, contrasted with nearly five years in ABB Robotics. Moreover, two of the asserted patents in this investigation did not even issue until 2005. (See Meyers, at 1309 (because patent owner had not contacted accused infringer after the issuance of

the asserted patents, he could not have communicated acquiescence with respect to alleged infringement).)

Based on the foregoing, the administrative law judge finds that Vöhringer has not shown, by a preponderance of the evidence, that it satisfied the first factor of “misleading conduct” required under the equitable estoppel defense.

As shown, supra, with respect to the second factor under Aukerman, Vöhringer must show that “in fact, it substantially relied on the misleading conduct of the patentee in connection with taking some action.” (Aukerman at 1043.) To show reliance, “the infringer must have had a relationship or communication with the plaintiff which lulls the infringer into a sense of security...” (Id.) {

} (CX-312.6C at 3;

See Sunbeam Products, Inc. v. Wing Shing Products (BVI) Ltd., 153 Fed. Appx. 703, 710 (Fed. Cir. 2005) (internal communications about “patent issues” indicated that the company was not misled into believing that the patentee would not enforce its patent rights).) Moreover, Unilin acted to prevent Vöhringer products it believed to be infringing from entering the United States. As indicated, supra, in June 2004, Unilin sent a cease and desist letter to a company named Floor and Décor, regarding Vöhringer products and the Unilin patents. (CX 880; Vohringer, Tr. at 2328-29.) {

} November 2004, Unilin filed suit against Ken Voss, a Florida corporation that was allegedly importing and selling infringing floor panels

manufactured by Vöhringer. (SPFF 753-54 (undisputed).) It is also undisputed that Jurgen Vöhringer was informed that Unilin sued Ken Voss (CFF 1080.1 (undisputed)) and that employees of respondent Vöhringer had direct contact with Ken Voss (CFF 1080.2 (undisputed).) Hence, the administrative law judge finds that Vöhringer has not shown, by a preponderance of the evidence, that it in fact, substantially relied on the misleading conduct of complainant, which is the second factor under the equitable estoppel defense.

Based on the foregoing and the record evidence, the administrative law judge finds that Vöhringer has not shown, by a preponderance of the evidence, that it is entitled to an equitable estoppel defense.

#### XIV. Domestic Industry

In proving the existence of a domestic industry, a complainant must establish that its activities in the United States meet the threshold set forth in the statute (economic prong) and that those activities are devoted to a product or process which is covered by the patents in issue (technical prong). In re Certain Removable Elec. Cards and Elec. Card Reader Devices and Prods. Containing Same, Inv. No. 337-TA-396, (Comm'n Op. Aug. 1998) (Pub. No. 3123). A complainant bears the burden of demonstrating the existence of an industry in the United States that practices the patent(s)-at-issue and meets the requirements of section 337(a)(3). Certain Microsphere Adhesives, Process for Making Same, and Products Containing Same Including Self-Stick Repositionable Notes, Inv. No. 337-TA-366, Comm'n Op. at 8 (1996) (U.S.I.T.C. Pub. No. 2949).

Regarding the economic prong, a complainant may show that a domestic industry exists or is in the process of being established under any of the three statutory grounds as set forth in 19

U.S.C. § 1337(a)(3):

(3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is the United States, with respect to the articles protected by the patent ... 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) (emphasis added). Given that said criteria are in the disjunctive, satisfaction of any one of the three criteria will be sufficient to meet the domestic industry requirement. Certain Variable Speed Wind Turbines and Components Thereof, Inv. No. 337-TA-376, Comm’n Op. at 15 (Nov. 1996) (U.S.I.T.C. Pub. No. 3003). There is no requirement in the statute that an industry must be of any particular size. Id.

The technical prong of the domestic industry requirement requires a complainant to demonstrate that it practices the patents at issue. Although there must be a domestic industry with respect to each asserted patent, there is no requirement that the claims asserted against a respondent must correspond with those practiced by the domestic industry. Microsphere Adhesives. Thus, a complainant need only show that its products meet one claim of every patent at issue. Certain Lens Fitted Film Packages, Inv. No. 337-TA-406, ID at 203 (Feb. 24, 1999), reviewed-in-part on other grounds (April 9, 1999); Certain Toothbrushes and Packages Thereof, Inv. No. 337-TA-391, Order 8 (July 7, 1997) (unreviewed initial determination).

Regarding the economic prong of the domestic industry requirement, complainants have satisfied the requirement. See Procedural History.

A. Technical Prong

In issue is whether complainant's Quick-Step® and Harmonics® products practice at least a claim of the '836 patent, a claim of the '292 patent and a claim of the '779 patent. No other party has argued that complainants have not satisfied the technical prong. Loferski prepared claim charts for the domestic products similar to those prepared for the accused products. (Loferski, Tr. at 529-30; CX-104.) Loferski's technical prong opinions are summarized in Exhibit CX-926. (Loferski, Tr. at 310; CX-926.) CX-926 contains a separate page for each of two domestic products, with each page having two photographs of the long and short side profiles of the product, and a table listing the asserted claims which that product allegedly practices. (CX-926.)

The administrative law judge, based on the foregoing, finds that complainants have established that their products meet at least one claim of each of the '836, 292 and '779 patents in issue.

XV. Remedy

Pursuant to the Commission rules 210.36(a) and 210.42(a)(1)(ii), the administrative law judge is to consider evidence on the issue of remedy and bonding and issue a recommended determination on these issues. In general, the Commission has broad discretion in formulating an appropriate remedy in a section 337 investigation. Certain Flash Memory Circuits and Products Containing Same, Inv. No. 337-TA-382, Comm'n Op. at 18 (July 1997). Complainants argued that the evidence in this investigation demonstrates that respondents sell for importation, import and sell after importation laminated floor panels that infringe the asserted claims of the patents in issue; that as a result and because of the number of foreign manufacturers who import infringing

products, and the ease of which manufacturers can create these products, the demand in the U.S. market for these products, complainants seek a general exclusion order directed to prevent the importation of all laminated floor panels which infringe the asserted claims of the patents in issue. If the Commission determines that there is insufficient grounds to issue a general exclusion order, complainants seek a limited exclusion order directed to each of the respondents. (CBr at 108, 109, 113.)

The PSV respondents argued that complainants have failed to show the requisite condition for either a general exclusion order or a limited exclusion order. (PSVBr at 112-115.) However, if an exclusion order were entered (limited or general) and if it were found that certain of the PSV respondents do not infringe, the PSV respondents argued that the administrative law judge should recommend that the Commission include a certification provision in the order so that noninfringing product can be imported if a certification of noninfringement is provided to Customs. (PSVBr at 115.)

The Greenberg respondents argued that if the administrative law judge determined that any of the Greenberg respondents have violated section 337 with regard to one or more of the asserted claims, he should recommend that the Commission include in any exclusion order a certification provision. (GBr at 98-99.)

Yekalon argued that complainants have not established that a general exclusion order should be granted; that no limited exclusion order should be granted against Yekalon's products although if any such products are found to infringe, a certification provision should be included in any exclusion order and that no cease and desist order should issue. (YRBr at 31-33.)

The Chinafloor respondents contend that there has been no violation of section 337 and

hence “no remedy is necessary.” (ChBr at 6.)

The staff, should a violation of section 337 be found, argued that a general exclusion order is appropriate. (SBr at 90.) The staff is unaware of any evidence of commercially significant inventories of infringing accused products in the United States and hence does not support entry of any cease and desist order. (SBr at 91.)

The staff further argued that complainants have stated that in light of on-going litigation with non-parties Välinge Aluminum AB, Alloc, Inc. and Berry Finance N.U. regarding an allegedly infringing product (the “Alloc II” profile), that they are not seeking to include this product within the scope of the general exclusion order they seek (CBr at 112 n. 6); that while somewhat unusual, the staff sees no compelling reason why an exception for a specific product could not be written into a general exclusion order since the Commission generally does not give complainants broader relief than they affirmatively seek. See Certain Devices for Connecting Computers via Telephone Lines, Inv. No. 337-TA-360, Commission Opinion on Remedy at 10 (public version) (“there is no reason to issue an order that excludes other types of entry when Complainant . . . has not requested” such a remedy). (SRBr at 23.)<sup>32</sup>

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<sup>32</sup> As to any general exclusion order the staff noted that on January 18, 2006, counsel for non-parties Armstrong World Industries, Alloc Inc., and Beaulieu International Group submitted a letter to the Secretary of the Commission stating that these entities are currently engaged in litigation with complainants in the Eastern District of Wisconsin involving, inter alia, accusations of infringement of the patents asserted in this investigation; that the letter further states that complainants have been aware of these entities’ importations of allegedly infringing floor panels since approximately early 2000 and yet did not include them in its section 337 complaint; and that the letter asks that any exclusion order entered in this investigation not include the products of those entities. It was argued that no additional evidence concerning alleged infringement by those entities was admitted at the hearing, but that those entities may seek to submit evidence to the Commission during the remedy phase; and that it does not appear, therefore, that the administrative law judge should make a recommendation at this time as to whether a general exclusion order, if entered, should cover those entities. (SBr at 90.) The letter



A. General Exclusion Order

19 U.S.C. § 1337(d)(2) sets forth the standard for the issuance of a general exclusion order when there are active Respondents in the investigation. Certain Sildenafil or any Pharmaceutically Acceptable Salt Thereof, Inv. 337-TA-489 Comm'n Order at 4-5 (February 6, 2004). A general exclusion order is warranted when it is necessary to prevent circumvention of a limited exclusion order, or there is a pattern of violation of section 337. 19 U.S.C. § 1337 (d)(2); Certain Plastic Food Containers, Inv. No. 337-TA-514, Order No. 8 at 34 (Feb. 10, 2005).

In Certain Airless Paint Spray Pumps and Components Thereof, Inv. No. 337-TA-90, USITC Pub. 1199 at 17, 216 U.S.P.Q. 465, 472-73 (1981) (Spray Pumps) a general exclusion order was deemed appropriate when there is proof of (1) a widespread pattern of unauthorized use of the patented invention, and (2) certain business conditions from which one might reasonably infer that foreign manufacturers other than respondents to the investigation may attempt to enter the U.S. market. Id.

In 1994, statutory standards on the issuance of general exclusion orders were adopted in the amendments to Section 337, adding a new subsection of Section 337(d) that states:

(2) The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that --

(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or

(B) there is pattern of violation of this section and it is difficult to identify the source of infringing products.

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of January 18, 2006 does not identify any profiles.

19 U.S.C. § 1337(d)(2) (effective January 1, 1995); see also Commission rule 210.50(c) (incorporating the statutory standards into the Commission rules). These standards “do not differ significantly” from the Spray Pumps standards. Certain Neodymium-Iron-Boron Magnets, Inv. No. 337-TA-372, Comm’n Op. on Remedy, the Public Interest and Bonding at 5 (Apr. 5, 1996). (Magnets) See also Certain Agricultural Tractors, Inv. No. 337-TA-380, 33 U.S.P.Q.2d 1385, Comm’n Op. at 34-41 (1997) (general exclusion order granted).

In Spray Pumps, the Commission pointed out that a complaint should not be compelled to file a series of separate complaints against several individual foreign manufacturers as it becomes aware of their products in the U.S. market. Such a practice would not only waste the resources of the complaint, it would also burden the Commission with redundant investigations. (Comm’n Op. at 30).

That consideration must be balanced against the potential of a general exclusion order to disrupt legitimate trade. Id. With this balance in mind, the commission concluded that it would

“require that a complainant seeking a general exclusion order prove both a widespread pattern of unauthorized use of its patented invention and certain business conditions from which one might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles.” Id.

The Commission in Spray Pumps then set out the following factors as relevant in demonstrating whether there is a “widespread pattern of unauthorized use”:

- (1) a Commission determined of unauthorized importation into the United States of infringing articles by numerous foreign manufacturers;
- (2) the pendency of foreign infringement suits based upon foreign patents which correspond to the domestic patent at issue; and

(3) other evidence which demonstrates a history of unauthorized foreign use of the patented invention.

Id. The Commission in Spray Pumps also identified the factors relevant to showing “certain business conditions” as including:

(1) an established market for the patented product in the U.S. market and conditions of the world market;

(2) the availability of marketing and distribution networks in the United States for potential foreign manufacturers;

(3) the cost to foreign entrepreneurs of building a facility capable of producing the patented article;

(4) the number of foreign manufacturers whose facilities could be retooled to produce the patented article; or

(5) the cost to foreign manufacturers of retooling their facility to produce the patented article.

Id. at 31-32.

In this investigation complainants have named 32 manufacturers and distributors as respondents. (CX-91).<sup>33</sup> Respondent Jiangsu Qianfeng Decoration Materials Co. Ltd. (QDM) was brought to complainants’ attention after the filing of the complaint by a third party who had purchased the infringing product from QDM in China. (CX-91 at Exhibit 124). Nineteen of the named respondents are manufacturers of infringing floor panels. (CX-91). Thirteen of the named respondents are distributors of infringing floor products who imported infringing laminated floor panels into the United States or sell laminated floor panels after importation into the United

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<sup>33</sup> Complainants have entered into over{ } license agreements regarding the patented inventions. (Thiers, Tr. at 140:18-141:1; CX-800 C – CX-858C.) Complainants received{ } euro in royalty payments in 2005. (Thiers, Tr. at 143:21-144:20; CX-859C.)

States. (CX-91). Respondents 3E Business Enterprises, Ltd., AMZ (Guangzhou) Wooden Industrial Co., Ltd., Changzhou Donjia Decorative Materials Co., Ltd., Dalton Carpet Liquidators, Inc. (d/b/a Dalton Flooring Liquidators), Huzhou Yongji Wooden Co., Ltd., Lodgi North America, Inc., Pacific Flooring Manufacture, Inc., P.J. Flooring Distributor, R.A.H. Carpet Supplies, Inc., Salvage Building Material, Inc., Shanghai Zhengrun Industry Development Co., Ltd., Tsailin Floorings, Inc., Universal Floor Covering, Inc., Vegas Laminate Hardwood Floors LLC and Jiangsu Qianfeng Decoration Materials Co. Ltd. have been found in default.

Companies also have switched from manufacturing traditional tongue and groove to manufacturing mechanically locking joints. (Cao, Tr. at 1668.) Hence the administrative law judge finds that there is a widespread pattern of unauthorized use of the patented inventions in issue.

The administrative law judge also finds that business conditions exist in which one might reasonably infer that foreign manufacturers other than the respondents in the investigation may attempt to enter the U.S. market for laminated floor panels. Thus in 2004, the total estimate for laminated floor manufacturers' sales including imports was \$1.1 billion. (CX-61C at 11.) In 2004, the forecast for laminated floor manufacturers' sales including imports by 2009 was \$1.682 billion. (CX-61 at 11.) There is a well-established network of importers, distributors, and home design stores where laminated floor panels may be purchased. (CX-61C at 7-8, 48-53.) In 2000, a tool supplier, Leuco, offered Vöhringer new milling equipment that would help them make mechanically locking floor panels. (Vöhringer, Tr. at 2262:8-2263:9.) Tools used to mill profiles for laminated flooring are commercially available. (Vöhringer, Tr. at 2262:8-2263:9; RX 517C, RX 518C at 300678; RX 519C, RX 520C at 500006, RX 521 C, CX 264C at 10-11, CX 283C at

9, CX 304C at 8-9, CX 333C at 5-6, CX 352C at 7-8, CX 392C at 7-8.) In 2000 when Leuco offered Vöhringer new milling tools, Vöhringer was manufacturing tongue and groove floors. (Vöhringer, Tr. at 2260: 4-20). The products at issue are sold to do-it-yourself customers and professional installers. (Thiers, Tr. at 170.) The products at issue are sold in the United States at “big box” stores like Home Depo and Lowes, as well as smaller mom-and-pop stores. (Thiers, Tr. at 170.)

Based on the foregoing the administrative law judge recommends the issuance of a general exclusion order should the Commission determine that there is a violation of section 337. Also, in view of the number of laminated floor panels that would be excluded from any general exclusion order, e.g. those of licensees of the patents in issue, those of non-parties regarding an allegedly infringing “Alloc II” profile<sup>34</sup> and possibly laminated floor panels of even active respondents and defaulting respondents which the Commission may find do not infringe certain claims in issue, the administrative law judge recommends that a certification provision be included with the general exclusion order, said certification provision containing procedures specified and deemed necessary by the Customs and Border Protection with respect to those laminated floor panels which would not be covered by the general exclusion order.

B. Cease And Desist Orders

Complainants seek cease and desist orders directed to all the domestic respondents found in default. (CBr at 108.) In Certain Video Games Systems, Accessories And Components Thereof Inv. No. 337-TA-473 the administrative law judge, in his Order No. 5 which issued on

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<sup>34</sup> It would appear that the “Alloc II” profile is related to the letter of January 18, 2006 to the Secretary identified by the staff, supra, since “Alloc Inc.” was a party identified in that letter.

October 9, 2002, found the sole respondent Ultimate Game Club Ltd. (UGC) of Old Saybrook Conn. in default for failure to respond to the complaint and notice of investigation. On October 23, 2002 the Commission determined not to review Order No. 5. Thereafter on December 24, 2002 the Commission issue an order to cease and desist order against UGC. Based on the issuance of a cease and desist order against UGC in Video Games, which had defaulted and assuming the Commission finds a violation, the administrative law judge recommends that the Commission issue cease and desist orders against all defaulting domestic respondents in this investigation.

#### XVI. Bond

Section 337(j) (3) provides for the entry of infringing articles upon the payment of a bond during the 60-day Presidential review period. 19 U.S.C. § 1337(j) (3). The bond is to be set at a level sufficient to “offset any competitive advantage resulting from the unfair method of competition or unfair act enjoyed by persons benefitting from the importation.” In re Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same, Inv. No. 337-TA-242, Comm’n Op., USITC Pub. No. 2034, (Sept. 21, 1987). When reliable price information is available, the Commission has set the bond by eliminating the price differential between the domestic and the imported infringing product. In re Certain Digital Satellite System (DSS) Receivers and Components Thereof, Inv. No. 337-TA-392, Final Initial and Recommended Determination on Remedy and Bonding, USITC Pub. No. 3418 (April 2001). Where reliable price information is not available, however, Commission precedent establishes that the bond should be set at 100 percent of entered value. In re Certain Flash Memory Circuits and Products Containing Same, Inv. No. 337-TA-382, USITC Pub. 3046, Commission Opinion

26-27 (June 1997).

Complainants requested that a bond be set at 100 percent of entered value of the accused products. (CBr at 117.) The Greenberg respondents argued that no bond is necessary because complainants have not suffered injury as a result of the imports of their accused products. (GBr at 106.) The PSV respondents argued that any bond should be minimal and should not exceed a small percentage of the entered value of the PSV respondents' accused product. (PSVBr at 117.) Yekalon argued that complainants have no support for "applying a bond during the Presidential review period" (YRBr at 34.) The staff proposed a bond of 100 percent of entered value. (SBr at 92.)

Evidence regarding pricing suggests a large price differential between Unilin's domestic product and the accused products. Thus Unilin sells its products in the United States for around {        } per square foot, with the end consumer typically paying between {        } per square foot. (Thiers, Tr. at 173.) Respondent Power Dekor sells its products to a U.S. trading company for about \$5 per square meter, which works out to about \$0.46 per square foot. (Lin, Tr. at 1889.) Respondent Shengda sells its products for about \$4.40 to \$5.00 per square meter in the United States. (Lin, Tr. at 1889-90.) Respondent Vöhringer sells its products for between \$4 and \$5 per square meter in the United States. (Vöhringer, Tr. at 2306.) There is also evidence that Unilin's U.S. licensees pay a royalty of {        } per square foot, in addition to a one-time flat fee. (CX-828; CX-844; Thiers, Tr. at 173.)

Based on the foregoing, if the Commission determines that there is a violation of section 337, the administrative law judge recommends a bond of 100% of entered value during any Presidential review period.

## XVII. Additional Findings Of Fact

### A. Complainants

1. Unilin Beheer B.V., Flooring Industries Ltd., and Unilin Flooring N.C. LLC are the complainants in this investigation. (CX-91C at 3-4, par. 2.1-2.3.)
2. Unilin Beheer B.V. is a Dutch corporation, headquartered at Hoogeveenweg 28, Postbus 135,2910 AC, Nieuwerkerk aan den IJssel, The Netherlands. (CX-91C at 3, par. 2.1.)
3. Unilin Beheer B.V. is the owner by assignment of the '836 patent, the '292 patent and the '779 patent. (CX-91C at 3, par. 2.1.)
4. Flooring Industries Ltd. is a Republic of Ireland corporation, having its principal place of business at Westblock, I.F.S.C., Dublin 1. (CX-91C at 3, par. 2.2.)

### B. Active Respondents At Hearing

5. Changzhou Saili Wood Co., Ltd. (Saili Wood) is a company organized and existing under the laws of China, having its principal place of business located at Furong Town, Changzhou City, Jiangsu 213118, China. (CX-91C at 5, par. 3.7, CX-140C at 4, par. 3.7.)
6. Saili Wood sells laminated floor panels for importation into the United States by Respondent HFC Horizon Co. Ltd. (CX-91C at 6, par. 3.8; CX-140C at 4, par. 3.7 and 3.8; CX-143C, Response to Interrogatory No. 8.)
7. Changzhou Wujin Zhongxin Wood Co. Ltd. (Wujin) is a company organized and existing under the laws of China, having its principal place of business at Lianrong Village, Henglin Town, Wujin District, Changzhou City, Jiangsu Province, China. (CX-162C, Response to Interrogatory No. 1.)



8. Wujin is in the business of manufacturing in China and selling for importation into the United States laminated floor panels. (CX-91C at 6, par. 3.10; CX-140C at 4, par. 3.10; CX-162C, Response to Interrogatory No. 3.)

9. Jiangsu Lodgi Woods Industry Co. Ltd. (Lodgi Woods) is a company organized and existing under the laws of China, having its principal place of business located at The Industrial Area of Henglin Town, Changzhou City, Jiangsu Province 213103, China. (CX-91C at 10, par. 3.25, CX-140C at 7, par. 3.25; CX-183C, Response to Interrogatory No. 1.)

10. Lodgi Woods is in the business of manufacturing and selling for importation into the United States laminated floor panels. (CX-91C at 10, par. 3.26; CX-140C at 7, par. 3.26.)

11. Hansol Homedeco Ltd. (Hansol) is a company organized and existing under the laws of South Korea, having its principal place of business located at 7<sup>th</sup> Floor Hansol Building, 736-1 Yeoksam-dong, Gangnam-gu, Seoul, 135-080, South Korea. (CX-91C at 19, par. 3.63; CX-240C at 10 par. 3.63; CX-243C, Response to Interrogatory No. 1.)

12. Hansol is in the business of manufacturing in South Korea and selling for importation into the United States laminated floor panels. (CX-91C at 19, par. 3.63-64; CX-240C at 10-11, par. 3.63-64; CX-243C, Response to Interrogatory No. 1.)

13. Yingbin-Nature (Guangdong) Wood Industry Co., Ltd. (Yingbin) is a company organized and existing under the laws of China, having its principal place of business located at Wusha Bridge, Daliang Street, Shunde District, Foshan, Guangdong Province 528306, China. (CX-91C at 18, par. 3.59; CX-140C at 11, par. 3.59; CX-221C, Response to Interrogatory No. 1.)

14. Yingbin is in the business of manufacturing in China laminated floor panels. (CX-91C at 18, par. 3. 60; CX-140C at 11, par. 3. 60.)

15. Power Dekor Group Co., Ltd. (Power Dekor) is a company organized and existing under the laws of China, having its principal place of business located at 3/F Byfond Hotel, No. 1587, Zhangyang Rd., Shanghai 200135 China. (CX-91C at 11, par. 3.31; CX-260C at 2, par. 3.31; CX-263C, Response to Interrogatory No.1.)

16. Power Dekor is in the business of manufacturing laminated floor panels in China. (CX-91C at 11, par. 3.32; CX-260C at 2, par. 3.32.)

17. Shengda Flooring Corp. (Shengda) is a company organized and existing under the laws of China, with its principal place of business located at 26-27/F Spectar Building, #42 Donghua Zhengjie Street, Chengdu City, China 610016. (CX-91C at 14, par. 3.43; CX-260C at 2, par. 3.43; 282C, Response to Interrogatory No. 1.)

18. Shengda is in the business of manufacturing laminated floor panels in China. (CX-91C at 14, par. 3. 44; CX-260C at 2 par. 3. 44; CX-283C, Response to Interrogatory No. 44.)

19. Vöhringer Wood Product (Shanghai) Co., Ltd. (Vöhringer) is a company organized and existing under the laws of China, having its principal place of business located at 1950 Huhang Road, Fenxian District, Shanghai 201415 China. (CX-91C at 17, par. 3.55; CX-260C at 3, par. 3.55; CX-302, Response to Interrogatory No. 1.)

20. Chinafloors Timber (Shanghai) Co., Ltd. (China Floors) is a company organized and existing under the laws of China, having its principal place of business at No.188 Bao Yuan 4<sup>th</sup> Road, Huoxian Village, JainQiao Town, Jinbao Industrial Park, Jia Ding District, Shanghai 201812, China. (CX-91C at 6, par. 3.11; CX-341C at 3, par. 3.11.)

21. China Floors is in the business of manufacturing in China and selling for

importation into the United States laminated floor panels. (CX-91C at 6, par. 3.112; CX-341C at 3, par. 3.12.)

22. Shanghai Dekorman Flooring Co., Ltd. (Shanghai Dekorman) is a company organized and existing under the laws of China, having its principal place of business located at No. 198 Zhongxin Road, Tianma, Songjiang District, Shanghai 201600 China. (CX-91C at 13, par. 3.39; CX-390C at 7, par. 3.39.)

23. Shanghai Dekorman is in the business of manufacturing laminated floor panels in China. (CX-91C at 13, par. 3.40; CX-390C at 7, par. 3.40.)

24. Yekalon Industry, Inc. (Yekalon) is a company organized and existing under the laws of China, having its principal place of business located at Suite 16A, Flat A, Jinxiu Building, Wenjin Middle Road, Shenzhen, Guangdong 518003 China. (CX-91C at 17 par. 3.57; CX-330C at 15, par. 3.57.)

25. Yekalon is in the business of manufacturing in China and selling for importation into the United States laminated floor panels. (Amended Complaint at 18, par. 3.58, CX-91C; Yekalon's Response to Amended Complaint at 15, par. 3.58, CX-330C.)

26. HFC Horizon Flooring Ltd. (HFC) is a limited liability company organized and existing under the laws of Ohio, having its principal place of business located at 1305 Holly Ave., Columbus, Ohio 43212. (CX-91C at 8, par. 3.17; CX-320 at par. 3.17.)

27. HFC is in the business of importing and selling within the United States laminated floor panels manufactured by Saili Wood. (Amended Complaint at 8, par. 3.18, CX-91C; CX-320 at par. 3.17; JX-9C-1.9.)

28. A letter confirms a stipulation of HFC that Sali Wood is the source of laminated

floor panels sold by HFC and that HFC will identify such products. (JX-9C-4.1.)

C. Settling Respondents

29. Inter Source Trading Corporation (Inter Source) is a company organized and existing under the laws of China, having its principal place of business located at 10F-N, Hongqiao Shijia Garden, No. 179, Zhongshan Road (W), Shanghai, China. Inter Source also has a Canadian office located at 201-3785 Myrtle St., Burnaby, B.C., Canada VC5 4E7. (Amended Complaint at 9, par. 3.21-22, CX-91C.)

30. Quality Craft, Ltd. (Quality Craft) is a company organized and existing under the laws of Canada, having its principal place of business located at #301, 17750-65A Ave., Surrey, B.C., V3S 5N4 Canada. Quality Craft is in the business of selling for importation into the United States laminated floor panels. (Amended Complaint at 12, par. 3.33-34, CX-91C.)

D. Defaulting Respondents

31. 3E Business Enterprises Ltd. (3E) is a company organized and existing under the laws of Canada, with its principal place of business at 5041 Manor Street, Vancouver, B.C. V5R 3Y4, Canada. 3E is in the business of manufacturing in China and selling for importation into the United States laminated floor panels. (Amended Complaint at 4, par. 3.1-2, CX-91C.)

32. AMZ (Ghangzhou) Wooden Industrial Co., Ltd. (AMZ) is a company organized and existing under the laws of China, having its principal place of business located at Amazon Industrial Garden, Pingbu Road, Huadu, Guangzhou, Guangdong 510800 China. AMZ is in the business of manufacturing in China and selling for importation into the United States laminated floor panels. (Amended Complaint at 4-5, par. 3.3-4, CX-91C.)

33. Changzhou Donjia Decorative Materials Co., Ltd. (Changzhou Dongjia) is a

company organized and existing under the laws of China, having its principal place of business at South Cuiqiao Industrial Zone, Henglin, Changzhou, Jiangsu 213103 China. Changzhou Dongjia is in the business of manufacturing in China and selling for importation into the United States laminated floor panels. (Amended Complaint at 5, par. 3.5-6, CX-91C.)

34. Dalton Carpet Liquidators, Inc. (Dalton) is a corporation organized and existing under the laws of Alabama, having its principal place of business located at 804 East Broad Street, Gadsden, Alabama, 35903. Dalton Carpet Liquidators, Inc. is doing business as Dalton Flooring Liquidators. Dalton is in the business of selling within the United States after importation laminated floor panels. (Amended Complaint at 7, par. 3.13-14, CX-91C.)

35. Huzhou Yongji Wooden Co. Ltd. (Huzhou Yongji) is a company organized and existing under the laws of China, having its principal place of business located at No. 18 Nianfeng Road, Nanxun, Huzhou, Zhejiang 313009 China. Huzhou Yongji is in the business of manufacturing in China and selling for importation into the United States laminated floor panels. (Amended Complaint at 8, par. 3.19-20, CX-91C.)

36. Lodgi North America, Inc. (Lodgi NA) is a company organized and existing under the laws of Canada, having its principal place of business located at 11131 Bird Road, Richmond, B.C. V6X1N7 Canada. Lodgi NA is in the business of selling for importation into the United States laminated floor panels. (Amended Complaint at 9 par. 3.23-24, CX-91C.)

37. Pacific Flooring Manufacture, Inc. (Pacific Flooring) is a corporation organized and existing under the laws of California, having its principal place of business located at 391 Foster City Blvd., Foster City, CA 94404. Pacific Flooring is in the business of manufacturing in China and selling within the United States after importation laminated floor panels. (Amended

Complaint at 10 par. 3.27-28, CX-91C.)

38. P.J. Flooring Distributor (P.J. Flooring) is a company organized and existing under the laws of California, having its principal place of business at 1455 Monterey Pass Rd., Suite 105, Monterey Park, CA 91754. P.J. Flooring is in the business of selling within the United States after importation laminated floor panels. (Amended Complaint at 11 par. 3.29-30, CX-91C.)

39. R.A.H. Carpet Supplies, Inc. (R.A.H.) is a corporation organized and existing under the laws of New Jersey, having its principal place of business located at 551 Main Avenue, Wallington, New Jersey 07057. R.A.H. is in the business of selling within the United States after importation laminated floor panels. (Amended Complaint at 12 par. 3.35-36, CX-91C.)

40. Salvage Building Material, Inc. (Salvage Building) is a corporation organized and existing under the laws of North Carolina, having its principal place of business located at 951 N. Liberty St., Winston-Salem, North Carolina 27101. Salvage Building is in the business of selling laminated floor panels within the United States after importation. (Amended Complaint at 12-13 par. 3.37-38, CX-91C.)

41. Shanghai Zhengrun Industry Development Co., Ltd. (Shanghai Zhengrun) is a company organized and existing under the laws of China, having its principal place of business located at No. 7735 Fanghuang Road, Shanghai 200000. Shanghai Zhengrun is in the business of manufacturing in China and selling for importation into the United States laminated floor panels. (Amended Complaint at 13-14 par. 3.41-42, CX-91C.)

42. Stalheim Industries SBN BHD (Stalheim Industries) is a company organized and existing under the laws of Malaysia, having its principal place of business located at Lot 2994,

Jalan Bukit Badong, 45600 Batang Berjuntai, Selangor Darul Ehsan, Malaysia. Stalheim Industries is in the business of manufacturing in Malaysia and selling for importation into the United States laminated floor panels by Stalheim U.S.A. (Amended Complaint at 14-15, par. 3.45-46, CX-91C.)

43. Stalheim (USA), Inc. (Stalheim U.S.A.) is a corporation organized and existing under the laws of California, having its principal place of business located at 173600 Colima Road, #332, Rowland Heights, California 91748. Stalheim U.S.A. is in the business of selling within the United States after importation laminated floor panels manufactured by Stalheim Industries. (Amended Complaint at 15, par. 3.47-48, CX-91C.)

44. Tsailin Floorings, Inc. (Tsailin) is a company organized and existing under the laws of China, having its principal place of business located at 283, Building 3, #402 Siping Road, Hongkou Qu, Shanghai 200081 China. Tsailin is in the business of manufacturing in China and selling for importation into the United States laminated floor panels. (Amended Complaint at 15-16, par. 3.49-50, CX-91C.)

45. Universal Floor Covering, Inc. ("Universal Floor") is a corporation organized and existing under the laws of California, having its principal place of business located at 4500 Automall Parkway, Fremont, California 94538. Universal Floor is in the business of selling laminated floor panels within the United States after importation. (Amended Complaint at 16, par. 3.51-52, CX-91C.)

46. Vegas Laminate Hardwood Floors LLC (Vegas Laminate) is a limited liability company organized and existing under the laws of Nevada, having its principal place of business located at 4059 Renate Drive, Las Vegas, Nevada 89103. Vegas Laminate is in the business of

selling laminated floor panels within the United States after importation. (Amended Complaint at 16-17, par. 3.53-54, CX-91C.)

47. Jiangsu Qianfeng Decoration Materials Co. (QDM) is a company organized and existing under the laws of China, having its principal place of business located at Cuiqiao Town, Dongmen, Changzhou Corporate, Jiangsu 213103 China. QDM is in the business of manufacturing in China and selling for importation into the United States laminated floor panels. (Amended Complaint at 18-19, par. 3.61-62, CX-91C.)

E. Respondent Yongan

48. Fujian Yongan Forestry (Group) Joint Stock Co. Ltd. (Yongan) is a company organized and existing under the laws of China, with its principal place of business located at No. 13 Nige, Yongan City, Fujian Province, China 366000. (CX-91C at 7, par. 3.15; CX-140C at 5, par. 3.15.)

49. Yongan is in the business of manufacturing in China and selling for importation into the United States laminated floor panels. (CX-91C at 7, par. 3.16; CX-140C at 5, par. 3.16.)

50. Yongan in the investigation had been represented by Greenberg Traurig LLP, but Yongan withdrew from participating in the investigation via a notice filed with the Commission on April 5, 2006. (Tr. at 1114-1117.) On April 10 Greenberg Traurig, LLP filed a notice of withdrawal of representation of Yongan, effective April 5.

F. Experts

51. Complainants' expert Joseph Loferski is a Professor of Wood Science and Forest Products at Virginia Tech. (Loferski, Tr. at 306; CX-501, ¶ 2.)

52. Loferski has a Ph.D. in Forest Products and Timber Engineering. (Loferski, Tr. at



306; CX-501, ¶ 3.)

53. Loferski has designed and made joints in wood and wood-based products for at least 26 years. (Loferski, Tr. at 306; CX-501, ¶ 8.)

54. Loferski was qualified as an expert witness in the field of wood sciences and the design and operation of joints for wood products. (Tr. at 883.)

55. Pingziang Cao testified on behalf of Respondents Saili Wood, Zhongxin, Yingbin, and Lodgi. (Cao, Tr. at 900-01.)

56. Cao has a Ph.D. in Engineering and Wood Science and Technology. (Cao, Tr. at 902-03, 909-10; RX-523.)

57. Cao has provided consulting to Chinese wood flooring companies regarding tooling, machinery, and manufacturing. (Cao, Tr. at 903.)

58. Cao was qualified as an expert in the field of locking joints and floor panels, including the locking joints at issue in this case, tooling for these types of locking joints, and wood products, as well as HDF and MDF. (Tr. at 910-11.)

59. Howard Brickman appeared as an expert witness on behalf of respondent Hansol. (Brickman, Tr. at 1720.)

60. Brickman does not have a technical degree but has considerable experience in the field of wood flooring. (Brickman, Tr. at 1720-; RX-524.)

61. Brickman was qualified as an expert in the design, manufacture, and maintenance of the profile of the tongue and groove, installation of all types of wood flooring, wood/moisture relationships, and wood anatomy. (Tr. at 1755.)

62. Elemer Lang appeared as an expert witness on behalf of respondent Yekalon.

(Lang, Tr. at 2114.)

63. Lang has a Ph.D. in Wood Science and Forest Products from Virginia Tech.

(RX-1001; Lang, Tr. at 2116-17.)

64. Lang received his Ph.D. under the guidance of Loferski. (Loferski, Tr. at 795; Lang, Tr. at 2117.)

65. Lang was qualified as an expert in the field of wood science technology, and the design, manufacture and engineering of wood interlocking joints. (Lang, Tr. at 2122.)

66. Robert W. Rich appeared as an expert witness on behalf of the PSV respondents.

67. Rice has a Ph.D. in Forest Products from Virginia Tech. (RX-164; RX-93.)

68. Rice was qualified as an expert in the area of wood science, the machining of wood and wood composites, the design and operation of joints made from wood products, and quality control measurements. (Tr. at 2365.)

#### G. Prosecution History

69. The '486 patent was filed as application Serial No. 08/872,044 on June 10, 1997 (hereinafter "the '486 application"). (JX-8.)

70. The '486 application, in turn, claimed priority from two Belgian patent applications dated June 11, 1996 and April 15, 1997, respectively. (JX-8.)

71. The originally filed '486 application contained the same figures as the English translation of the Belgian patent specification and claims. (JX-8.)

72. The original '486 application contained an inventors' declaration signed by the inventors on May 20, 1997. (JX-8.)

73. In a first restriction requirement dated March 16, 1998, the Examiner examining

the '486 application identified five patentably distinct species of the claimed invention ((a) Figures 2-4; (b) Figures 5-7; (c) Figures 8-10; (d) Figure 11; and (e) Figures 22-25), and directed Applicant's attorney to elect a single disclosed species for prosecution. (JX-8.)

74. In a response dated September 16, 1998, the applicants' attorney elected the species (e) shown in Figs. 22-25. (JX-8.)

75. In a second restriction requirement, the Examiner examining the '486 application directed applicant's attorney to designate for prosecution claims drawn to a floor covering or claims drawn to a method for manufacturing a floor panel. (JX-8.)

76. On May 10, 1999, Unilin responded to a substantive Office Action of November 9, 1998. The May 1999 papers included a Substitute Specification (in both "clean" and "markup" form), and replacement claims 29-94 (claims 1-28 were cancelled.) (JX-8 UNILIN-ITC-075264 to 349)

77. The '486 application issued as the '486 patent to Unilin Beheer B.V. as assignee on December 28, 1999. (Amended Complaint at 5:1.)

78. The '836 patent was filed as Application Serial No. 09/471,014 (the '836 application) on December 23, 1999. (Exh. 2. of the Amended Complaint.)

79. The '836 application was a continuation of the '486 application. (Amended Complaint at 5:4; Exh. 2. of the Amended Complaint.)

80. When the '836 application was filed as a continuation of the '486 application, the attorney submitted the original specification of the '486 application in the initial filing. (JX-2.)

81. When the '836 application was filed in December 1999, Unilin included the same Substitute Specification that had already been examined in the '486 application. (JX-8,

UNILIN-ITC-75644 to 667.)

82. The only inventors' declaration or oath filed in the '836 application was the original declaration filed in the '486 application. No new oath or declaration was submitted. (JX-2; JX-8.)

83. The '779 application was filed as Application Serial No. 10/265,657 as a continuation of the '836 application, on October 8, 2002 (the '779 application), claiming priority to the two Belgian applications filed on June 11, 1996 and April 15, 1997. (Amended Complaint at 5.10, and Exh. 101.)

84. No new oath or declaration was submitted with the '779 application. (JX-6.)

85. In accordance with the requirements for filing continuation applications under 37 C.F.R. § 1.53, Unilin filed the '779 application using the original 1997 specification and drawings through an incorporation by reference, and filed a Preliminary Amendment to amend the specification of the '779 application. (JX-6, UNILIN-ITC-078382 to 462.)

86. The continuation application papers filed on October 8, 2002 included both amendment instructions in the body of the amendment. (JX-6 UNILIN-ITC-078387 to 393) and a "Marked-Up Version of Specification as Amended by Preliminary Amendment Before Examination." (JX-6, UNILIN-ITC-078395 to 418.)

87. On December 16, 2003, the Examiner issued an office action on the papers filed October 8, 2002 which, inter alia rejected claim 1 which ultimately became claim 1 of the '779 patent with further amendments. In the office action, the Examiner allowed claim 15 which ultimately became claim 13 of the '779 patent after further amendments. (JX-6 UNILIN-ITC-078588 to 593.)

88. On March 15, 2004, applicants filed a response and amendment to the Office action of December 16, 2003. (UNILIN-ITC-078600-13.) This response included claim 1 of the '779 patent (Unilin-ITC-078603-04) and claim 13 of the '779 patent, designated on March 15, 2004 as claim 15 (UNILIN-ITC-078607-08.)

89. The Examiner responded to the March 15, 2004 response on June 4, 2004 (UNILIN-ITC-078614-20.)

90. A notice of allowance, regarding the '779 patent, issued on Nov. 4, 2004. (UNILIN-ITC-078712.)

## CONCLUSIONS OF LAW

1. The Commission has in rem jurisdiction.
2. The Commission has in personam jurisdiction over the Greenberg respondents, the PSV respondents, the Chinafloor respondents, respondent Yekalon and respondent Yongan.
3. There has been an importation of certain laminated floor panels which are the subject of the alleged unfair trade allegations.
4. An industry exists in the United States, as required by subsection (a)(2) of section 337, that exploits the '836, '292 and '779 and patents in issue.
5. The asserted claims of the '836 and '292 patents are not invalid.
6. The asserted claims of the '779 patent are invalid.
7. The products accused by complainants of infringing claims 10 and 18 of the '836 patent so infringe said claims.
8. With the exception of China Floors Easy Click 7.3mm (RS 132-134); China Floors Easy Click 8.3mm (RS 138-140); China Floors Easy Click 12.3mm (RS 141-143); China Floors Art Plus 8.3mm (RS 037-039); Vöhringer Type C (RS 016-018); Yongan Arc Locking 8.2 mm (RS 0520054); Yongan Arc Locking 10 mm (RS 043-045) Lodgi Arc Locking 8.2mm (RS 046-048); Lodgi Arc Locking 12mm (RS 049-051); Saili Woods Semi-Arc Locking 8.2 mm (RS 034-036); Wujin Arc-Locking 8.2mm (RS 058-060); Wujin Arc-Locking 12mm (RS 055-057); and Yingbin Arc Locking 8.2mm (RS 070-072), the products accused by complainants of infringing claim 23 of the '836 patent so infringe said claim.
9. There is infringement of claim 1 of the '836 patent by the defaulting respondents.
10. Complainants have not established infringement of claim 1 of the '836 patent by

the active respondents and by respondent Yongan.

11. Complainants have not established infringement of claim 2 of the '836 patent and claims 3 and 4 of the '292 patent by any accused product.

12. There is no equitable estoppel involving respondent Vöhringer.

13. There is a violation of section 337.

14. The record supports issuance of a general exclusion order with a certification provision directed to infringing products and certain cease and desist orders against defaulting domestic respondents. It also supports imposition of a bond in the amount of 100 percent of the entered value, during the Presidential review period.

## ORDER

Based on the foregoing, and the record as a whole, it is the administrative law judge's Final Initial Determination that there is a violation of section 337 in the importation into the United States, sale for importation, and the sale within the United States after importation of certain laminated floor panels. It is also the administrative law judge's recommendation that a general exclusion order, with a certification provision, should issue directed to infringing products. The administrative law judge further recommends that a bond in the amount of 100 percent of the entered value, be imposed during the Presidential review period.

The administrative law judge hereby CERTIFIES to the Commission his Final Initial and Recommended Determinations together with the record consisting of the exhibits admitted into evidence. The pleadings of the parties filed with the Secretary and the transcript of the pre-hearing conference, and the hearing, are not certified, since they are already in the Commission's possession in accordance with Commission rules.

Further it is ORDERED that:

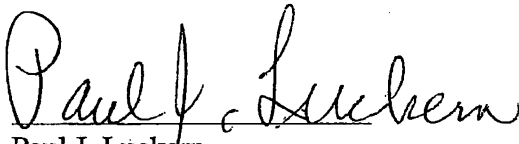
1. In accordance with Commission rule 210.39, all material heretofore marked in camera because of business, financial and marketing data found by the administrative law judge to be cognizable as confidential business information under Commission rule 201.6(a), is to be given in camera treatment continuing after the date this investigation is terminated.

2. Counsel for the parties shall have in the hands of the administrative law judge those portions of the final initial and recommended determinations which contain bracketed confidential business information to be deleted from any public version of said determinations, no later than July 21, 2006. Any such bracketed version shall not be served via facsimile on the



administrative law judge. If no such bracketed version is received from a party, it will mean that the party has no objection to removing the confidential status, in its entirety, from these initial and recommended determinations.

3. The initial determination portion of the Final Initial and Recommended Determinations, issued pursuant to Commission rule 210.42(h)(2), shall become the determination of the Commission forty-five (45) days after the service thereof, unless the Commission, within that period shall have ordered its review or certain issues therein or by order has changed the effective date of the initial determination portion. The recommended determination portion, issued pursuant to Commission rule 210.42(a)(1)(ii), will be considered by the Commission in reaching a determination on remedy and bonding pursuant to Commission rule 210.50(a).

  
Paul J. Luckern  
Administrative Law Judge

Issued: July 3, 2006

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **Public Version Final Initial and Recommended Determinations** was served by hand upon Commission Investigative Attorney David H. Hollander, Jr., Esq. and upon the following parties via first class mail, and air mail where necessary, on August 24, 2006.



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**CERTAIN LAMINATED FLOOR PANELS**

**Investigation No. 337-TA-545**

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