

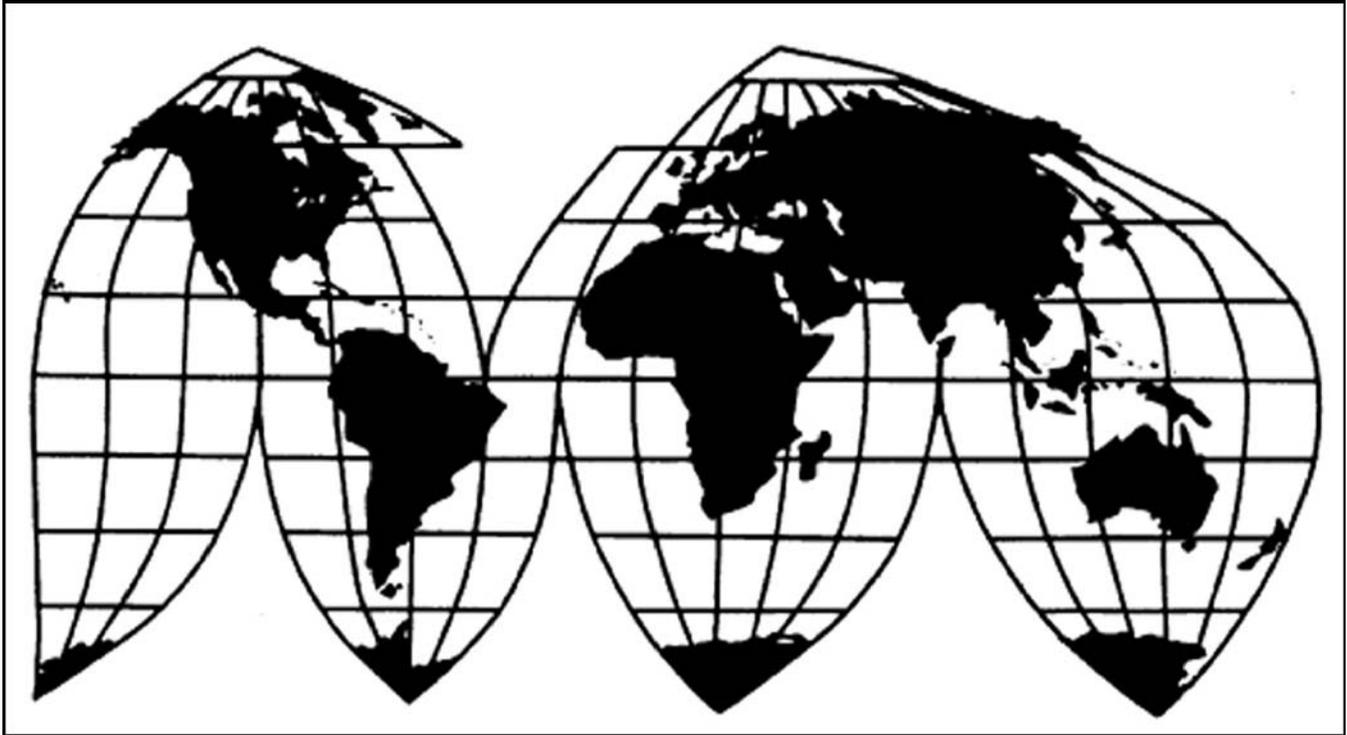
In the Matter of
Certain Lighters

Investigation No. 337-TA-575

Publication 4112

November 2009

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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U.S. International Trade Commission

Washington, DC 20436
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In the Matter of **Certain Lighters**

Investigation No. 337-TA-575



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

In the Matter of _____
CERTAIN LIGHTERS _____

Inv. No. 337-TA-575

**ISSUANCE OF A GENERAL EXCLUSION ORDER AND TERMINATION OF THE
INVESTIGATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has issued a general exclusion order directed to infringing lighters.

FOR FURTHER INFORMATION CONTACT: Clint A. Gerdine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2310. Copies of the public version of the administrative law judge's ("ALJ's") initial determination ("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 June 20, 2006, based on a complaint, as supplemented, filed by Zippo Manufacturing Company, Inc., of Bradford, Pennsylvania, and ZippMark, Inc. of Wilmington, Delaware (collectively "Zippo"), alleging violations of section 337 of the Tariff Act of 1930 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain lighters by reason of infringement of United States Trademark Registration No. 2,606,241 ("the '241 mark"). 71 *Fed. Reg.* 35450 (June 20, 2006). The complaint further alleged that an industry in the United States exists or is in the process of being established as required by subsection(a)(2) of section 337. Complainants requested that the Commission issue a general exclusion order and cease and desist orders. The ALJ set July 20, 2007, as the target date for completion of the investigation.

The complaint named seven respondents: Tung Fong International Promotion Co., Ltd. of Hong Kong; Wenzhou Star Smoking Set Co., Ltd. of China; Taizhou Rongshi Lighter Development Co., Ltd. of China; Wenzhou Tailier Smoking Set Co., Ltd. of China; Vista Wholesale of Greencastle, Indiana; beWild.com of Bellmore, New York; and Kalan LP of Landsdowne, Pennsylvania. Respondents Kalan and Wenzhou Star Smoking Set Company were terminated from the investigation on the basis of settlement agreements. The remaining five respondents were found to be in default by the ALJ and the Commission did not review that determination.

On November 7, 2006, complainants filed a motion seeking summary determination with respect to the domestic industry requirement and violation of section 337. Complainants also requested that the ALJ recommend a general exclusion order and a 100 percent bond during the period of Presidential review. Complainants did not renew their request for cease and desist orders. The Commission investigative attorney supported the motion for summary determination and the requested remedy and bonding. No respondents responded to the motion.

On February 21, 2007, the ALJ issued an ID (Order No. 11) finding the domestic industry requirement satisfied, finding a violation of section 337, and containing a recommended determination on remedy and bonding. The ALJ found a violation of section 337 based on his conclusion that there are no genuine issues of material fact that respondents' accused products infringe the '241 mark and that a domestic industry exists as required by 19 U.S.C. § 1337(a)(2). He recommended issuance of a general exclusion order and that the amount of bond for temporary importation during the Presidential review period be set at 100 percent of the entered value of the articles concerned. No petitions for review were filed.

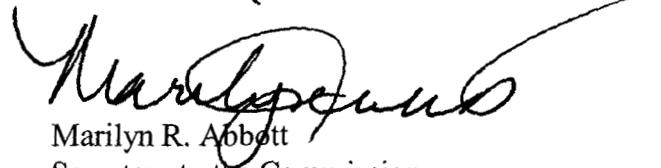
On March 15, 2007, the Commission determined not to review this ID and requested written submissions on the issues of remedy, the public interest, and bonding. On March 29 and April 5, 2007, respectively, the complainant Zippo and the IA filed briefs and reply briefs on these issues.

Having reviewed the record in this investigation, including the ID and the parties' written submissions, the Commission has determined that the appropriate form of relief is a general exclusion order prohibiting the unlicensed entry of lighters that infringe the '241 mark.

The Commission has further determined that the public interest factors enumerated in section 337(d)(1) (19 U.S.C. § 1337(d)(1)) do not preclude issuance of the general exclusion order. Finally, the Commission determined that the amount of bond to permit temporary importation during the period of Presidential review (19 U.S.C. § 1337(j)) shall be in the amount of 100 percent of the value of the lighters that are subject to the order. The Commission's order and opinion were delivered to the President and to the United States Trade Representative on the day of its issuance.

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.

A handwritten signature in black ink, appearing to read "Marilyn R. Abbott", with a long, sweeping flourish extending to the right.

Marilyn R. Abbott
Secretary to the Commission

Issued: July 18, 2007

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached NOTICE OF ISSUANCE OF A GENERAL EXCLUSION ORDER AND TERMINATION OF THE INVESTIGATION has been served by hand upon the Commission Investigative Attorney, Thomas S. Fusco, Esq., and the following parties as indicated, on July 18, 2007.

Marilyn R. Abbott

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

**ON BEHALF OF COMPLAINANT ZIPPO
MANUFACTURING CO., INC. AND ZIPPMARK,
INC.:**

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Michael E. Murphy, Esq.
Brian F. Burke, Esq.
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**ON BEHALF OF RESPONDENT WENZHOU STAR
SMOKING SET CO., LTD.:**

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**ON BEHALF OF RESPONDENT KALAN LP (dba
Kalan Trendsetting Gifts & Novelties)**

Tom M. Schaumberg, Esq.

Michael L. Doane, Esq.

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

In the Matter of

CERTAIN LIGHTERS

Inv. No. 337-TA-575

GENERAL EXCLUSION ORDER

The Commission has previously 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 lighters that infringe U.S. Registered Trademark No. 2,606,241.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has made its determinations 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 in that there is a widespread pattern of violation of section 337 and it would be difficult to identify the source of infringing products. Accordingly, the Commission has determined to issue a general exclusion order prohibiting the unlicensed importation of infringing lighters.

The Commission has also determined that the public interest factors enumerated in 19 U.S.C. §§ 1337(d)(1) do not preclude the issuance of that 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:

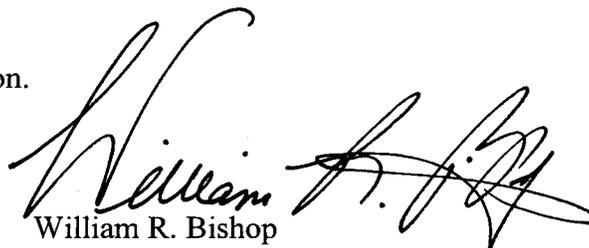
1. Lighters that infringe U.S. Registered Trademark No. 2,606,241 are excluded from entry for consumption, entry for consumption from a foreign-trade zone, and withdrawal from warehouse for consumption until such date as the trademark is abandoned, canceled, or rendered invalid or unenforceable, except under license of the trademark owner or as provided by law.
2. Notwithstanding paragraph 1 of this Order, the aforesaid lighters are entitled to entry into the United States for consumption, entry for consumption from a foreign-trade zone, and withdrawal from warehouse for consumption, under bond in the amount of 100 percent of the entered value of such articles pursuant to subsection (j) of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337(j), from the day after this Order is received by the United States Trade Representative as delegated by the President, 70 *Fed. Reg.* 43251 (July 21, 2005), until such time as the United States Trade Representative notifies the Commission that this action is approved or disapproved but, in

any event, not later than 60 days after the date of receipt of this action.

3. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to lighters 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.
4. Each year on the anniversary of the issuance of this Order, complainants Zippo Manufacturing Company, Inc. and ZippMark, Inc. (collectively, “Zippo”) shall file a written statement with the Commission, made under oath, stating whether they continue to use the aforesaid trademark in commerce in the United States in connection with lighters and whether the aforesaid trademark has been abandoned, canceled, or rendered invalid or unenforceable.
5. The Commission may modify this Order 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).
6. The Commission Secretary 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 Customs and Border Protection.

7. Notice of this Order shall be published in the *Federal Register* pursuant to section 337(j)(1)(A) of the Tariff Act of 1930 as amended (19 U.S.C. § 1337(j)(1)(A)) and section 210.49(b) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.49(b)).

By order of the Commission.

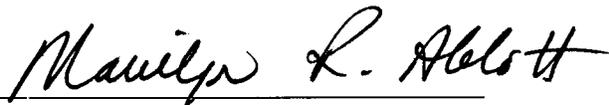


William R. Bishop
Acting Secretary to the Commission

Issued: July 24, 2007

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **CORRECTED GENERAL EXCLUSION ORDER** has been served by hand upon the Commission Investigative Attorney, Thomas S. Fusco, Esq., and the following parties as indicated, on July 25, 2007.



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

**ON BEHALF OF COMPLAINANT ZIPPO
MANUFACTURING CO., INC. AND ZIPPMARK,
INC.:**

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**ON BEHALF OF RESPONDENT WENZHOU STAR
SMOKING SET CO., LTD.:**

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**ON BEHALF OF RESPONDENT KALAN LP (dba
Kalan Trendsetting Gifts & Novelties)**

Tom M. Schaumberg, Esq.

Michael L. Doane, Esq.

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Other: _____

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

**In the Matter of
CERTAIN LIGHTERS**

Inv. No. 337-TA-575

COMMISSION OPINION

BACKGROUND

The Commission instituted this investigation on June 20, 2006, based on a complaint, as supplemented, filed by Zippo Manufacturing Company, Inc., of Bradford, Pennsylvania, and ZippMark, Inc. of Wilmington, Delaware (collectively “Zippo”), alleging violations of section 337 of the Tariff Act of 1930 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain lighters by reason of infringement of United States Trademark Registration No. 2,606,241 (“the ‘241 mark”). 71 *Fed. Reg.* 35450 (June 20, 2006). The complaint further alleged that an industry in the United States exists or is in the process of being established as required by subsection(a)(2) of section 337. Complainants requested that the Commission issue a general exclusion order and cease and desist orders. The presiding administrative law judge (ALJ) set July 20, 2007, as the target date for completion of the investigation.

The complaint named seven respondents: Tung Fong International Promotion Co., Ltd. of Hong Kong; Wenzhou Star Smoking Set Co., Ltd. of China; Taizhou Rongshi Lighter Development Co., Ltd. of China; Wenzhou Tailier Smoking Set Co., Ltd. of China; Vista Wholesale of Greencastle, Indiana; beWild.com of Bellmore, New York; and Kalan LP of Landsdowne, Pennsylvania. Respondents Kalan and Wenzhou Star Smoking Set Company were

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terminated from the investigation on the basis of settlement agreements. The ALJ found the remaining five respondents in default, and the Commission did not review his determination.

On November 7, 2006, complainants filed a motion seeking summary determination with respect to the domestic industry requirement and violation of section 337. Complainants also requested that the ALJ recommend a general exclusion order and a 100 percent bond during the period of Presidential review. The Commission investigative attorney (IA) supported the motion for summary determination and the requested recommendation on remedy and bonding. No respondents responded to the motion for summary determination.

On February 21, 2007, the ALJ issued an initial determination (ID) (Order No. 11) finding that Zippo had satisfied the domestic industry requirement, and that there was a violation of section 337. He also issued a recommended determination (RD) on remedy and bonding. The ALJ found a violation of section 337 based on his conclusion that there are no genuine issues of material fact as to whether respondents' accused products infringe the '241 mark and that a domestic industry exists as required by 19 U.S.C. § 1337(a)(2). He recommended issuance of a general exclusion order and that the amount of bond for temporary importation during the period of Presidential review be set at 100 percent of the entered value of the articles concerned. No petitions for review were filed.

On March 15, 2007, the Commission determined not to review Order No. 11 and requested written submissions on the issues of remedy, the public interest, and bonding. On March 29 and April 5, 2007, respectively, complainant Zippo and the IA filed briefs and reply briefs on these issues as well as proposed exclusion orders. Zippo no longer requests any cease

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and desist orders. This investigation is now before the Commission for final disposition and determinations on remedy, the public interest, and bonding.

DISCUSSION

I. REMEDY

A. Statutory Background and Criteria for Issuance of a General Exclusion Order

Where a violation of section 337 has been found, the Commission must consider the issues of remedy, the public interest, and bonding. With respect to remedy, the Commission may issue a remedial order excluding the goods of the person(s) found in violation (a limited exclusion order) or, if certain criteria are met, against all infringing goods regardless of the source (a general exclusion order).¹ Depending on the circumstances, the Commission's authority to issue a general exclusion order may be found in either section 337(d)(2) or 337(g)(2).

Section 337(d)(2) provides that:

The authority of the Commission to issue 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.

¹ The Commission also has authority to issue cease and desist orders and to sanction parties for certain conduct. *See* 19 U.S.C. § 1337(f) & (h).

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19 U.S.C. § 1337(d)(2).

Section 337(g)(2) provides that:

In addition to the authority of the Commission to issue a general exclusion from entry of articles when a respondent appears to contest an investigation concerning a violation of the provisions of this section, a general exclusion from entry of articles, regardless of the source or importer of the articles, may be issued if--

- (A) no person appears to contest an investigation concerning a violation of the provisions of this section,
- (B) such a violation is established by substantial, reliable, and probative evidence, and
- (C) the requirements of subsection (d)(2) of this section are met.

19 U.S.C. § 1337(g)(2).

Read together, section 337(g)(2) supplements the authority granted to the Commission under section 337(d)(2), empowering it to issue a general exclusion order when “no person appears to contest an investigation concerning violation of this section,” if certain conditions are met. Given that two respondents have appeared to contest the current investigation, and have settled with complainants, the Commission’s authority to issue a general exclusion order in this investigation, therefore, arises under section 337(d)(2). The standards for finding a violation of 337 under section 337(d)(2) are the same as those for finding a violation under 337(g)(2).²

²See *Certain Sildenafil or any Pharmaceutically Acceptable Salt Thereof, such as Sildenafil Citrate, and Products Containing Same*, Inv. 337-TA-489 (Feb. 2004), Comm’n Op. at 5 (violation of 337 under section 337(d) must be supported by “reliable, probative, and substantial evidence”, and there is no difference between this standard and the “substantial, reliable, and probative evidence” standard of 337(g)(2)).

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The Commission has noted in previous cases 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, 216 U.S.P.Q. 465 (USITC 1981) (“*Spray Pumps*”).³ The Federal Circuit has clarified that section 337(d)(2) is not an adoption of the Commission’s policy objectives expressed in *Spray Pumps*, but rather was added to the statute to comply with obligations under the General Agreement on Tariffs and Trade.⁴ Nonetheless, the *Spray Pumps* factors are still useful in determining whether to issue a general exclusion order.

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 (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*, 216 U.S.P.Q. at 473. Under *Spray Pumps*, the evidence that may be presented to prove a “widespread pattern of unauthorized use of the patented invention” includes:

- (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*Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing Same*, Inv. No. 337-TA-372, USITC Pub. 2694 (May 1996), Comm’n Op. at 5 (“*Neodymium Magnets*”).

⁴ See *Vastfame Camera, Ltd. v. USITC*, 386 F.3d 1108, 1113 (Fed. Cir. 2004).

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- (3) other evidence which demonstrates a history of unauthorized use of the patented invention.

Spray Pumps, 216 U.S.P.Q. 465, 473.

The Commission further determined that evidence that may be presented to prove the “business conditions” criterion includes:

- (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.

Id.

Although *Spray Pumps* involved claims of patent infringement, the Commission applies the same criteria with respect to general exclusion orders in investigations involving trademark infringement.⁵

B. The ALJ’s RD

⁵*Certain Agricultural Tractors and Components Thereof*, Inv. No. 337-TA-487, Comm’n Op. at 7-8 (Sept. 2004) (“The criteria and factors set forth in *Spray Pumps* apply *mutatis mutandis* to trademark cases.”); *Certain Cigarettes and Packaging Therefor*, Inv. No. 337-TA-424, USITC Pub. No. 3366 (Nov. 2000), Comm’n Op. at 6-7.

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The ALJ's Recommended Determination is included within his ID finding a violation of section 337 (Order No. 11). In it, the ALJ addressed the requirements for the issuance of a general exclusion order that appear in section 337(d)(2), and made findings that bear directly on the additional requirements.

With respect to subsection (d)(2) and the "widespread pattern of unauthorized use" criterion, the ALJ found that Zippo had demonstrated the existence of a widespread pattern of violation with respect to the registered trademark at issue. ID at 12. The ALJ noted evidence of numerous manufacturing entities in the same country (China) where *** counterfeit lighters were seized during an investigation. *Id.* The ALJ also found evidence that the infringing lighters are widely available via the internet through auction sites. *Id.*

With respect to the business conditions criterion of subsection (d)(2), the ALJ reviewed the evidence that showed that Zippo lighters are popular lighters in the U.S. market and that infringers offer their versions of Zippo lighters over the internet at significantly lower prices. *Id.* Also, the ALJ noted that it was not difficult for foreign entities to gain access to the U.S. market due to the high number of foreign manufacturers of the infringing lighters and ready access to the market through direct sales and internet sales. *Id.* Further, the ALJ noted evidence of the increasing volume of infringing lighters in the U.S. in the past several years. *Id.*

Further, regarding the possibility of circumvention, the ALJ noted evidence of the difficulties in identifying and shutting down individual suppliers as these suppliers, especially those on the internet, often operate with limited contact information. *Id.* Based on these representations, the ALJ found the "widespread pattern" and "business conditions" criteria to be

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satisfied, and he recommended that the Commission issue a general exclusion order if it finds a violation of section 337. *Id.* at 13.

C. Parties' Submissions

Both Zippo and the IA agree that a general exclusion order should issue. Citing the relevant findings of the ALJ, Zippo and the IA argue that there is a widespread pattern of unauthorized use of the patented invention and that certain business conditions exist from which one might reasonably infer that foreign manufacturers other than the respondents may attempt to enter the U.S. market with infringing goods.⁶ The proposed orders of Zippo and the IA differ significantly only in that the IA's proposed order contains a reporting requirement. The IA submits, in his reply brief, that it has been routine to include a reporting provision in orders involving trademarks to apprise the Commission at the earliest possible time as to whether a particular trademark has fallen out of use and, therefore, may be subject to cancellation. IA reply br. at 2-3; *see* 15 U.S.C. § 1058 (registered mark may be canceled for owner's failure to submit an affidavit demonstrating current use of the mark). Zippo does not object to the IA's version of the order. Zippo reply br. at 1.

D. Analysis and Determination

The Commission agrees with the ALJ and the parties that the requirements for the issuance of a general exclusion order have been met in this investigation, and therefore adopts the ALJ's analysis in its entirety. As to the widespread pattern of unauthorized use criterion, the

⁶ Zippo's br. at 4-11; IA's br. at 3.

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record indicates that unauthorized uses occurred in the importation and sale of infringing products manufactured by the respondents and numerous other lighter producers. ID at 12. As to the certain business conditions criterion, the record shows an established U.S. market for goods practicing the trademarks at issue, and the availability of U.S. marketing and distribution networks for such goods. ID at 12-13. Moreover, the ALJ found and the Commission concurs with his assessment that it is difficult to determine the source of infringing goods, and there is evidence that foreign manufacturers of lighters can distribute infringing products at significantly lower prices. ID at 12.

Further, we agree with the IA's recommendation that there be a reporting requirement and therefore issue a general exclusion order including a reporting provision to require Zippo to show that it continues to use the trademark at issue in U.S. commerce and that it has not been abandoned, canceled, or rendered invalid or unenforceable in accordance with 15 U.S.C. § 1058.

III. THE PUBLIC INTEREST

In addition to the factors discussed above, the Commission's authority to issue any exclusion order is conditioned on consideration of the public interest.⁷ Specifically, where respondents have appeared to contest the investigation, the Commission may issue a general exclusion order only if it determines that "a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons" and

after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or

⁷ 19 U.S.C. § 1337(d)(1).

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directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.⁸

The public interest analysis does not concern whether there is a public interest in issuing a remedial order, but whether issuance of such an order will adversely affect the public interest.⁹

Zippo submits that the issuance of a general exclusion order would further the public interest as Zippo lighters are proven to be safe, high quality products as opposed to the poor quality of lighters produced abroad which, given their purpose, can be a serious health and safety hazard. Zippo br. at 12-13. Zippo also asserts that it can meet the demand for lighters covered by the '241 mark and that the public interest favors the protection of U.S. intellectual property rights. *Id.* The IA did not specifically comment regarding the public interest, but agreed with the *Spray Pumps* analysis applied by the ALJ. IA br. at 5-6.

The Commission is not aware of any evidence on the record indicating that the issuance of a general exclusion order in this investigation would be contrary to the public interest. The proposed order bars entry of infringing lighters only, and does not extend to non-infringing lighters. Moreover, the record indicates that U.S. demand for lighters covered by the '241 mark can be met by Zippo. Zippo br. at 13.

IV. BOND DURING PERIOD OF PRESIDENTIAL REVIEW

⁸ Similarly, the Commission may elect not to issue a cease and desist order if it finds that such an order would be contrary to the public interest. 19 U.S.C. § 1337(f).

⁹ *Certain Agricultural Vehicles*, Inv. No. 337-TA-487, Comm'n Op. at 17.

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During the 60-day period of Presidential review, imported articles otherwise subject to a remedial order are entitled to conditional entry under bond, pursuant to section 337(j)(3).¹⁰ The amount of the bond is specified by the Commission and must be an amount sufficient to protect the complainant from any injury.¹¹

The ALJ noted that there is only limited evidence of the prices charged by the defaulting respondents as they did not participate in the investigation. ID at 13. He found that this situation makes it difficult to set the bond on the basis of a difference in sales prices between the protected domestic product and the infringing product.¹² Further, he noted that the pricing evidence presented in the investigation showed a wide range of prices charged by the respondents that was generally well below the retail price charged for Zippo's lighter product. ID at 13-14. Also, the ALJ explained that, in setting the amount of the bond during the period of Presidential review in cases where no reliable comparative pricing information has been available, the Commission has set a 100% bond.¹³ In the present investigation, the ALJ noted that none of the respondents

¹⁰ 19 U.S.C. § 1337(j)(3).

¹¹ *Id.*, 19 C.F.R. § 210.50(a)(3).

¹² ID at 13 (citing *Certain Microsphere Adhesives, Process for Making Same, and Products Containing Same, Including Self-stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. No. 2949 (Jan. 1996), Comm'n Op. at 24-25).

¹³ ID at 13, citing to *Certain Oscillating Sprinklers, Sprinkler Components, and Nozzles*, Inv. No. 337-TA-448, USITC Pub. 3498 (Mar. 2002), Limited Exclusion Order at 4-5 (noting that traditionally, 100% bond is appropriate when a respondent fails to provide discovery regarding pricing of its products).

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provided any discovery, and recommended a bond of 100 percent of the entered value of the infringing goods. ID at 14.

We find that the record lacks sufficient information to calculate the difference in price between the asserted lighters and the infringing products. When the pricing information is insufficient, the Commission has set the amount of the bond at 100 percent of entered value.¹⁴ In accordance with the recommendation of the ALJ and Commission precedent, we determine to set the bond at 100 percent of the entered value of infringing lighters to prevent any harm to Zippo during the period of Presidential review.

By order of the Commission.



Marilyn R. Abbott
Secretary to the Commission

Issued: August 30, 2007

¹⁴ See *Neodymium Magnets*, Inv. No. 337-TA-372, USITC Pub. 2694 (May 1996), Comm'n Op. at 15.

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached COMMISSION PUBLIC OPINION has been served by hand upon the Commission Investigative Attorney, Thomas S. Fusco, Esq., and the following parties as indicated, on August 31, 2007.

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

ON BEHALF OF COMPLAINANT ZIPPO MANUFACTURING CO., INC. AND ZIPPMARK, INC.:

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(checked) Via Overnight Mail
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() Other:

ON BEHALF OF RESPONDENT WENZHOU STAR SMOKING SET CO., LTD.:

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'241 mark"). 71 Fed. Reg. 35450 (June 20, 2006). The complaint further alleged that an industry in the United States exists or is in the process of being established as required by subsection(a)(2) of section 337. Complainants requested that the Commission issue a general exclusion order and cease and desist orders. The ALJ set July 20, 2007, as the target date for completion of the investigation.

The complaint named seven respondents: Tung Fong International Promotion Co., Ltd. of Hong Kong; Wenzhou Star Smoking Set Co., Ltd. of China; Taizhou Rongshi Lighter Development Co., Ltd. of China; Wenzhou Tailier Smoking Set Co., Ltd. of China; Vista Wholesale of Greencastle, Indiana; beWild.com of Bellmore, New York; and Kalan LP of Landsdowne, Pennsylvania. Respondents Kalan and Wenzhou Star Smoking Set Company were terminated from the investigation on the basis of settlement agreements. The remaining five respondents were found to be in default by the ALJ and the Commission did not review that determination.

On November 7, 2006, complainants filed a motion seeking summary determination with respect to the domestic industry requirement and violation of section 337. Complainants also requested that the ALJ recommend a general exclusion order and a 100 percent bond during the Presidential review period. The Commission investigative attorney supported the motion for summary determination and the requested recommendation on remedy and bonding. No respondents responded to the motion.

On February 21, 2007, the ALJ issued an ID finding the domestic industry requirement satisfied, finding a violation of section 337, and containing a recommended determination on remedy and bonding. The ALJ found a violation of section 337 based on his conclusion that there are no genuine issues of material fact that respondents' accused products infringe the '241 mark and that a domestic industry exists as required by 19 U.S.C. § 1337(a)(2). He recommended issuance of a general exclusion order and that the amount of bond for temporary importation during the Presidential review period be set at 100 percent of the entered value of the articles concerned. No petitions for review were filed and the Commission has determined not to review the ID.

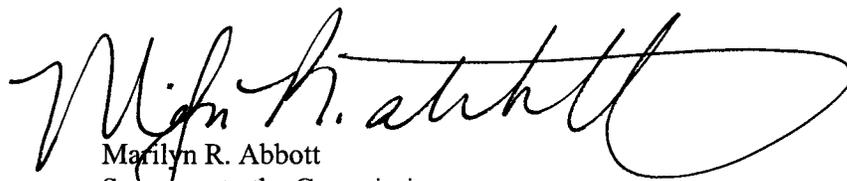
In connection with the final disposition of this investigation, the Commission may issue an order that results in the exclusion of the subject articles from entry into the United States. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, 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). When 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. When the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 *Fed. Reg.* 43251 (July 26, 2005). 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 if a remedy is ordered.

WRITTEN SUBMISSIONS: 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 be no more than twenty-five (25) pages and should address the recommended determination by the ALJ on remedy and bonding. The complainants and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainants are also requested to state the HTSUS numbers under which the accused products are imported. The written submissions and proposed remedial orders must be filed no later than close of business on March 29, 2007. Reply submissions must be filed no later than the close of business on April 5, 2007. 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 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* 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: March 15, 2007

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF A COMMISSION DETERMINATION GRANTING COMPLAINANTS' MOTION FOR SUMMARY DETERMINATION THAT A DOMESTIC INDUSTRY EXISTS AND THAT THERE IS A VIOLATION OF SECTION 337; SCHEDULE FOR FILING WRITTEN SUBMISSIONS ON REMEDY, PUBLIC INTEREST, AND BONDING** has been served on upon the Commission Investigative Attorney Thomas S. Fusco, and all parties via first class mail and air mail where necessary on March 16, 2007.



Marilyn R. Abbott, Secretary
U.S. International Trade Commission
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**ON BEHALF OF COMPLAINANT ZIPPO
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PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

CERTAIN LIGHTERS

Inv. No. 337-TA-575

**ORDER NO. 11: INITIAL DETERMINATION GRANTING MOTION FOR SUMMARY
DETERMINATION WITH RESPECT TO DOMESTIC INDUSTRY AND VIOLATION
OF SECTION 337**

(February 21, 2007)

I. Background

On November 7, 2006, Complainants Zippo Manufacturing Company, Inc. and ZippMark, Inc. (collectively “Zippo”) filed a motion (575-008) for summary determination with respect to domestic industry and violation of Section 337. On November 17, 2006, the Commission Investigative Staff (“Staff”) filed a response in support of the motion. No other responses were received.

On May 16, 2006, Zippo filed a complaint with the Commission pursuant to Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337. Zippo’s complaint alleged violations of Section 337 by all named respondents in connection with the importation, sale for importation, and sale within the United States after importation of certain lighters by reason of infringement of U.S. Trademark Registration No. 2,606,241 (“the ‘241 mark” or “the ‘241 registration”). On June 15, 2006, the Commission issued a Notice of Investigation that was subsequently published in the Federal Register on June 20, 2006.¹

¹ See Notice of Investigation, 71 Fed. Reg. 35,450 (June 20, 2006).

The Notice of Investigation listed seven entities as respondents. Of these, five were found to be in default. The five defaulting respondents are as follows: beWild.com (“beWild”); Vista Wholesale (“Vista”); Tung Fong International Promotion Co., Ltd. (“Tung Fong”), Taizhou Rongshi Lighter Development Co., Ltd. a/k/a Rongshi Enterprise (“Rongshi”), and Wenzhou Tailier Smoking Set Co., Ltd. a/k/a Wenzhou Tailier Smoking Set Manufacturing Co., Ltd. (“Wenzhou Tailier”).² The other two respondents were terminated from this investigation on the basis of settlement agreements, namely Kalan LP (“Kalan”)³ and Wenzhou Star Smoking Set Co., Ltd. aka Wenzhou Hengxing Smoking Set Co., Ltd. (“Wenzhou Star”).⁴ Thus, none of the named respondents have contested Zippo’s allegations that they have violated and continue to violate Section 337.

Zippo’s motion seeks, in addition to a summary determination of a Section 337 violation and the existence of a domestic industry, the entry of a general exclusion order against all infringing imports of accused lighters.⁵

II. Legal Standards

The standards for granting a motion for summary determination under 19 C.F.R. § 210.18(a) are well-recognized and need no repetition here.⁶ It is useful to note that, for the purposes of the

² See Unreviewed Initial Determination, Order No. 8 (September 14, 2006); Commission Notice (October 2, 2006).

³ See Unreviewed Initial Determination, Order No. 7 (August 24, 2006); Commission Notice (September 12, 2006).

⁴ See Unreviewed Initial Determination, Order No. 9 (November 7, 2006); Commission Notice (November 27, 2006).

⁵ See Motion Memorandum at 1.

⁶ See 19 C.F.R. § 210.18(b); also see, e.g., *Anchor Wall Systems, Inc. v. Rockwood Retaining Walls, Inc.*, 340 F.3d 1298, 1306 (Fed. Cir. 2003) (“*Anchor*”).

instant motion, the Commission's Rules require an appropriate, properly supported, unopposed motion for summary determination to be granted.⁷

Under Section 337(d)(1), if the Commission determines as a result of an investigation that there is a violation of Section 337, the Commission is authorized to issue exclusion orders after considering certain public interest factors.⁸ Section 337(d)(2) further provides that exclusion orders are to be "limited to persons determined by the Commission to be violating this section"—that is, limited exclusion orders—unless the Commission finds that a general exclusion order against all unfairly imported accused products, regardless of the identity of the importer, either (i) "is necessary to prevent circumvention of an exclusion order limited to products of named persons" or (ii) is required because "there is a pattern of violation of this section and it is difficult to identify the source of infringing products."⁹ The conditions set forth in subsection (d)(2) are referred to generally as the "*Spray Pumps*" factors, after the Section 337 investigation that established them prior to their 1988 codification into that subsection.¹⁰ The Commission has held that the requirements of subsection (d)(2) are, for all intents and purposes, the same as those that the Commission articulated in *Spray Pumps*.¹¹ The Commission has found that in an investigation where there are defaulting and settling

⁷ See 19 C.F.R. § 210.18(c) ("If the opposing party does not so respond, a summary determination, if appropriate, shall be rendered against the opposing party." (emphasis added)).

⁸ See 19 U.S.C. § 1337(d)(1).

⁹ See 19 U.S.C. § 1337(d)(2).

¹⁰ *Certain Airless Paint Spray Pumps and Components Thereof*, Inv. No. 337-TA-90, USITC Pub. No. 1199, Commission Opinion, 216 U.S.P.Q. 465 (U.S.I.T.C., November 1981).

¹¹ See *Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing Same*, Inv. No. 337-TA-372, USITC Pub. No. 2964, Commission Opinion at 5-6, 1996 WL 1056324 (U.S.I.T.C., May 1996).

respondents, the Commission has the authority to issue a general exclusion order under Section 337(d)(2).¹²

III. Discussion

As to the substance of the motion, Zippo has amply established by “reliable, probative, and substantial evidence”¹³ that a violation has occurred and continues to occur, and that the *Spray Pumps* conditions for issuing a general exclusion order are present in this case. Zippo’s motion include declarations from three individuals, including: (1) [] an investigator for Zippo, which details the instances of importation and sale of respondents’ accused products;¹⁴ (2) Charles Jeffrey Duke, General Counsel of Zippo Manufacturing Corp., detailing the domestic activities related to the Zippo trademark at issue at its facilities in Bradford, Pennsylvania;¹⁵ and (3) [] a computer forensic analyst.¹⁶

A. Importation

Concerning importation of the accused products, the Wise declaration demonstrates that each of the defaulting respondents has imported accused lighters into the United States.¹⁷ Zippo has also shown importation by the samples submitted in this investigation, along with documentary evidence, such as website and internet postings.¹⁸ Staff concurs with these findings.¹⁹

¹² See *Certain Sildenafil or any Pharmaceutically Acceptable Salt Thereof, such as Sildenafil Citrate, and Products Containing Same*, Inv. No. 337-TA-489, Commission Opinion (February 6, 2004).

¹³ See 5 U.S.C. § 556.

¹⁴ See Exhibits 4A-4E, Declarations of []

¹⁵ See Exhibit 3, Declaration of Charles Jeffrey Duke.

¹⁶ See Exhibit 10, Declaration of []

¹⁷ See Motion Memorandum at 8-9; Exhibits 4A-4E, [] Declarations.

¹⁸ See Motion Memorandum at 8-9.

¹⁹ See Staff’s Response at 8.

The undersigned finds that, based on the evidence presented, there is no genuine issue of material fact with respect to whether the accused articles have been imported into the United States.

B. Trademark Infringement

The test for infringement of a trademark is whether the accused mark is “likely to cause confusion, or to cause mistake or to deceive.”²⁰ The undersigned finds that Zippo’s motion establishes, and Staff concurs, that there is a violation by reason of the respondents’ importation into the United States, sale for importation in the United States, or sale within the United States after importation, of certain lighters that infringe the ‘241 mark.²¹

Specifically, Zippo asserts that it has provided samples and substantial documentary evidence that the imported products infringe the ‘241 mark. Zippo has provided excerpts from the websites of the defaulting respondents, showing that the ‘241 mark is infringed and that such infringement was intentional.²² According to Zippo, the excerpts from the websites are proof that the respondents’ lighters are confusing similar, thereby infringing the ‘241 mark.

Zippo analyzes trademark infringement under the factors adopted in *Certain Strip Lights* and *Certain Chemiluminescent Compositions*, including: (a) the degree of similarity between the designation and the trademark or trade name in (i) appearance, (ii) pronunciation of the words used; (iii) verbal translation of the pictures or designs involved; or (iv) suggestion; (b) the intent of the actor in adopting the designation; (c) the relation in use and manner of marketing between the goods and services marketed by the actor and those marketed by the other; and (d) the degree of care likely

²⁰ 15 U.S.C. § 1114(1).

²¹ See Motion Memorandum at 7-12; Staff’s Response at 7-10.

²² See Exhibit 10, [] Declaration.

to be exercised by purchasers.²³ As to the first two factors, Zippo asserts that the ‘241 mark and genuine Zippo shape have been copied as closely as possible, where respondents’ lighters are virtually indistinguishable. According to Zippo, the respondents make no effort to conceal that their lighters are identical in shape to the ‘241 mark and that they openly advertise infringing lighters on their websites.²⁴ As to the third factor, Zippo asserts that the goods are identical. According to Zippo, in recent years it has received []“returns” for repairs of infringing lighters that were purchased by consumers who believed they had purchased a genuine Zippo product.²⁵ As to the fourth factor, Zippo asserts that the degree of care exercised by the consuming public is low because of the low prices (which range from 50 cents to \$5.99 per lighter) at which respondents’ products can be purchased.²⁶

Staff agrees with Zippo, which analyzes trademark infringement based on the factors set forth in the Restatement of Unfair Competition, including:

- (1) the degree of resemblance between the competing marks;
- (2) the similarity of marketing methods and channels of distribution;
- (3) the characteristics of prospective purchasers and the degree of care they exercise;
- (4) the degree of distinctiveness of the senior user’s mark;
- (5) where the goods or services are not competitive, the likelihood that prospective buyers would expect the senior user to expand into the field of the junior user;

²³ See *Certain Strip Lights*, Inv. No. 337-TA-287, Unreviewed Initial Determination (June 27, 1989); Comm’n Order (September 28, 1989); *Certain Chemiluminescent Compositions and Components Thereof and Methods of Using, and Products Incorporating the Same*, Inv. No. 337-TA-285, USITC Pub. 2370, Comm’n Op. (March 1991).

²⁴ See Motion Memorandum at 10-11.

²⁵ See Motion Memorandum at 11; Exhibit 3, Duke Declaration, ¶ 9.

²⁶ See Motion Memorandum at 11-12; Exhibit 4A-4E, [] Declarations.

- (6) where the goods or services are sold in different territories, the extent to which the senior user's designation is known in the junior user's territory;
- (7) the intent of the junior user; and
- (8) actual confusion.²⁷

No single factor is dispositive and all factors should be considered and balanced together to determine whether a likelihood of confusion exists.²⁸

According to Staff, with respect to the first factor, Zippo and the named respondents offer essentially identical goods that are identical in shape, which can be seen by comparing the photographs in [] declaration to the image depicted in the '241 mark.²⁹ With respect to the second factor, Staff asserts that, while Zippo did not explicitly reference this factor, it is beyond dispute that, regardless of manufacturer, cigarette lighters are typically sold in retail establishments that carry tobacco products. With respect to the third factor, Staff asserts that Zippo has shown that the accused lighters are typically sold at low prices that would result in consumers not spending substantial time considering their purchases and are more likely to be confused. With respect to the last factor, Staff asserts that since 2003, Zippo has received more than [] counterfeit lighters from consumers who, believing them to be authentic, submitted them to Zippo for repair.³⁰ Based on all of the above, Staff agrees that Zippo has carried its burden of establishing that there is no genuine issue of material fact regarding infringement of the trademark at issue by the accused lighters.³¹

²⁷ Restatement (Third) of Unfair Competition, §§ 20-23 (1995). *See Certain Purple Protective Gloves*, Inv. No. 337-TA-500, Order No. 17, Unreviewed Initial Determination (September 23, 2004), Comm'n Notice (October 19, 2004).

²⁸ *Arrow Fastener Co. v. Stanley Works*, 59 F.3d 384, 391 (2nd Cir. 1995); *Plus Products v. Plus Disc. Foods, Inc.*, 772 F.2d 999, 1004 (2nd Cir. 1983).

²⁹ *See* Exhibits 4A-4E, Declarations of []

³⁰ *See* Exhibit 3, Duke Declaration, ¶ 9.

³¹ *See* Staff's Response at 8-10.

The undersigned agrees that, under either set of factors set forth by Zippo and Staff, that Zippo has carried its burden regarding trademark infringement.

C. Domestic Industry

Zippo's motion, with Staff concurrence, also demonstrates that a domestic industry exists that practices the '241 mark in accordance with Section 337(a)(2) and (a)(3).³² Under Section 337, in order to prove a violation of Section 337 in an investigation based on registered trademarks, a complainant must demonstrate that a domestic industry exists or is in the process of being established. An industry in the United States exists (1) if the domestic articles are "protected by the trademark . . . concerned" and (2) if there exists in the United States with respect to those articles one or more of the following:

1. Significant investment in plant and equipment;
2. Significant employment of labor or capital; or
3. Substantial investment in the exploitation of the patent, including engineering, research and development, or licensing.³³

Zippo's motion satisfies both the first, so-called "technical prong" and the second, so-called "economic prong" of the domestic industry requirements.

Regarding the technical prong, the declaration of Mr. Duke shows that Zippo's lighters are protected by the trademark at issue.³⁴ Mr. Duke's declaration explains how Zippo manufactures lighters that are the same shape as the lighter depicted in the '241 mark and are thus protected

³² See 19 U.S.C. §§ 1337(a)(2) and (a)(3); Motion Memorandum at 5-7; Staff Response at 6-7.

³³ See 19 U.S.C. § 1337(a)(3).

³⁴ See Motion Memorandum at 5; Staff's Response at 6.

thereby.³⁵ The photographs attached to the motion also support Zippo's motion.³⁶ Furthermore, Mr. Duke's declaration states that nearly [] million lighters bearing the '241 mark have been sold since 1946.³⁷

Regarding the economic prong, the declaration of Mr. Duke shows that Zippo has satisfied the economic prong of the domestic industry requirement under all three prongs.³⁸ Mr. Duke's declaration states that Zippo's lighters are produced at its facility in Bradford, Pennsylvania.³⁹ Over the past four years Zippo has manufactured, on average, [] million lighters per year at this facility.⁴⁰ During the period from 2000-2005, Zippo invested [] million in capital projects relating to lighters, [] of which are allocable to lighters protected by the '241 mark.⁴¹ In addition, Zippo has [] employees in the United States involved in research and development, manufacturing, and quality assurance, [] of whom are considered to work on lighters protected by the '241 mark.⁴² Furthermore, Zippo engages in significant research and development in the United States. According to Zippo, it is continually involved in attempting to improve production processes and to reduce costs by employing [] development personnel, with a budget of [] per year for production improvements.⁴³

³⁵ See Exhibit 3, Duke Declaration, ¶¶ 3, 8.

³⁶ See Exhibit 2.

³⁷ See Exhibit 3, Duke Declaration, ¶ 8.

³⁸ See Motion Memorandum at 5-6.

³⁹ See Exhibit 3, Duke Declaration, ¶ 8.

⁴⁰ See Exhibit 3, Duke Declaration, ¶ 4.

⁴¹ See Exhibit 3, Duke Declaration, ¶ 5.

⁴² See Exhibit 3, Duke Declaration, ¶ 6.

⁴³ See Exhibit 3, Duke Declaration, ¶ 7.

Based on the above, the undersigned finds that Zippo has met its burden of establishing that its lighters are protected by the trademark at issue and that there are no genuine issues of material fact in dispute retarding satisfaction of the domestic industry requirement.

D. Validity

The '241 mark has been registered by Zippo with the U.S. Patent and Trademark Office.⁴⁴ According to Zippo, the '241 mark has been in continuous use since 1946.⁴⁵ Registered trademarks are presumed valid and the registrant is presumed to have the exclusive right to use the registered mark.⁴⁶ The undersigned finds that there is no evidence that would rebut the presumption that the trademark at issue is valid.

E. Conclusion on Violation of Section 337

In accordance with the foregoing reasons, Zippo has demonstrated by “substantial, reliable, and probative evidence,” with the concurrence of Staff, that there is a violation of Section 337 by reason of the defaulting respondents’ importation into the United States, sale for importation, and sale within the United States after importation, of certain lighters that infringe the '241 mark.

IV. Recommended Determination on Remedy and Bonding

Finally, following the issuance of an initial determination on violation of Section 337, the administrative law judge must also issue a recommended determination concerning the appropriate remedy in the event that the Commission finds a violation of Section 337 and the amount of the bond

⁴⁴ See Exhibit 1, the '241 mark registration.

⁴⁵ See Motion Memorandum at 8; Exhibit 3, Duke Declaration, ¶ 8.

⁴⁶ 15 U.S.C. §§ 1057(c), 1115.

to be posted by the respondents during the 60-day period of Presidential review of the Commission's action under Section 337(j).⁴⁷

A. General Exclusion Order

In the case of a finding of violation of Section 337 by defaulting respondents under Section 337(g)(2), a general exclusion order may issue if the requirements of Section 337(d)(2) are met.⁴⁸

As mentioned earlier, these are the *Spray Pumps* factors, under which a general exclusion order is warranted if: “(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.”⁴⁹

Under *Spray Pumps*, a two-pronged test must be satisfied for issuance of a general exclusion order. There must be (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 with infringing articles.”⁵⁰ The following factors are considered relevant to demonstrating a widespread pattern of unauthorized use:

1. Commission determination of unauthorized importation into the United States of infringing articles by numerous foreign manufacturers; and
2. other evidence which demonstrates a history of unauthorized foreign use of the patented invention.⁵¹

⁴⁷ 19 C.F.R. § 210.42(a)(1)(ii).

⁴⁸ 19 U.S.C. § 1337(g)(2)(C).

⁴⁹ 19 U.S.C. § 1337(d)(2).

⁵⁰ *Spray Pumps, supra*, 216 U.S.P.Q. at 473.

⁵¹ *Id.*

The Commission has also identified a number of factors relevant to showing “certain business conditions,” including:

1. an established market for the patented product in the U.S. market and conditions of the world market; and
2. the availability of marketing and distribution networks in the United States for potential foreign manufacturers.⁵²

Both Zippo and Staff agree that there is a “widespread pattern of unauthorized use” in that numerous entities in China manufacture infringing lighters. In support, Zippo points to evidence of a raid in China where [] counterfeit lighters were seized.⁵³ Zippo and Staff also agree that infringing lighters are widely available on the Internet and through auction sites, such as eBay.⁵⁴

Concerning the presence of “business conditions” influencing such unfair imports, Zippo and Staff agree that Zippo lighters are popular lighters and that infringers offer their versions of Zippo lighters over the Internet at significantly lower prices. It is not difficult for foreign entities to gain access to the U.S. market, citing numerous foreign manufacturers of infringing lighters and ready access to the market through direct sales and Internet sales. In addition, the volume of infringing products in the United States has sharply increased in the past few years.⁵⁵

Concerning the possibility of circumvention, Zippo and Staff note the difficulty of identifying and shutting down individual suppliers. In support, Zippo asserts that the factory that was raided in China operated surreptitiously because it [

] ⁵⁶ Both note that infringers operating through Internet web sites

⁵² *Id.*

⁵³ See Motion Memorandum at 17-18; Exhibit 3, Attachment 3; Staff’s Response at 12.

⁵⁴ See Motion Memorandum at 17; Staff’s Response at 12.

⁵⁵ See Motion Memorandum at 18-19; Exhibit 3, Duke Declaration, ¶ 9.

⁵⁶ See Motion Memorandum at 19-20; Staff’s Response at 13-14.

typically offer very limited contact information, making it difficult to take effective action against individual suppliers.⁵⁷

Zippo also asserts that there are no public interest factors that weigh against the issuance of a general exclusion order and that the issuance of a general exclusion order would further the public interest by eliminating potentially unsafe products from the market.⁵⁸

Based on these considerations, it is readily apparent that the *Spray Pumps* factors have been satisfied by Zippo in this case and that there are no public interest factors that weigh against the issuance of a general exclusion order. Accordingly, the undersigned finds that a general exclusion order is warranted.

B. Bond

In accordance with Section 337(j), the accused products are entitled to entry under bond during the 60-day period of Presidential review.⁵⁹ To the extent possible, the bond should be an amount that would be sufficient to protect the complainant from any injury.⁶⁰

Although the Commission frequently sets the bond on the basis of a difference in sales prices between the patented domestic product and the infringing product,⁶¹ there is only limited evidence here of prices charged by the defaulting respondents because they did not participate in the investigation. As Zippo points out, the evidence that does exist is based on Zippo's investigation

⁵⁷ *Id.*

⁵⁸ See Motion Memorandum at 20-21.

⁵⁹ 19 U.S.C. § 1337(j).

⁶⁰ 19 C.F.R. § 210.50(a)(3).

⁶¹ See *Certain Microsphere Adhesives, Process for Making Same, and Products Containing Same, Including Self-stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. No. 2949, Commission Opinion at 24-25 (USITC, January 1996)

and demonstrates a wide range of prices charged by the respondents, generally well below the retail price charged for Zippo's lighter product.⁶²

Where it has been difficult or impossible to calculate a bond based upon price differentials, and particularly where the respondents fail to provide discovery, the Commission has set the bond at 100 percent of the entered value of the infringing imported product.⁶³ Zippo and Staff concur,⁶⁴ and the undersigned recommends as appropriate, that the bond in this instance should be set at 100 percent of the entered value of respondents' accused products during the Presidential review period.

V. Conclusion

Accordingly, Zippo's motion (575-008) for summary determination that there is a violation of Section 337 is hereby granted. Furthermore, the undersigned recommends the issuance of a general exclusion order.

Pursuant to 19 C.F.R. § 210.38(d), the Administrative Law Judge hereby CERTIFIES to the Commission the record in this investigation.

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

Within seven days of the date of this document, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not it seeks to have any portion of this

⁶² See Motion Memorandum at 18.

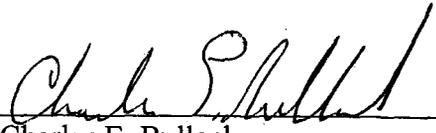
⁶³ See *Certain Oscillating Sprinklers, Sprinkler Components, and Nozzles*, Inv. No. 337-TA-448, Limited Exclusion Order at 4-5 (March 2002) (setting bond at 100% of entered value with respect to the products of a defaulting respondent).

⁶⁴ See Motion Memorandum at 21-22; Staff's Response at 14.

document deleted from the public version. The parties' submissions may be made by facsimile and/or hard copy by the aforementioned date.

Any party seeking to have any portion of this document deleted from the public version thereof must submit to this office a copy of this document with red brackets indicating any portion asserted to contain confidential business information. The parties' submissions concerning the public version of this document need not be filed with the Commission Secretary.

SO ORDERED.



Charles E. Bullock
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER** was served upon, **Thomas S. Fusco, Esq.**, Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on March 21, 2007.


Marilyn R. Abbott, Secretary
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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of

CERTAIN LIGHTERS

Investigation No. 337-TA-575

**NOTICE OF COMMISSION DECISION NOT TO REVIEW AN INITIAL
DETERMINATION FINDING FIVE RESPONDENTS IN DEFAULT**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's ("ALJ") initial determination ("ID") (Order No. 8) finding five respondents in default for failure to respond to the complaint and notice of investigation the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Monica A. Stump, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3106. Copies of the ALJ's ID and all other non-confidential 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 at <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: On June 20, 2006, the Commission instituted this investigation, based on a complaint filed by Zippo Manufacturing Company, Inc., of Bradford, Pennsylvania, and ZippMark, Inc. of Wilmington, Delaware. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain personal lighters by reason of infringement of United States Trademark Registration No. 2,606,241 ("the Zippo trademark"). 71 *Fed. Reg.* 35450 (2006). The complaint further alleged that an industry in the United States exists as required by subsection (a)(2) of section 337. The complainants requested that the Commission issue a general exclusion order and cease and desist orders.

The complaint named seven respondents: beWild.com (beWild) of Bellmore, New York; Kalan LP (Kalan) of Landsdowne, Pennsylvania, Taizhou Rongshi Lighter Development Co., Ltd. a/k/a Rongshi Enterprise (Rongshi) of China; Tung Fong International Promotion Co., Lt. (Tung Fong) of China; Vista Wholesale (Vista) of Greencastle, Indiana; Wenzhou Tailier Smoking Set Manufacturing Co., Ltd. (Wenzhou Tailier) of China; and Wenzhou Star Smoking Set Co., Ltd. (Wenzhou Star) of China. Respondent Kalan has been terminated from the investigation on the basis of a settlement agreement. Wenzhou Star is the only respondent remaining in the investigation. The Commission instituted this investigation on June 20, 2006, based on a complaint filed by Zippo Manufacturing Company, Inc., of Bradford, Pennsylvania, and ZippMark, Inc. of Wilmington, Delaware, alleging violations of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain personal lighters by reason of infringement of United States Trademark Registration No. 2,606,241. 71 *Fed. Reg.* 35450 (2006).

On July 17, 2006, July 18, 2006, and July 21, 2006, complainants filed motions for orders to be directed to respondents beWild, Rongshi, Tung Fong, Vista and Wenzhou Tailier to show cause why they should not be found in default for failure to respond to the complaint and notice of investigation. Complainants' motions also requested issuance of an ID finding these five respondents in default upon failure to show cause. Complainants also requested an immediate entry of a limited exclusion order, cease and desist order, and/or other appropriate relief upon finding the above named respondents in default. The Commission investigative attorney supported the motions, but took no position with respect to complainants' request for relief. No party opposed the motions.

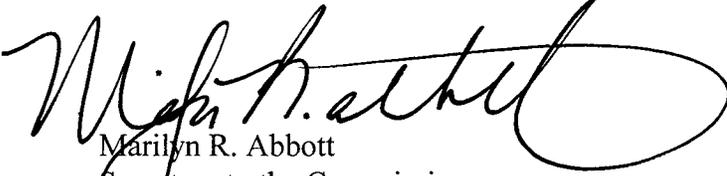
On August 16, 2006, Judge Bullock issued Order No. 6, ordering beWild, Rongshi, Tung Fong, Vista, and Wenzhou Tailier to show cause why each should not be held in default no later than September 1, 2006. None of those five respondents filed a response to the order, an answer to the complaint, or a notice of appearance within the time permitted. On September 15, 2006, the ALJ issued the subject ID finding beWild, Rongshi, Tung Fong, Vista, and Wenzhou Tailier in default. No party petitioned for review of the ID.

The Commission will take up the issue of immediate relief after the finding of default becomes its final determination, and complainants have filed their declarations. See Commission rule 210.16(c).

Having examined the record of this investigation, the Commission has determined not to review the ALJ's ID finding beWild, Rongshi, Tung Fong, Vista, Wenzhou Tailier in default.

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 section 210.42(h) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.42(h)).

By order of the Commission.

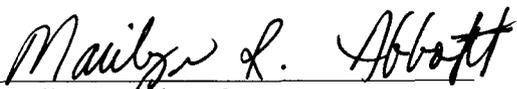


Marilyn R. Abbott
Secretary to the Commission

Issued: October 2, 2006

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF COMMISSION DECISION NOT TO REVIEW AN INTIAL DETERMINATION FINDING FIVE RESPONDENTS IN DEFAULT** has been served on upon the Commission Investigative Attorney Thomas S. Fusco, and all parties via first class mail and air mail where necessary on October 3, 2006.



Marilyn R. Abbott, Secretary
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Certificate of Service – page 2

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UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

CERTAIN LIGHTERS

Inv. No. 337-TA-575

**ORDER NO. 8: INITIAL DETERMINATION FINDING RESPONDENTS
BEWILD.COM, VISTA, TUNG FONG, RONGSHI, AND WENZHOU TAILIER IN
DEFAULT**

(September 15, 2006)

On July 17, 2006, Complainants Zippo Manufacturing Company, Inc. and ZippMark, Inc. (collectively “Zippo”) filed a motion [575-002] for order to show cause why Respondent beWild.com (“beWild”) should not be found in default for failure to respond to the complaint and notice of investigation,² pursuant to 19 C.F.R. § 210.13. On July 18, 2006, Zippo filed a motion [575-003] for order to show cause why Respondent Vista Wholesale (“Vista”) should not be found in default for failure to respond to the complaint and notice of investigation, pursuant to 19 C.F.R. § 210.13. On July 21, 2006, Zippo filed a motion [575-004] for order to show cause why Respondents Tung Fong International Promotion Co., Ltd. (“Tung Fong”), Taizhou Rongshi Lighter Development Co., Ltd. a/k/a Rongshi Enterprise (“Rongshi”), and Wenzhou Tailier Smoking Set Co., Ltd. a/k/a Wenzhou Tailier Smoking Set Manufacturing Co., Ltd. (“Wenzhou Tailier”) should not be found in default for failure to respond to the complaint and notice of investigation, pursuant to 19 C.F.R. § 210.13. Zippo’s motion further requested issuance of an initial determination finding

¹ Zippo filed a complaint with the Commission pursuant to Section 337 of the Tariff Act of 1930 on May 16, 2006 and supplemented its Complaint on June 5, 2006.

² The Notice of Investigation, issued by the Commission, was published in the Federal Register as 71 Fed. Reg. 35,450, on June 20, 2006.

the above named respondents in default upon failure to show cause. In addition, Zippo's motion included a request for immediate entry of a limited exclusion order, cease and desist order, and/or other appropriate relief upon finding the above named respondents in default. On July 28, 2006, August 3, 2006, and August 15, 2006, the Commission Investigative Staff ("Staff") filed responses supporting Zippo's motions, and took no position with respect to Zippo's request for immediate entry of relief upon finding of default. No other responses to Zippo's motion were filed.

Order No. 6, issued on August 16, 2006, granted Zippo's motions ordering the above named respondents to show, by the close of business on September 1, 2006, why they should not be found in default for failure to respond to the Complaint and Notice of Investigation pursuant to Rule 210.16 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.16. No responses to Order No. 6 were filed by the deadline date, and no responses have been filed as of the present date.

Commission Rule 210.16 provides in pertinent part, as follows:

A party shall be found in default if it fails to respond to the complaint and notice of investigation in the manner prescribed in §210.13 or § 210.59(c), or otherwise fails to answer the complaint and notice, and fails to show cause why it should not be found in default.

19 C.F.R. § 210.16(a)(1). The Commission's Rules further provide that "[a] party found in default shall be deemed to have waived its right to appear, to be served with documents, and to contest the allegations at issue in the investigation." 19 C.F.R. § 210.16(b)(3).

Accordingly, it is the INITIAL DETERMINATION of the Administrative Law Judge that Respondents beWild, Vista, Tung Fong, Rongshi, and Wenzhou Tailier be found to be in default. Consequently, Respondents beWild, Vista, Tung Fong, Rongshi, and Wenzhou Tailier have waived

their right to appear, to be served with documents, and to contest the allegations at issue in the investigation.

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

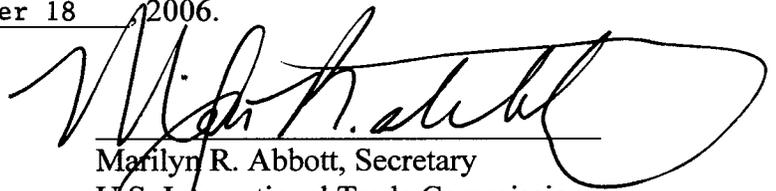
SO ORDERED.



Charles E. Bullock
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER** was served upon, **Thomas S. Fusco, Esq.**, Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on September 18 2006.



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