

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

**In the Matter of
CERTAIN NITRILE GLOVES**

Investigation No. 337-TA-608

AND

**In the Matter of
CERTAIN NITRILE RUBBER GLOVES**

Investigation No. 337-TA-612

**NOTICE OF COMMISSION DETERMINATION TO REVIEW-IN-PART A FINAL
DETERMINATION ON VIOLATION OF SECTION 337; SCHEDULE FOR FILING
WRITTEN SUBMISSIONS ON THE ISSUES UNDER REVIEW AND ON REMEDY,
THE PUBLIC INTEREST, AND BONDING**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review a portion of the final initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”) on August 25, 2008, regarding whether there is a violation of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, in the above-captioned consolidated investigation.

FOR FURTHER INFORMATION CONTACT: Michelle Walters, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-5468. Copies of 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: The Commission instituted Inv. No. 337-TA-608 on July 6, 2007, based on a complaint filed by Tillotson Corporation d.b.a. Best Manufacturing Company ("Tillotson"). The complaint alleged 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 nitrile gloves by reason of infringement of various claims of United States Patent No. Re. 35,616 ("the '616 patent"). The complaint named over thirty respondents. The Commission instituted a second investigation, Inv. No. 337-TA-612, on August 22, 2007, based on a complaint filed by Tillotson. That complaint also 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 nitrile gloves by reason of infringement of various claims of the '616 patent and named seven respondents. On September 19, 2007, the ALJ consolidated Inv. No. 337-TA-608 with Inv. No. 337-TA-612.

On August 25, 2008, the ALJ issued a final ID and recommended determination on remedy and bonding in the above-referenced consolidated investigation, finding that the active respondents did not violate section 337. Specifically, he found that the vast majority of accused gloves infringe claims 17, 18, and 19 of the '616 patent, but that nine accused gloves do not infringe the asserted claims. He also concluded that when the patentees amended the claims through a reissue application filed more than two years after the grant of the original patent, they improperly enlarged the scope of the claims, rendering them invalid. The ALJ further concluded that the claims are invalid because the patentees filed a defective reissue declaration when applying for the reissue patent. He rejected other arguments of invalidity and unenforceability. Accordingly, the ALJ concluded that respondents had not violated section 337.

On September 8, 2008, complainant Tillotson filed a petition for review, as did several respondents. On September 16, 2008, respondents filed a response to complainant's petition and complainant filed a response to respondents' petition.

Having examined the record of this investigation, including the ALJ's ID and the submissions of the parties, the Commission has determined (1) to review the ALJ's claim construction of the term "predetermined pressure," (2) to review the ALJ's determination of invalidity for a broadening reissue, (3) to review the ALJ's determination of invalidity for a deficient reissue declaration, (4) to review the ALJ's determination that the claims are not invalid for failure to disclose a best mode, (5) to review the ALJ's determination that the claims are not invalid for lack of enablement, and (6) not to review the ALJ's determinations relating to any of the remaining issues on violation. Finally, the Commission has determined to deny complainant's request for oral argument.

The parties should brief their positions on the issues on review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission is particularly interested in responses to the following questions:

1. Before the ALJ and in its petition for review, complainant asserted that the term “predetermined pressure” means “the amount of pressure first exerted on the hand by the glove after the glove is donned.” Nevertheless, complainant also states in its petition that the “predetermined pressure” must be determined in advance – a limitation that is omitted from its proposed claim construction. Assuming that the “predetermined pressure” must be determined in advance, what does it mean to determine the pressure in advance?
 - a. Please explain the meaning of the word “determine.” Please submit copies of any dictionary entries that you rely upon for the term “determine” and any dictionary entries that you relied upon before the ALJ for the term “predetermine.”
 - b. Must a person select a particular pressure to be exerted on the hand, for example, 100 psi, and then make the glove and test it to ensure that it meets the 100 psi requirement? If so, is a mental step, such as this, appropriate in a product claim?
 - c. Or is it enough to actually measure the pressure in psi, for example, before putting the glove on the hand? For purposes of this question, assume that the claims require that the predetermined pressure be determined in advance of initially exerting the pressure on the hand.
 - d. Or is it enough that the pressure is fixed by “basic physics” when the glove is made? Can the pressure in fact be calculated from the physical characteristics of the glove and the hand?
 - e. How do the intrinsic and extrinsic evidence support your responses?
2. State precisely how your claim construction of the term “predetermined pressure” differs from the ALJ’s claim construction.
3. Regarding the issue of broadening reissue, if the “predetermined pressure” is determined in advance by selecting a specific pressure and then making the glove, were the claims broadened when the claims were amended during reissue?
4. If the “predetermined pressure” is determined in advance by measuring the pressure in advance, were the claims broadened when the claims were amended during reissue?
5. If the “predetermined pressure” is determined in advance by means of the properties of the glove, *i.e.*, basic physics, were the claims broadened when the claims were amended during reissue?
6. Please analyze these three scenarios (3, 4, and 5) under the hypothetical glove test.
7. Has the United States Court of Appeals for the Federal Circuit ever applied the omitted limitation test in the broadening reissue context?
8. Regarding the issue of the reissue declaration, assuming that *Dethmers Manufacturing Co., Inc. v. Automatic Equipment Manufacturing Co.*, 272 F.3d 1365 (Fed. Cir. 2001), and 37 C.F.R. § 1.175(a) (1996) control and further assuming that the change from “predetermined pressure” to “initial pressure” (regardless of their meanings) was a broadening amendment, were the declarations deficient?

9. Was the amendment a small change in language that did not affect the scope of claim 1? If so, did the change need to be explained in the reissue declaration?
10. Regarding the issue of enablement, what must respondents establish in order to prove that the claims are not enabled?
11. Were any articles or references submitted into evidence that discuss the use of non-carboxylated nitrile butadiene rubber in thin films?

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 a respondent 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 United States 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: The parties to the investigation are requested to file written submissions on the issues identified in this notice. 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 recommended determination by the ALJ on remedy and bonding. Complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the dates that the patent expires and 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

November 10, 2008. Reply submissions must be filed no later than the close of business on November 17, 2008. The written submissions must be no longer than 60 pages and the reply submissions must be no longer than 30 pages. 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. § 210.6. 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 and 210.50 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.42-46 and 210.50).

By order of the Commission.

/s/
Marilyn R. Abbott
Secretary to the Commission

Issued: October 24, 2008