

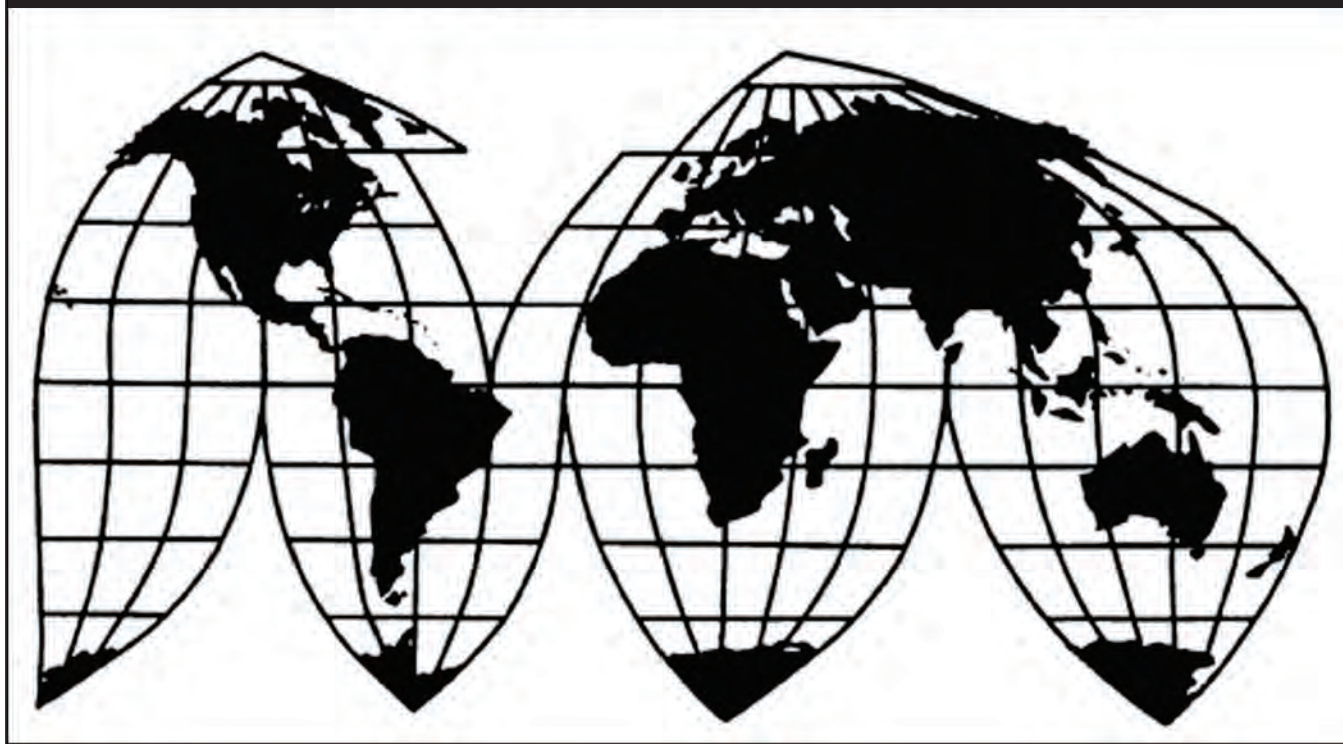
*In the Matter of*  
**CERTAIN MULTIPLE MODE OUTDOOR  
GRILLS AND PARTS THEREOF**

337-TA-895

**Publication 4864**

**February 2019**

**U.S. International Trade Commission**



Washington, DC 20436

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

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**United States International Trade Commission**  
**Washington, DC 20436**

# U.S. International Trade Commission

Washington, DC 20436  
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*In the Matter of*

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

337-TA-895



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

**In the Matter of**

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

**Investigation No. 337-TA-895**

**NOTICE OF COMMISSION'S FINAL DETERMINATION FINDING A VIOLATION  
OF SECTION 337; ISSUANCE OF A LIMITED EXCLUSION ORDER AND CEASE  
AND DESIST ORDERS; 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 found a violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), in the unlawful importation, sale for importation, and sale after importation by respondents The Brinkmann Corporation ("Brinkmann") of Dallas, Texas; Outdoor Leisure Products, Inc. ("OLP") of Neosho, Missouri; Dongguan Kingsun Enterprises Co., Ltd. ("Kingsun") of Dongguan City, China; Academy, Ltd. ("Academy") of Katy, Texas; and Ningbo Huige Outdoor Products Co., Ltd. ("Huige") of Zhejiang Province, China, of certain multiple mode outdoor grills and parts thereof by reason of infringement of one or more claims of U.S. Patent No. 8,381,712 ("the '712 patent"). The Commission also found defaulted respondent Keesung Manufacturing Co., Ltd. ("Keesung") of Guangzhou, China in violation pursuant to Section 337(g)(1). The Commission's determination is final, and the investigation is terminated.

**FOR FURTHER INFORMATION CONTACT:** Cathy Chen, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2392. 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 this investigation on September 26, 2013, based on a complaint filed on behalf of A&J Manufacturing, LLC of St. Simons, Georgia and A&J Manufacturing, Inc. of Green Cove Springs, Florida (collectively, “A&J” or “Complainants”). 78 *Fed. Reg.* 59373 (Sept. 26, 2013). The complaint alleged violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the sale for importation, importation, or sale within the United States after importation of certain multiple mode outdoor grills and parts thereof by reason of infringement of certain claims of the ’712 patent, the claim of U.S. Patent No. D660,646, and the claim of U.S. Patent No. D662,773. The Commission’s notice of investigation, as amended, named numerous respondents including Brinkmann, OLP, Kingsun, Academy, Huige, Char-Broil, LLC (“Char-Broil”), and Fudeer Electric Appliance Co., Ltd. (“Fudeer”). The Office of Unfair Import Investigations (“OUII”) is also a party to this investigation.

On January 9, 2014, the Commission determined not to review an initial determination finding respondent Keesung in default. Order No. 16 (Dec. 20, 2013).

On June 24, 2014, the Commission affirmed-in-part and vacated-in-part an initial determination granting-in-part a motion for summary determination of non-infringement filed by Char-Broil, Fudeer, OLP, Kingsun, Tractor Supply Co., and Chant Kitchen Equipment (HK) Ltd. The Commission found that Complainants admit that the following redesigned grills do not infringe the ’712 patent: (1) Chant/Tractor Supply’s New Model 1046761; (2) Rankam’s Member’s Mark Grill, Model No. GR2071001-MM (Ver. 2) and (3) Rankam’s Smoke Canyon Grill, Model No. GR2034205-SC (Ver. 2). *Comm’n Op.* at 1 (Jun. 24, 2014). The Commission found the other redesigned products at issue were within the scope of the investigation. *Id.* The Commission adopted the ALJ’s construction of the “openable [] cover” limitations of claims 1 and 17 on modified grounds. *Id.* The Commission affirmed the ALJ’s finding of non-infringement of claims 1 and 17 for the Char-Broil Oklahoma Joe Longhorn Model 12210767 Grill and adopted the ALJ’s findings that the redesigned grills do not infringe claims 1 and 17 on modified grounds. *Id.* The Commission also found that the “openable [] cover means” limitations of claim 10 are means-plus-function limitations and directed the ALJ to make findings consistent with its means-plus-function interpretation. *Id.* at 2.

On July 31, 2014, the Commission determined not to review an initial determination granting a motion for partial termination of the investigation based on withdrawal of allegations in the complaint concerning the two asserted design patents. *See* Order No. 50 (Jul. 14, 2014).

On September 26, 2014, the ALJ issued the final Initial Determination (“ID”), finding a violation of section 337 as to respondents Brinkmann, OLP, Kingsun, Academy, and Huige based upon his determinations: (i) that certain, but not all, accused products infringe at least one claim of the ’712 patent; (ii) that the domestic industry requirement has been satisfied with respect to the ’712 patent; and (iii) that the asserted claims of the ’712 patent have not been shown by clear and convincing evidence to be invalid. On October 9, 2014, the ALJ issued his Recommended Determination on remedy and bonding.

On October 14, 2014, A&J filed a petition for review of certain aspects of the final ID's findings concerning claim construction and infringement. On the same day, Brinkmann, OLP, and Academy together sought review of certain aspects of the final ID's findings regarding validity. OLP separately challenged certain aspects of the final ID's findings regarding claim construction and infringement. Academy and Huige petitioned for review of the ID's determination (Order No. 47) to exclude evidence and testimony concerning their redesigns, and the ALJ's refusal to make a determination as to whether those redesigns infringe the asserted claims of the '712 patent. Responses to the petitions were filed on October 22, 2014.

On December 2, 2014, the Commission determined to review the final ID in part and requested briefing on issues it determined to review, and on remedy, the public interest, and bonding. 79 Fed. Reg. 72700-02 (Dec. 8, 2014). Specifically, with respect to the '712 patent, the Commission determined to review: (1) the ID's construction of the "exhaust" and "exhaust means" limitations in claims 10 and 16, and related findings regarding infringement of claims 10-16; (2) the ID's findings regarding infringement of claims 1, 4, and 6-8 by the accused Dyna-Glo grills imported by respondent GHP Group, Incorporated; (3) the ID's findings regarding infringement of claims 1, 2, 4-8, 10, 11, and 13-15 by the accused Char-Broil Model No. 463724512 grill; and (4) the ID's finding that the '712 patent was not shown to be invalid.

On December 12, 2014, A&J and OUII each filed initial written submissions regarding issues on review, remedy, the public interest, and bonding. On the same day, the respondents jointly filed their initial written submission regarding issues on review, remedy, the public interest, and bonding. Responses to the initial written submissions were filed on December 19, 2014.

Having examined the record of this investigation, including the parties' submissions and responses thereto, the Commission has determined that 35 U.S.C. § 112, ¶ 6 applies to the "exhaust means" and "exhaust" limitations in claims 10 and 16. Based on the Commission's interpretation of claims 10-16, the Commission has determined (i) that the accused Brinkmann 810-3821 grill infringes claims 10, 11, 13, 15, and 16; (ii) that the accused Academy/Huige grills infringe claims 10-13, 15, and 16; and (iii) that the other accused Brinkmann grills, the OLP/Kingsun redesigned grills, the OLP/Kingsun original grills, and the Char-Broil/Fudeer grills do not infringe any of claims 10-16 of the '712 patent. The Commission vacates the ID's finding that the DGB730SNB-D grill does not infringe claims 1, 4, and 6-8 of the '712 patent. The Commission also reverses the ID's finding that the DGJ810CSB-D grill does not infringe claims 1, 4, and 6-8 of the '712 patent. With respect to the accused Char-Broil/Fudeer grill, Model No. 463724512, the Commission has determined to affirm, with modified reasoning, the ID's finding that the grill does not infringe any asserted claims of the '712 patent. The Commission has further determined to affirm, with modified reasoning, the ID's finding that the asserted claims of the '712 patent have not been proven invalid as obvious. Accordingly, the Commission has found a violation of section 337 as to respondents Brinkmann, OLP, Kingsun, Academy, and Huige, and defaulted respondent Keesung.

The Commission has determined that the appropriate form of relief is a limited exclusion order prohibiting the unlicensed entry of covered multiple mode outdoor grills and parts thereof

manufactured by, for, or on behalf of Brinkmann, OLP, Kingsun, Academy, Huige, and Keesung, or any of their affiliated companies, parents, subsidiaries, licensees, or other related business entities, or their successors or assigns. The Commission has also determined to issue cease and desist orders prohibiting Brinkmann, OLP, and Academy from further importing, selling, and distributing articles that infringe certain claims of the '712 patent in the United States. The orders include the following exemptions: (1) conduct licensed or authorized by the owner of the '712 patent; (2) conduct related to covered products imported by or for the United States; and (3) the importation, distribution, and sale of parts for use in the maintenance, service, or repair of covered products purchased prior to the effective date of the orders. The Commission has carefully considered the submissions of the parties and has determined that the public interest factors enumerated in section 337(d)(1), (f)(1), and (g)(1) do not preclude issuance of its orders.

Finally, the Commission has determined that excluded multiple mode outdoor grills and parts thereof may be imported and sold in the United States during the period of Presidential review (19 U.S.C. § 1337(j)) with the posting of a bond of 100 percent of the entered value for all covered articles manufactured by, for, or on behalf of Keesung, and the posting of a bond of zero percent for all covered articles manufactured by, for, or on behalf of Brinkmann, OLP, Kingsun, Academy, and Huige. The Commission's Orders and Opinion were delivered to the President and to the United States Trade Representative on the day of their 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 Part 210 of the Commission's Rules of Practice and Procedure (19 C.F.R. Part 210).

By order of the Commission.



Lisa R. Barton  
Secretary to the Commission

Issued: February 3, 2015

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

**In the Matter of**

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

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

**LIMITED EXCLUSION ORDER**

The Commission found that there is a violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), in the unlawful importation, sale for importation, and sale after importation by Respondents The Brinkmann Corporation (“Brinkmann”) of Dallas, Texas; Outdoor Leisure Products, Inc. (“OLP”) of Neosho, Missouri; Dongguan Kingsun Enterprises Co., Ltd. (“Kingsun”) of Dongguan City, China; Academy, Ltd. (“Academy”) of Katy, Texas; and Ningbo Huige Outdoor Products Co., Ltd. (“Huige”) of Zhejiang Province, China, of certain multiple mode outdoor grills and parts thereof by reason of infringement of one or more claims of U.S. Patent No. 8,381,712 (“the ’712 patent”).

The Commission also found Respondent Keesung Manufacturing Co., Ltd. (“Keesung”) of Guangzhou, China in default pursuant to section 337(g)(1) and 19 C.F.R. § 210.16 for failing to respond to the Notice of Investigation and a complaint that alleged a violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), with respect to the unlawful importation, sale for importation, and sale after importation into the United States of certain multiple mode outdoor grills and parts thereof by reason of infringement of one or more claims of the ’712 patent.

Having reviewed the record of 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 the appropriate form of relief is a limited exclusion order prohibiting the unlicensed entry of covered multiple mode outdoor grills and parts thereof manufactured by, for, or on behalf of Brinkmann, OLP, Kingsun, Academy, Huige, and Keesung, or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns.

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

During the Presidential review period, the Commission has further determined to set a bond of 100 percent of the entered value for all covered products manufactured by, for, or on behalf of Keesung, and to set a bond of zero percent of the entered value for all covered products manufactured by, for, or on behalf of Brinkmann, OLP, Kingsun, Academy, and Huige.

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

1. Multiple mode outdoor grills and parts thereof covered by one or more of claims 1, 2, 4, 6-11, 13, and 15-20 of the '712 patent and that are manufactured abroad by or on behalf of, or imported by or on behalf of Brinkmann or any of its affiliated companies, parents, subsidiaries, or other related business entities, or its successors or assigns, are excluded from entry for consumption into the United States, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, for the remaining term of the patent, except under license of the patent owner or as provided by law, and except for parts imported

for use in the maintenance, service, or repair of multiple mode outdoor grills purchased prior to the effective date of this Order.

2. Multiple mode outdoor grills and parts thereof covered by one or more of claims 1-9 of the '712 patent and that are manufactured abroad by or on behalf of, or imported by or on behalf of OLP, Kingsun, or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns, are excluded from entry for consumption into the United States, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, for the remaining term of the patent, except under license of the patent owner or as provided by law, and except for parts imported for use in the maintenance, service, or repair of multiple mode outdoor grills purchased prior to the effective date of this Order.
3. Multiple mode outdoor grills and parts thereof covered by one or more of claims 1-13, 15, and 16 of the '712 patent and that are manufactured abroad by or on behalf of, or imported by or on behalf of Academy, Huige, or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns, are excluded from entry for consumption into the United States, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, for the remaining term of the patent, except under license of the patent owner or as provided by law, and except for parts imported for use in the maintenance, service, or repair of multiple mode outdoor grills purchased prior to the effective date of this Order.
4. Multiple mode outdoor grills and parts thereof covered by one or more of claims 1, 4, 6-10, 13, 15, and 16 of the '712 patent and that are manufactured abroad by

or on behalf of, or imported by or on behalf of Keesung, or any of its affiliated companies, parents, subsidiaries, or other related business entities, or its successors or assigns, are excluded from entry for consumption into the United States, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, for the remaining term of the patent, except under license of the patent owner or as provided by law, and except for parts imported for use in the maintenance, service, or repair of multiple mode outdoor grills purchased prior to the effective date of this Order.

5. Notwithstanding paragraphs 1-4 of this Order, the multiple mode outdoor grills and parts thereof 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 the entered value for all covered products manufactured by, for, or on behalf of Keesung, and zero percent of the entered value for all covered products manufactured by, for, or on behalf of Brinkmann, OLP, Kingsun, Academy, and Huige pursuant to subsection (j) of Section 337 (19 U.S.C. § 1337(j)) and the Presidential Memorandum for the United States Trade Representative of July 21, 2005 (70 *Fed. Reg.* 43,251), 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 sixty days after the date of receipt of this Order.
6. At the discretion of U.S. Customs and Border Protection (“CBP”) and pursuant to procedures that it establishes, persons seeking to import multiple mode outdoor grills and parts thereof that are potentially subject to this Order may be required to

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 one or more of paragraphs 1-4 of this Order. At its discretion, CBP 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.

7. The provisions of this Order shall not apply to multiple mode outdoor grills and parts thereof found to be non-infringing as detailed in the Commission Opinion dated June 27, 2014, the final initial determination dated September 26, 2014 at pages 54-57 and 59, and the Commission Opinion dated February 3, 2015 at pages 27-36.
8. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to multiple mode outdoor grills and parts thereof 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.
9. 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).
10. The 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 U.S. Customs and Border Protection.



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

By Order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', written in a cursive style.

Lisa R. Barton  
Secretary to the Commission

Issued: February 3, 2015

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

**In the Matter of**

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

**Investigation No. 337-TA-895**

**CEASE AND DESIST ORDER**

**IT IS HEREBY ORDERED THAT** Outdoor Leisure Products, Inc. of 45400 Doniphan Drive, Neosho, Missouri 64850, cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, transferring (except for exportation), and soliciting U.S. agents or distributors for multiple mode outdoor grills and parts thereof that infringe one or more of claims 1-9 of U.S. Patent No. 8,381,712 (“the ’712 patent”) in violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337).

**I.**  
**Definitions**

As used in this order:

- (A) “Commission” shall mean the United States International Trade Commission.
- (B) “Complainants” shall mean A&J Manufacturing, LLC of St. Simons, Georgia, and A&J Manufacturing, Inc. of Green Cove Springs, Florida.
- (C) “Respondent” shall mean Outdoor Leisure Products, Inc. of Neosho, Missouri.
- (D) “Person” shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority-owned or controlled subsidiaries, successors, or assigns.
- (E) “United States” shall mean the fifty States, the District of Columbia, and Puerto Rico.

- (F) The terms “import” and “importation” refer to importation for entry for consumption under the Customs laws of the United States.
- (G) The term “covered products” shall mean multiple mode outdoor grills and parts thereof that infringe one or more of claims 1-9 of the '712 patent. Covered products shall not include multiple mode outdoor grills and parts thereof found to be non-infringing as detailed in the Commission Opinion dated June 27, 2014, the final initial determination issued on September 26, 2014 at pages 54-57 and 59, and the Commission Opinion dated February 3, 2015 at pages 27-36.

## **II. Applicability**

The provisions of this Cease and Desist order shall apply to the Respondent and to any of its principals, stockholders, officers, directors, employees, agents, 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 this Order.

For the remaining term of the '712 patent, Respondent shall not:

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, 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, Respondent shall be permitted:

- A. To distribute or sell parts imported for use in the maintenance, service, or repair of multiple mode outdoor grills purchased prior to the effective date of this Order;
- B. To engage in specific conduct otherwise prohibited by the terms of this Order if, in a written instrument, the owner of the '712 patent authorizes or licenses such specific conduct; or
- C. To engage in specific conduct otherwise prohibited by the terms of this Order if 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 requirement, the reporting periods shall commence on January 1 of each year and shall end on the subsequent December 31. The first report required under this section shall cover the period from the date of issuance of this order through December 31, 2015. This reporting requirement shall continue in force until such time as Respondent has truthfully reported, in two consecutive timely filed reports, that they have 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 (a) the quantity in units and the value in dollars of covered products that it has (i) imported and/or (ii) sold in the United States after importation during the reporting period,

and (b) 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.

Respondents filing written submissions must file the original document electronically on or before the deadlines stated above and submit eight (8) true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-895") in a prominent place on the cover pages and/or the first page. (See Handbook for Electronic Filing Procedures, [http://www.usitc.gov/secretary/fed\\_reg\\_notices/rules/handbook\\_on\\_electronic\\_filing.pdf](http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf)). Persons with questions regarding filing should contact the Secretary (202-205-2000). If Respondent desires to submit a document to the Commission in confidence, it must file the original and a public version of the original with the Office of the Secretary and must serve a copy of the confidential version on Complainants' counsel.<sup>1</sup>

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

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<sup>1</sup> Complainants must file a letter with the Secretary identifying the attorney to receive reports and bond information associated with this order. The designated attorney must be on the protective order entered in the investigation.

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 purposes of determining or securing compliance with this Order and for no other purpose, subject to any privilege recognized by the federal courts of the United States, and upon reasonable written notice by the Commission or its staff, duly authorized representatives of the Commission 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, in detail and in summary form, that must be retained under subparagraph VI(A) of this Order.

## **VII.**

### **Service of Cease and Desist Order**

Respondent is ordered and directed to:

- (A) Serve, within fifteen 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 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 expiration date of the '712 patent.

### **VIII. Confidentiality**

Any request for confidential treatment of information obtained by the Commission pursuant to Section V or VI of this Order should be made in accordance with section 201.6 of the Commission's Rules of Practice and Procedure (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 an action for civil penalties under section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(f)), as well as any other action that the Commission deems appropriate. In determining whether Respondent is in violation of this order, the Commission may infer facts adverse to Respondent if it 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 United States Trade Representative, as

delegated by the President (70 *Fed. Reg.* 43,251 (Jul. 21, 2005)), subject to Respondent posting of a bond in the amount of zero percent of the 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 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* 19 C.F.R. § 210.68). The bond and any accompanying documentation are to be provided to and approved by the Commission prior to the commencement of conduct that is otherwise prohibited by Section III of this Order. Upon the Secretary's acceptance of the bond, (a) the Secretary will serve an acceptance letter on all parties, and (b) Respondent must serve a copy of the bond and any accompanying documentation on Complainants' counsel.<sup>2</sup>

The bond is to be forfeited in the event that the United States Trade Representative approves this Order (or does not disapprove it within the review period), unless (i) 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 (ii) Respondent exports or destroys the products subject to this bond and provides certification to that effect that is satisfactory to the Commission.

The bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved (or

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<sup>2</sup> *See* note 1 above.



not disapproved) by the United States Trade Representative, 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 'Lisa R. Barton', written in a cursive style.

Lisa R. Barton  
Secretary to the Commission

Issued: February 3, 2015

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

**In the Matter of**

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

**Investigation No. 337-TA-895**

**CEASE AND DESIST ORDER**

**IT IS HEREBY ORDERED THAT** The Brinkmann Corporation of 4215 McEwan Road, Dallas, Texas 75244, cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, transferring (except for exportation), and soliciting U.S. agents or distributors for multiple mode outdoor grills and parts thereof that infringe one or more of claims 1, 2, 4, 6-11, 13, and 15-20 of U.S. Patent No. 8,381,712 (“the ’712 patent”) in violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337).

**I.**  
**Definitions**

As used in this order:

- (A) “Commission” shall mean the United States International Trade Commission.
- (B) “Complainants” shall mean A&J Manufacturing, LLC of St. Simons, Georgia, and A&J Manufacturing, Inc. of Green Cove Springs, Florida.
- (C) “Respondent” shall mean The Brinkmann Corporation of Dallas, Texas.
- (D) “Person” shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority-owned or controlled subsidiaries, successors, or assigns.

- (E) “United States” shall mean the fifty States, the District of Columbia, and Puerto Rico.
- (F) The terms “import” and “importation” refer to importation for entry for consumption under the Customs laws of the United States.
- (G) The term “covered products” shall mean multiple mode outdoor grills and parts thereof that infringe one or more of claims 1, 2, 4, 6-11, 13, and 15-20 of the ’712 patent. Covered products shall not include multiple mode outdoor grills and parts thereof found to be non-infringing as detailed in the Commission Opinion dated June 27, 2014, the final initial determination issued on September 26, 2014 at pages 54-57 and 59, and the Commission Opinion dated February 3, 2015 at pages 27-36.

## **II. Applicability**

The provisions of this Cease and Desist order shall apply to the Respondent and to any of its principals, stockholders, officers, directors, employees, agents, 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 this Order.

For the remaining term of the ’712 patent, Respondent shall not:

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, 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, Respondent shall be permitted:

- A. To distribute or sell parts imported for use in the maintenance, service, or repair of multiple mode outdoor grills purchased prior to the effective date of this Order;
- B. To engage in specific conduct otherwise prohibited by the terms of this Order if, in a written instrument, the owner of the '712 patent authorizes or licenses such specific conduct; or
- C. To engage in specific conduct otherwise prohibited by the terms of this Order if 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 requirement, the reporting periods shall commence on January 1 of each year and shall end on the subsequent December 31. The first report required under this section shall cover the period from the date of issuance of this order through December 31, 2015. This reporting requirement shall continue in force until such time as Respondent has truthfully reported, in two consecutive timely filed reports, that they have 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 (a) the quantity in units and the value in dollars of covered products that it has

(i) imported and/or (ii) sold in the United States after importation during the reporting period, and (b) 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.

Respondents filing written submissions must file the original document electronically on or before the deadlines stated above and submit eight (8) true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-895") in a prominent place on the cover pages and/or the first page. (See Handbook for Electronic Filing Procedures, [http://www.usitc.gov/secretary/fed\\_reg\\_notices/rules/handbook\\_on\\_electronic\\_filing.pdf](http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf)). Persons with questions regarding filing should contact the Secretary (202-205-2000). If Respondent desires to submit a document to the Commission in confidence, it must file the original and a public version of the original with the Office of the Secretary and must serve a copy of the confidential version on Complainants' counsel.<sup>1</sup>

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

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<sup>1</sup> Complainants must file a letter with the Secretary identifying the attorney to receive reports and bond information associated with this order. The designated attorney must be on the protective order entered in the investigation.

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 purposes of determining or securing compliance with this Order and for no other purpose, subject to any privilege recognized by the federal courts of the United States, and upon reasonable written notice by the Commission or its staff, duly authorized representatives of the Commission 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, in detail and in summary form, that must be retained under subparagraph VI(A) of this Order.

## **VII.**

### **Service of Cease and Desist Order**

Respondent is ordered and directed to:

- (A) Serve, within fifteen 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 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 expiration date of the '712 patent.

### **VIII. Confidentiality**

Any request for confidential treatment of information obtained by the Commission pursuant to Section V or VI of this Order should be made in accordance with section 201.6 of the Commission's Rules of Practice and Procedure (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 an action for civil penalties under section 337(f) of the Tariff Act of 1930, as amended (19 U.S.C. § 1337(f)), as well as any other action that the Commission deems appropriate. In determining whether Respondent is in violation of this order, the Commission may infer facts adverse to Respondent if it 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 United States Trade Representative, as

delegated by the President (70 *Fed. Reg.* 43,251 (Jul. 26, 2005)), subject to Respondent posting of a bond in the amount of zero percent of the 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 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* 19 C.F.R. § 210.68). The bond and any accompanying documentation are to be provided to and approved by the Commission prior to the commencement of conduct that is otherwise prohibited by Section III of this Order. Upon the Secretary's acceptance of the bond, (a) the Secretary will serve an acceptance letter on all parties, and (b) Respondent must serve a copy of the bond and any accompanying documentation on Complainants' counsel.<sup>2</sup>

The bond is to be forfeited in the event that the United States Trade Representative approves this Order (or does not disapprove it within the review period), unless (i) 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 (ii) Respondent exports or destroys the products subject to this bond and provides certification to that effect that is satisfactory to the Commission.

The bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved (or

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<sup>2</sup> *See* note 1 above.



not disapproved) by the United States Trade Representative, 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 'Lisa R. Barton', written in a cursive style.

Lisa R. Barton  
Secretary to the Commission

Issued: February 3, 2015

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

**In the Matter of**

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

**Investigation No. 337-TA-895**

**CEASE AND DESIST ORDER**

**IT IS HEREBY ORDERED THAT** Academy, Ltd. of 1800 N. Mason Road, Katy, Texas 77449, cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, transferring (except for exportation), and soliciting U.S. agents or distributors for multiple mode outdoor grills and parts thereof that infringe one or more of claims 1-13, 15, and 16 of U.S. Patent No. 8,381,712 (“the ’712 patent”) in violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337).

**I.  
Definitions**

As used in this order:

- (A) “Commission” shall mean the United States International Trade Commission.
- (B) “Complainants” shall mean A&J Manufacturing, LLC of St. Simons, Georgia, and A&J Manufacturing, Inc. of Green Cove Springs, Florida.
- (C) “Respondent” shall mean Academy, Ltd. of Katy, Texas.
- (D) “Person” shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority-owned or controlled subsidiaries, successors, or assigns.

- (E) “United States” shall mean the fifty States, the District of Columbia, and Puerto Rico.
- (F) The terms “import” and “importation” refer to importation for entry for consumption under the Customs laws of the United States.
- (G) The term “covered products” shall mean multiple mode outdoor grills and parts thereof that infringe one or more of claims 1-13, 15, and 16 of the ’712 patent. Covered products shall not include multiple mode outdoor grills and parts thereof found to be non-infringing as detailed in the Commission Opinion dated June 27, 2014, the final initial determination issued on September 26, 2014 at pages 54-57 and 59, and the Commission Opinion dated February 3, 2015 at pages 27-36.

## **II. Applicability**

The provisions of this Cease and Desist order shall apply to the Respondent and to any of its principals, stockholders, officers, directors, employees, agents, 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 this Order.

For the remaining term of the ’712 patent, Respondent shall not:

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, 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, Respondent shall be permitted:

- A. To distribute or sell parts imported for use in the maintenance, service, or repair of multiple mode outdoor grills purchased prior to the effective date of this Order;
- B. To engage in specific conduct otherwise prohibited by the terms of this Order if, in a written instrument, the owner of the '712 patent authorizes or licenses such specific conduct; or
- C. To engage in specific conduct otherwise prohibited by the terms of this Order if 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 requirement, the reporting periods shall commence on January 1 of each year and shall end on the subsequent December 31. The first report required under this section shall cover the period from the date of issuance of this order through December 31, 2015. This reporting requirement shall continue in force until such time as Respondent has truthfully reported, in two consecutive timely filed reports, that they have 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 (a) the quantity in units and the value in dollars of covered products that it has (i) imported and/or (ii) sold in the United States after importation during the reporting period,

and (b) 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.

Respondents filing written submissions must file the original document electronically on or before the deadlines stated above and submit eight (8) true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-895") in a prominent place on the cover pages and/or the first page. (See Handbook for Electronic Filing Procedures, [http://www.usitc.gov/secretary/fed\\_reg\\_notices/rules/handbook\\_on\\_electronic\\_filing.pdf](http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf)). Persons with questions regarding filing should contact the Secretary (202-205-2000). If Respondent desires to submit a document to the Commission in confidence, it must file the original and a public version of the original with the Office of the Secretary and must serve a copy of the confidential version on Complainants' counsel.<sup>1</sup>

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

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<sup>1</sup> Complainants must file a letter with the Secretary identifying the attorney to receive reports and bond information associated with this order. The designated attorney must be on the protective order entered in the investigation.

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 purposes of determining or securing compliance with this Order and for no other purpose, subject to any privilege recognized by the federal courts of the United States, and upon reasonable written notice by the Commission or its staff, duly authorized representatives of the Commission 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, in detail and in summary form, that must be retained under subparagraph VI(A) of this Order.

## **VII.**

### **Service of Cease and Desist Order**

Respondent is ordered and directed to:

- (A) Serve, within fifteen 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 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 expiration date of the '712 patent.

### **VIII. Confidentiality**

Any request for confidential treatment of information obtained by the Commission pursuant to Section V or VI of this Order should be made in accordance with section 201.6 of the Commission's Rules of Practice and Procedure (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 an action for civil penalties under section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(f)), as well as any other action that the Commission deems appropriate. In determining whether Respondent is in violation of this order, the Commission may infer facts adverse to Respondent if it 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 United States Trade Representative, as

delegated by the President (70 *Fed. Reg.* 43,251 (Jul. 21, 2005)), subject to Respondent posting of a bond in the amount of zero percent of the 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 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* 19 C.F.R. § 210.68). The bond and any accompanying documentation are to be provided to and approved by the Commission prior to the commencement of conduct that is otherwise prohibited by Section III of this Order. Upon the Secretary's acceptance of the bond, (a) the Secretary will serve an acceptance letter on all parties, and (b) Respondent must serve a copy of the bond and any accompanying documentation on Complainants' counsel.<sup>2</sup>

The bond is to be forfeited in the event that the United States Trade Representative approves this Order (or does not disapprove it within the review period), unless (i) 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 (ii) Respondent exports or destroys the products subject to this bond and provides certification to that effect that is satisfactory to the Commission.

The bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved (or

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<sup>2</sup> *See* note 1 above.



not disapproved) by the United States Trade Representative, 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 'Lisa R. Barton', written in a cursive style.

Lisa R. Barton  
Secretary to the Commission

Issued: February 3, 2015

***PUBLIC VERSION***

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

In the Matter of

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

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

**COMMISSION OPINION**

On April 17, 2014, the presiding administrative law judge (“ALJ”) issued an initial determination (“ID”) granting summary determination of non-infringement as to certain products. Complainants petitioned for review. On May 20, 2014, the Commission determined to review the ID.

Having considered the ID, and the submissions of the parties, the Commission has determined to affirm-in-part and vacate-in-part the ID. The Commission finds that Complainants assert admit that the following redesigned grills do not infringe the ’712 patent: (1) Chant/Tractor Supply’s New Model 1046761; (2) Rankam’s Member’s Mark Grill, Model No. GR2071001-MM (Ver. 2) and (3) Rankam’s Smoke Canyon Grill, Model No. GR2034205-SC (Ver. 2). The Commission finds that the remaining redesigned products are within the scope of the investigation. The Commission adopts the ALJ’s construction of the “openable [] cover” limitations of claims 1 and 17 on modified grounds. The Commission affirms the ALJ’s finding of non-infringement of claims 1 and 17 for the existing Char-Broil product and adopts the ALJ’s findings that the redesigned grills do not infringe claims 1 and 17 on modified grounds. The

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Commission also finds that the “openable [] cover means” limitations of claim 10 are means-plus-function limitations and directs the ALJ to make findings consistent with its means-plus-function interpretation.

**I. BACKGROUND**

**A. Procedural History**

The Commission instituted this investigation on September 26, 2013, based on a complaint filed on behalf of A&J Manufacturing, LLC of St. Simons, Georgia and A&J Manufacturing, Inc. of Green Cove Springs, Florida (collectively “A&J” or “Complainants”). 78 *Fed. Reg.* 59373 (Sept. 26, 2013). The complaint alleged violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the sale for importation, importation, or sale within the United States after importation of certain multiple mode outdoor grills and parts thereof by reason of infringement of certain claims of U.S. Patent No. 8,381,712 (“the ’712 patent”), U.S. Patent No. D660,646, and U.S. Patent No. D662,773. The Commission’s Notice of Investigation, as amended, named several respondents including, among others, Char-Broil, LLC (“Char-Broil”); Zhejiang Fudeer Electric Appliance Co., Ltd (“Fudeer”); Rankam Metal Products Manufactory Limited, USA (“Rankam”); Outdoor Leisure Products, Inc. (“OLP”); Dongguan Kingsun Enterprises Co., Ltd. (“Kingsun”); Tractor Supply Co. (“Tractor”); and Chant Kitchen Equipment (HK) Ltd. (“Chant”) (collectively “the Respondents”).

On March 5, 2014, the Respondents filed a motion for summary determination of non-infringement of the asserted claims of the ’712 patent. On March 24, 2014, Complainants opposed the motion, and the Office of Unfair Import Investigations (“OUII”) filed a response in partial support of the motion. After considering the parties’ briefs, on April 8, 2014, the ALJ

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requested additional briefing from the parties. Order No. 28. The parties filed responses to Order No. 28 on April 11, 2014 and April 14, 2014. Respondents sought leave to file a Reply, which the ALJ granted.

On April 17, 2014, the ALJ granted the Respondents' motion in part. The ALJ found that the following products do not infringe claims 1-20 of the '712 patent: (i) Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill Model Number 12210767; (ii) Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill Model Number 14201767; (iii) Char-Broil Charcoal/Gas Combo 1010 Deluxe, Model No. 463724514; (iv) Rankam Model No. GR2034205-SC (Ver 2); (v) Rankam Model No. GR2071001-MM; (vi) Rankam GR2071001-MM (Ver 2); (vii) Outdoor Leisure Products Smoke Hollow Model Numbers PS9500, 8000, 8500, 3500, 3300, and 6500; and (viii) Chant Red Stone Model 1046761. ID at 11. The ALJ found that a genuine issue of material fact exists with respect to Char-Broil Model 463724512 combination charcoal/gas grill and denied summary determination for this product. *Id.* at 10-11.

On April 25, 2014, Complainants timely petitioned for review. On May 2, 2014, OUII filed a response. On May 2, 2014, Char-Broil, Fudeer, Rankam, OLP, and Kingsun (collectively "the Char-Broil Respondents") filed a joint response. Also on May 2, 2014, Tractor and Chant (collectively "the Chant Respondents") filed a joint response.

On May 20, 2014, the Commission determined to review the ID in the entirety and posed questions to the parties. On May 28, 2014, A&J, OUII, the Chant Respondents, and the Char-Broil Respondents submitted separate responses to the Commission's questions. On June 2, 2014, A&J, OUII, and the Char-Broil Respondents filed reply responses to each other's submissions.

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**B. Overview of the '712 Patent**

The '712 patent issued on February 26, 2013, and is entitled "Simultaneous Multiple Cooking Mode Barbecue Grill." John Lee Simms, II is named as the sole inventor. The '712 patent relates to dual-mode grills having cooking units for both solid fuels (*e.g.*, charcoal) and gas fuels (*e.g.*, propane) that can be operated simultaneously. The asserted independent claims each relate to cooking units having openable covers that have at least one exhaust. '712 patent at 4:54, 6:60. Claims 1-20 are asserted. The asserted independent claims recite:

**Claim 1.** A barbecue grill having multiple cooking units, comprising:

a support structure configured to support a plurality of cooking units;

a first cooking unit configured to cook food using gas cooking fuel, the first cooking unit attached to the support structure and including at least one first grill, the first cooking unit further including an openable first cover attached to the first cooking unit that selectively covers the first grill, wherein the first cover includes at least one exhaust; and

a second cooking unit configured to cook food using solid cooking fuel, the second cooking unit attached to the support structure and including at least one second grill, the second cooking unit further including an openable second cover attached to the second cooking unit that selectively covers the second grill, wherein the second cover includes at least one exhaust,

wherein the first cooking unit and the second cooking unit are simultaneously operable to cook food and the first grill and second grill are selectively and independently coverable.

**Claim 10.** A barbecue grill having multiple means for cooking, comprising:

a first means for cooking food using gas cooking fuel, the first means for cooking including at least one first grill and an openable first cover means for selectively covering the first grill, wherein the first cover means is attached to the first means for cooking and includes at least one exhaust;

a second means for cooking food using solid cooking fuel, the second means for cooking including at least one second grill and an openable second cover means for selectively covering the

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second grill, wherein the second cover means is attached to the second means for cooking and includes at least one exhaust means; and

a structure means for supporting the first means for cooking and the second means for cooking;

wherein the first means for cooking and the second means for cooking are simultaneously operable to cook food and the first grill and second grill are selectively and independently coverable.

**Claim 17.** A barbecue grill having multiple cooking units, comprising:

a support structure configured to support a plurality of cooking units;

a first cooking unit supported by the support structure, the first cooking unit having a substantially cylindrical shape, the first cooking unit configured to cook food using gas cooking fuel, the first cooking unit including at least one first grill and an openable first cover attached to the first cooking unit that selectively covers the first grill, wherein the first cover includes at least one exhaust; and

a second cooking unit supported by the support structure, the second cooking unit having a substantially cylindrical shape, the second cooking unit configured to cook food using solid cooking fuel, the second cooking unit including at least one second grill and an openable second cover attached to the second cooking unit that selectively covers the second grill, wherein the second cover includes at least one exhaust,

wherein the first cooking unit and the second cooking unit are simultaneously operable to cook food and the first grill and second grill are selectively and independently coverable.

'712 patent at 4:54-5:8, 5:40-59, 6:25-47 (emphasis added).

## **II. INFRINGEMENT OF THE '712 PATENT**

### **A. The ALJ's ID**

In considering Respondents' Motion for Summary Determination of Non-Infringement with respect to the limitations containing the term "openable [] cover," the ALJ noted that the parties' dispute principally concerns whether the claimed cover can include both fixed and openable portions of a grill cover. ID at 3. The ALJ construed the disputed claim term

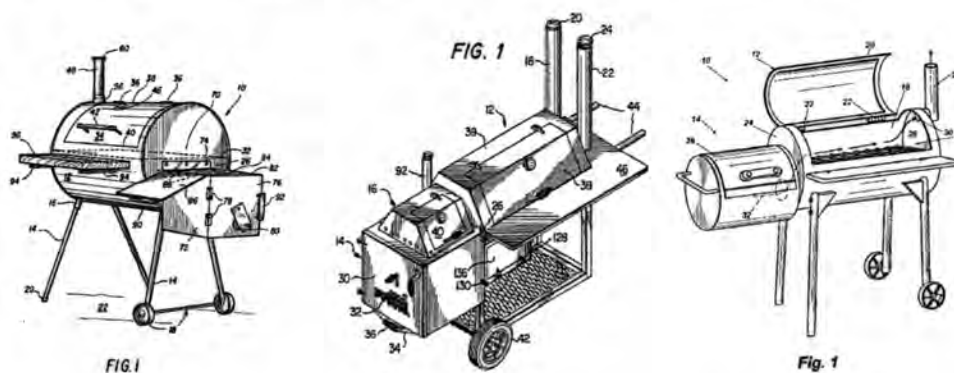


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“openable [ ] cover” to mean “a cover that excludes any portion of the grill enclosure that is not openable (*i.e.*, fixed).” *Id.* at 4.

The ALJ determined that the plain language of the disputed claim term “openable [ ] cover” requires that the cover be openable, and that in view of the prosecution history of the ’712 patent, the “openable [ ] cover” limitations cannot be met by grills having exhausts on fixed portions of the grill. *Id.*

The ALJ noted that the U.S. Patent and Trademark Office (“PTO”) Examiner rejected the applicant’s claimed invention over prior art grills having exhausts on the fixed portions of the grills. *Id.* These references include U.S. Patent No. 4,665,891 (“Nemec”), U.S. Patent No. 6,209,533 (“Ganard”), and U.S. Patent No. 4,700,618 (“Cox”). *Id.* The ALJ reproduced figures from Nemec, Ganard and Cox, which were included in Respondents’ motion exhibits,<sup>1</sup> and noted that all of these references include exhausts on fixed portions of the grill.



*Id.* at 4-5 (reproducing Mot. Ex. 5 (Nemec), Fig. 1; Mot. Ex. 7 (Cox), Fig. 1; and Mot. Ex. 6 (Ganard), Fig. 1)).

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<sup>1</sup> Respondents attached various exhibits to their Statement of Undisputed Facts in Support of Respondent’s Motions for Summary Determination of Non-Infringement. These exhibits are cited herein as “Mot. Ex.”

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The ALJ noted that the applicant initially sought broad claim coverage, but was required to distinguish the asserted claims over the prior art. *Id.* at 5-6. Specifically, the ALJ explained that the applicant “amended its claims on August 25, 2011, to add the following narrowing limitations: (i) that the recited cover be ‘openable’; and (ii) that the cover include ‘at least one exhaust.’” *Id.* at 6 (citing Mot. Ex. 2 at A&J000259-63). The ALJ noted that these claims were finally rejected over U.S. Patent No. 4,787,477 (“McLane”) in view of Cox. *Id.* (citing Mot. Ex. 2 at A&J000295). The applicant appealed this rejection and argued that the claimed invention was not rendered obvious over McLane in view of Cox. The applicant stated:

The Office suggests that combining the barbecue grill of McLane with the oven/smoker enclosures and chimneys described in Cox would render obvious “wherein the first cover includes at least one exhaust,” and “wherein the second cover includes at least one exhaust,” as recited in claim 22. Office Action, pp. 7-8. Assuming, for the sake of argument, that this combination is even possible (which it is not), **at best it would result in a barbecue grill with chimneys connected to exit ports on the fixed portions of the oven/smoker enclosures which are not openable (i.e., not covers).** Thus, even if the references could be combined in the manner suggested in the Office Action, the combination still fails to teach “wherein the first cover includes at least one exhaust,” and “wherein the second cover includes at least one exhaust,” as recited in claim 22.

*Id.* (citing Mot. Ex. 2 at A&J000387). The ALJ determined that “[t]his argument concerning Cox shows that the applicant did not regard the fixed portion of the grill enclosure 39 as ‘openable.’” *Id.* The ‘openable cover’ of Cox is the door 38 that can be opened to provide access to the inside of the grill enclosure.” *Id.* The ALJ found that this interpretation was consistent with the plain meaning of the term “openable [] cover.” *Id.*

The ALJ rejected A&J’s argument that the applicant’s statements in his September 4, 2012 PTO Appeal Brief address only “the unworkability of the Examiner’s position by assuming



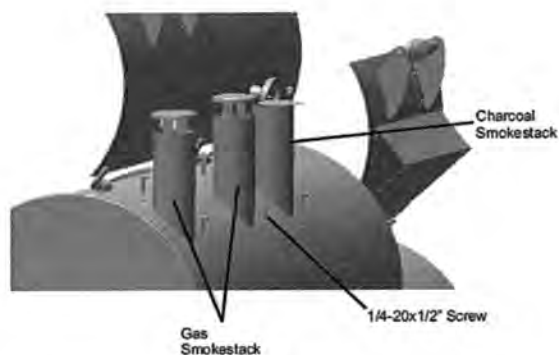
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for the sake of argument that if this combination was possible the result would be a grill ‘with chimneys connected to exit ports on the fixed portions of the oven/smoker enclosures which are not openable (*i.e.*, not covers)’” and do not address the claimed invention. *Id.*

The ALJ determined that the prosecution history shows that the applicant did not regard the fixed portion of the grill enclosure as “openable.” *Id.* at 7. The ALJ found that the narrowing amendments to the claims made on August 25, 2011 gave rise to “claim amendment-based estoppel.” *Id.* Specifically, the ALJ held that the applicant amended his claims to overcome a prior art rejection of McLean in view of Nemec. *Id.* According to the ALJ, these narrowing amendments lead to the surrender of the equivalents as to that claim limitation. *Id.* at 7-8 (citing *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 727 (2002) (“When the patentee responds to the rejection by narrowing his claims, this prosecution history estops him from later arguing that the subject matter covered by the original, broader claim was nothing more than an equivalent.”)).

Based on his determination that “openable [ ] cover” should be construed to mean a cover that excludes any portion of the grill enclosure that is not openable (*i.e.*, the fixed portion), the ALJ found that seven of the products at issue in the summary determination motion that have exhausts only on the fixed portions of the grill do not infringe the asserted claims of the ’712 patent. *Id.* at 8-9. The ALJ explained, for example, that the Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill Model Number 12210767 has an exhaust on the fixed portion of the grill, as illustrated below:

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*Id.* at 9 (citing Mot. Ex. 11 at Ex. B at 24). Therefore, the ALJ asserted that “there is no genuine issue of material fact that those products fail to satisfy each limitation of the claimed invention, and therefore do not literally infringe any asserted claim.” *Id.* The ALJ also found that, because of the narrowing amendments made during prosecution, A&J is estopped from asserting infringement under the doctrine of equivalents. *Id.*

**B. Analysis**

**1. Claim Construction**

The parties dispute the construction of the “openable [] cover” limitations of claims 1, 10 and 17. An additional dispute arises with respect to whether the “openable [] cover means” limitations of claim 10 are means-plus-function limitations. For the reasons set forth below, the Commission adopts the ALJ’s construction of “openable [] cover” for claims 1 and 17 on modified grounds and finds that the “openable [] cover means” limitations of claim 10 are means-plus-function limitations. To the extent the ALJ’s analysis and findings are consistent with this opinion, they are adopted.

**a. Construction of “Openable [] Cover” of Claims 1 and 17**

The Federal Circuit has held that prosecution history estoppel and prosecution disclaimer can both serve to constrain the scope of a claim. *Trading Techs. Int’l, Inc. v. Open E Cry, LLC*,

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728, F.3d 1309, 1322 (Fed. Cir. 2013).<sup>2</sup> Prosecution disclaimer prevents a patentee from reclaiming subject matter surrendered through statements or claim amendments made during prosecution, and it limits the scope of literal infringement based on a patentee's disavowal of claim meaning. *Omega Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1324-26 (Fed. Cir. 2003) (stating patentees are precluded from recapturing through claim interpretation specific meanings disclaimed during prosecution, explaining that prosecution disclaimer requires alleged disavowing actions or statements to be clear and unmistakable); *Sentry Protection Prods., Inc. v. Eagle Mfg. Co.*, 400 F.3d 910, 915 (Fed. Cir. 2005) (finding district court's application of prosecution disclaimer based on claim amendment sound and stating that expressly disclaiming subject matter during prosecution modifies scope of claim); *Cordis Corp. v. Medtronic Ave, Inc.* 511 F.3d 1157, 1177 (Fed. Cir. 2008).

The claims that were originally filed in the application that became the '712 patent were amended during the course of prosecution. On August 25, 2011, the applicant amended the asserted independent claims to require that the claimed covers be "openable" and that the covers each include "at least one exhaust having a configuration based on the fuel type." Mot. Ex. 2 at

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<sup>2</sup> In construing the "openable [] cover" limitations of the asserted independent claims, the ALJ analyzed the statements and amendments the applicant made during prosecution and determined that they constituted amendment-based prosecution history estoppel. Prosecution history estoppel prevents a patentee from arguing under the doctrine of equivalents that the subject matter surrendered during prosecution is covered by the patent. *See e.g., Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 727 (2002); *Regents of the Univ. of Minn. v. AGA Medical Corp.*, 717 F.3d 929, 942 (Fed. Cir. 2013); *Trading Tech Int'l, Inc. v. Open E Cry, LLC*, 728 F.3d 1309, 1322 (Fed. Cir. 2013). Before the ALJ, the parties disputed whether the prosecution history estoppel at issue here was amendment-based or argument-based. However, this argument appears to be moot because A&J now submits that it is asserting only literal infringement, and prosecution history estoppel does not limit the literal scope of the patent claims. *See Comp. Pet.* at 5-6.

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A&J000259-63. The applicant argued that the independent claims were patentable over the cited prior art because the cited references did not teach the configuration of smoke stacks on the openable covers of the cooking units based on the type of fuel used in the cooking units. *Id.* at A&J 000270-73.

As prosecution continued, the applicant amended the independent claims, in response to a § 112 rejection (written description), to remove the requirement that the exhausts be configured based on the type of fuel used. These amended claims did not overcome the ALJ's final rejection over McLane in view of Cox. *Id.* at A&J00295; A&J000631. Thereafter, the applicant filed a PTO Appeal Brief in response to a final prior art rejection, arguing:

Assuming, for the sake of argument, that this combination is even possible (which it is not), at best it would result in a barbecue grill with chimneys connected to exit ports *on the fixed portions of the oven/smoker enclosures which are not openable (i.e., not covers).* Thus, even if the references could be combined in the manner suggested in the Office Action, the combination still fails to teach "wherein the first cover includes at least one exhaust," and "wherein the second cover includes at least one exhaust."

Mot. Ex. 2 at A&J000387 (emphasis added). Thus, the applicant and the PTO equated the fixed portions of the grill enclosure with the portions of the grill enclosure that were not openable and thus were not covers. We agree with the ALJ that the applicant's statements and claim amendments constitute a clear and unmistakable disclaimer of any construction of the term "openable [ ] cover" that includes portions of the grill enclosure that are not fixed.

A&J argues that the applicant did not describe placement of the exhausts on the moveable cover as a critical or essential feature of the claimed invention during prosecution, and therefore his statements on appeal did not constitute a disclaimer. Comp. Rev. Br. at 6-7. However, the Commission finds this argument unpersuasive. There is no requirement that a prosecution

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disclaimer must relate solely to the critical or essential feature of the invention. The applicant cannot take back statements that he made during prosecution because they do not relate to a critical feature.

A&J also argues that its statements in the PTO Appeal Brief were not directed to the invention itself, but rather to the Examiner's combination of references. *Id.* at 7-9. A&J asserts that the applicant's main argument was that the prior art references were not properly combined. However, an applicant's arguments distinguishing an invention over the prior art can give rise to disclaimer even if the applicant distinguishes the reference on other grounds as well. *See Anderson Corp. v. Fiber Composites, LLC*, 474 F.3d 1361, 1374 (Fed. Cir. 2007); *Saffran v. Johnson*, 712 F.3d 549, 559 (Fed. Cir. 2013). Here, the applicant clearly and unambiguously argued that McLane and Cox did not render the invention obvious because "at best it would result in a barbecue grill with chimneys connected to exit ports on the fixed portions of the oven/smoker enclosures which are not openable (i.e., not covers)." *See* Mot. Ex. 2 at A&J000387.

Accordingly, the Commission adopts the ALJ's construction of "openable [] cover." We agree that one of ordinary skill in the art would not consider the fixed unopenable portion of the grill enclosure to be within the term "openable [] cover." Moreover, the applicant's amendments and statements made during prosecution unambiguously define the scope of the limitation. The Commission finds that a reasonable competitor would believe that the applicant clearly and unmistakably surrendered claim scope in the amendments and statements made to the PTO. *Uship Intellectual Properties, LLC v. United States*, 714 F.3d 1311, 1316 (Fed. Cir. 2013); *Hockerson-Halberstadt, Inc. v. Avia Group Int'l, Inc.*, 222 F.3d 951, 956-57 (Fed. Cir. 2000).



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For these reasons, the Commission adopts the ALJ's construction with respect to claims 1 and 17. ID at 8.

**b. Construction of “Openable [] Cover Means” of Claim 10**

The ALJ did not discuss whether the “openable [] cover means” limitations of independent claim 10 are means-plus-function limitations. For the reasons that follow, the Commission has determined that the “openable [] cover means” limitations are mean-plus-function limitations.

In response to the Commission's notice, the Char-Broil Respondents, OUII and A&J all agree that the presence of the word “means” results in a presumption that a term is a means-plus-function limitation. Comp. Rev. Br. at 2; Char-Broil Rev. Br. at 5; OUII Rev. Br. at 1. Moreover, the parties also agree that the presumption can be rebutted. *Id.* The only question remaining is whether the presumption has been rebutted for the “openable [] cover means” limitations.

In order to overcome the presumption, there must be sufficient structure to perform the claimed function. In analyzing whether there is sufficient structure to overcome the “means” presumption, the Federal Circuit has considered whether the claim recites the structure, material or acts need to perform the claimed function. *See Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1427-28 (Fed. Cir. 1997). Respondents assert that claim 10 recites sufficient structure to overcome the presumption. Claim 10 recites, *inter alia*, “an openable [] cover means for selectively covering the [] grill, wherein the [] cover is attached to the [] means for cooking.” The parties agree, and the Commission finds, that the claimed function is “selectively covering the [] grill.” *See e.g.*, OUII Rev. Br. at 6; Char-Broil Rev. Br. at 11; Comp. Rev. Br. at 10.

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Although claim 10 requires that the openable cover means be attached to the means for cooking, we find that it does not provide the structure, material or acts that perform the function of the “openable [] cover means” that “selectively covers the [] grill.”

The construction of a means-plus-function limitation requires a determination of what function is claimed by the limitation and what structure in the specification performs the claimed function. *Omega Eng'g., Inc. v. Raytek Corp.*, 334 F.3d 1314, 1321 (Fed. Cir. 2003). In construing the claim limitations, any disclaimer must also be considered. Prosecution history disclaimer applies to mean-plus-function limitations as it applies to other claim limitations. *Regents of the Univ. of Minn. v. AGA Medical Corp.*, 717 F.3d 929, 942 (Fed. Cir. 2013).

As discussed above, the parties agree that the claimed function is “selectively covering the [] grill.” The parties generally agree that the openable first cover structures that perform the claimed function include the covers depicted as item 111 in Figure 1, item 211 in Figure 2, and item 311 in Figure 3 (*see* '712 patent at 2:32-34, 3:4-7, and 3:36-39); and that the openable second cover structures that perform the claimed function include the covers depicted as item 121 in Figure 1, item 221 in Figure 2, and item 321 in Figure 3 (*see* '712 patent at 2:32-34, 3:4-7, and 3:36-39). *See e.g.*, OUII Rev. Br. at 6-7; Char-Broil Rev. Br. at 11; Comp. Rev. Br. at 11. The Commission agrees with the parties that at least these structures correspond to the openable first cover means and openable second cover means. However, the Respondents assert that the corresponding cover structures should also include the exhausts. *See* Char-Broil Rev. Br. at 11. A&J contends that the lid of the fourth cooking mode unit 324, depicted in Figure 3, is also a structure that corresponds to the “openable [] cover means” limitations. Comp. Rev. Br. at 11; Comp. Reply Rev. Br. at 8. The construction of the “openable [] cover means” was not

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addressed in Respondents' motion for summary determination, and the Commission finds that the ALJ is better situated to make this finding, taking into account the corresponding structures identified by the Commission above.

As we discussed in detail above with respect to claims 1 and 17, we find that the applicant clearly and unmistakably disclaimed any construction of the term "openable [] cover" that includes portions of the grill enclosure that are not openable. The ALJ should consider the Commission's finding in determining whether the applicant's disclaimer applies to the means-plus-function limitations of claim 10.

**2. Whether the Redesigned Products are Within the Scope of the Investigation**

The ALJ ruled on eight different products/product lines, but provided no discussion regarding why the redesigned products are properly within the scope of the investigation. The eight products/product lines at issue in the ID are:

- (i) Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill, Model Number 12210767;
- (ii) Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill, Model Number 14201767;
- (iii) Char-Broil Model 463724512 Charcoal/Gas Grill Combination;
- (iv) Char-Broil Charcoal/Gas Combo 1010 Deluxe, Model No. 463724514;
- (v) Rankam Model No. GR2034205-SC (Ver 2);
- (vi) Rankam Model No. GR2071001-MM (Ver 2);
- (vii) Outdoor Leisure Products Smoke Hollow Model Numbers PS9500, 8000, 8500, 3500, 3300, and 6500; and
- (viii) Chant Red Stone Model 1046761.

ID at 8. The ALJ denied the motion for summary determination with respect to Char-Broil Model 463724512 Charcoal/Gas Grill Combination, but granted it as to the other products. For



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the reasons discussed below, we find that all of the redesigned products are within the scope of the investigation.

In its petition for review, A&J disputed which products are properly at issue in the investigation. A&J contends that the only redesigned products at issue with respect to the summary determination motion are: (1) Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill Model Number 14201767; (2) Char-Broil Charcoal/Gas Combo 1010 Deluxe, Model No. 463724514; and (3) Outdoor Leisure Products Smoke Hollow Model Numbers PS9500, 8000, 8500, 3500, 3300, and 6500. *See e.g.*, Comp. Rev. Br. at 12. A&J acknowledges that Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill Model Number 12210767 is an existing product, but disputes that it is non-infringing. *Id.* at 15. A&J has inspected Rankam Model No. GR2034205-SC (Ver 2), Rankam Model No. GR2071001-MM (Ver 2), and Chant Red Stone Model 1046761, and agrees that these products do not infringe the '712 patent. *Id.* at 12. We do not further address the latter three models that A&J agrees do not infringe the '712 patent, and those models will be exempted from any remedy that might issue in this investigation.

Recently in *Electronic Digital Media Devices*, Inv. No. 337-TA-796, Comm'n Op. at 104-05 (Sept. 6, 2013), the Commission found that redesigned products can be within the scope of an investigation. In that investigation, Complainant Apple sought to include Respondent Samsung's redesigned products within the scope of the remedial orders but did not "present any direct or affirmative evidence" on infringement of the redesigned products. *Id.* at 105. The Commission found that Apple conducted extensive discovery with respect to the redesigned products and had the opportunity to present evidence on the redesigned products at the hearing.

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*Id.* Accordingly, the Commission found that the products were properly within the scope of the investigation, *id.*, noting “that the consideration of design around products during the course of the proceedings before the ALJ provides predictability in enforcement of the order by U.S. Customs and Border Protection (“CBP”).” *Id.* at 104.

Respondents and OUII contend that sufficient discovery has occurred and that the redesigned grills are therefore properly at issue in the investigation. OUII Rev. Br. at 8-11; OUII Opp. to Pet. at 11; Resp. Opp. to Pet. at 33-37; Char-Broil Rev. Br. 18-21. The Commission agrees that relevant discovery has occurred to place the redesigned products at issue in the investigation. Specifically, Respondents had produced documents regarding the redesigned grills prior to filing the summary determination motion.<sup>3</sup> *See e.g.*, Char-Broil Rev. Br. at 19, Char-Broil Rev. Br. at Ex. L. Accordingly, the Commission finds that the parties engaged in sufficient discovery to place the redesigned grills at issue in the investigation.

A party opposing a motion that feels that it has had inadequate discovery to respond may seek a continuance from the ALJ under Commission Rule 210.18(d), to conduct additional

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<sup>3</sup> With respect to the Oklahoma Joe Combination Charcoal/Gas Longhorn Grill Model Number 14201767 and the Char-Broil Charcoal/Gas Combo 1010 Deluxe, Model No. 463724514 (collectively the “redesigned Char-Broil grills”), Respondents produced at least photographs and product manuals on February 14 and 27, 2014. Char-Broil Rev. Br. at 19-21; Resp. Opp. to Pet. at 33-35.

A&J was first put on notice of the OLP redesigned grills in responses to discovery requests on December 2, 2013, and OLP and Kingsun began producing documents on December 10, 2013. Char-Broil Rev. Br. at 19; Resp. Opp. to Pet. at 33. On January 27, 2014, counsel for OLP and Kingsun identified production documents illustrating the redesign of model PS 9500. Resp. Opp. to Pet. at 34. Respondents made several document productions on the redesigned products before filing the motion for summary determination, including on December 10, 2013, December 12, 2013, February 6, 2014, February 10, 2014, February 14, 2014, February 20, 2014, February 25, 2014, and February 27, 2014. *Id.* at 33.

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discovery. In this case, Respondents provided sufficient discovery prior to moving for summary determination. *See e.g.*, Resp. Opp. to Pet. at 33. Shortly thereafter, by April 18, 2014, A&J had sufficient discovery to assert that the redesigned grills fall within the scope of any remedy for the '712. *See* Joint Identification of Accused Products, EDIS Doc ID 532292, at 4 (Apr. 18, 2014) (“Complainants identify the [Redesigned Products] and assert, based on the information available to Complainants, that they fall within the scope of any remedy in this Investigation.”). In addition, the parties premised their infringement positions based on photographs or diagrams, thereby demonstrating that this particular limitation was readily ascertainable from the discovery provided by Respondents at the time the motion was filed. *See e.g.* Resp. Motion for Sum. Det. at 21-41; Comp. Rev. Br. at 15-24.

A&J contends that it had insufficient time to analyze the redesigned Char-Broil grills and inspect physical samples, etc. Comp. Reply Rev. Br. at 9-10. With respect to the redesigned OLP grills, A&J notes that for model PS9500, Respondents identified the documents for that model on January 27, 2014, but did not disclose documents for the other redesigned OLP models until days before serving their motion. *Id.* at 10. A&J asserts that it did not seek a continuance under Rule 210.18(d) to conduct further discovery because it had sufficient discovery to prove a violation on the models it accused of infringement in the complaint. Comp. Rev. Br. at 12.

The Commission notes that Respondents here provided sufficient discovery in advance of filing their summary determination motion. If A&J could not respond to the motion without additional specific discovery, it should have sought a continuance under Rule 210.18(d) to delay

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judgment and obtain an extension for its opposition until that specific discovery could be obtained.<sup>4</sup> Accordingly, the Commission finds Respondent's motion was ripe for determination.

A&J contends that there is no evidence that the redesigned Char-Broil grills are fixed in design or have been imported. Respondents, however, have produced product manuals which evidence the "fixed" nature of the redesigned Char-Broil grills. Comp. Pet. at 29-30; Resp. Opp. to Pet. at 11, Exs. 23, 24. In addition, A&J contends that the redesigned Char-Broil grills would fall within the scope of any remedy, and thus implicitly acknowledges that the designs are fixed. Joint Identification of Accused Products, EDIS Doc. ID 532292, at 4 (Apr. 18, 2014). For these reasons, the Commission finds that the redesigned Char-Broil grills are sufficiently fixed.

Similarly, A&J argues that there was no evidence that the redesigned OLP grills were fixed or that the grills have been imported. Comp. Pet. at 30-31. The parties have since stipulated to the importation of the redesigned OLP grills, with the exception of the Smoke Hollow 8000 model. *See* Joint Stipulation of Material Facts Relating to the Importation Requirement of 19 U.S.C. § 1337(a), EDIS Doc ID 533076 (May 2, 2014). The stipulation as to importation implies that the designs imported into the U.S. are fixed, and therefore the Commission finds that the designs are sufficiently fixed to be included within the scope of the investigation. With respect to the Smoke Hollow 8000 model grill, A&J contends that this

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<sup>4</sup> Commissioner Schmidlein agrees with the Commission's finding that Respondents provided sufficient discovery prior to moving for summary determination because, as noted above, the relevant discovery, including photographs and diagrams, had already been produced. She does not agree with the Commission's statement that A&J was required to seek a continuance under Rule 210.18(d). She notes that A&J's opposition to Respondent's motion argued that the motion was premature given that discovery was still ongoing. *See* A&J Combined Opp. to Summary Mot. at 4, 23. In her view, requiring A&J to file a separate motion to make the same point elevates form over substance.

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model will fall within the scope of any remedy, which implicitly acknowledges that the design is fixed. Joint Identification of Accused Products, EDIS Doc. ID 532292, at 4 (Apr. 18, 2014).

The parties have not stipulated to the importation of the redesigned Char-Broil grills or the OLP Smoke Hollow 8000 model grill and a dispute remains whether some of these products have been imported. The Respondents submitted a declaration stating the redesigned Char-Broil grills were imported in January 2014, and OLP submitted a declaration stating that it recently began to manufacture the redesigned OLP grills in place of existing models. *See, e.g.*, Comp. Pet. at 29-30. A&J argued that it rebutted these assertions in its petition for review by contending that there was no actual evidence of importation (*i.e.*, documentation). *Id.* In *Certain Flash Memory Circuits and Products Containing Same ("Flash")*, Inv. No. 337-TA-382, Comm'n Op. at 19 (June 9, 1997), the Commission reviewed the ALJ's determination not to make a finding on Samsung's redesigned products stating:

As a threshold matter, we note that the questions regarding the importation or developmental stage of Samsung's new designs did not offer an appropriate basis for the ALJ to decline to make a determination of infringement. SanDisk argues that it was appropriate for the ALJ not to make a determination because Commission can decline to exercise jurisdiction. Yet questions regarding importation and the developmental stage of the devices go not only to jurisdiction but also to the merits of the case itself. Where the jurisdictional requirements of section 337 mesh with the factual requirements necessary to prevail on the merits, the appropriate course of action is to assume jurisdiction and resolve the complaint on its merits. *Amgen, Inc. v. United States Int'l Trade Comm'n*, 902 F.2d 1532, 1536 (Fed. Cir. 1990).

Accordingly, despite A&J's argument to the contrary, the ALJ is not precluded from making a finding on non-infringement even when a question of jurisdiction remains. The Char-Broil respondents submitted a declaration testifying that their redesigned products were imported as



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early as January 2014 and A&J submitted no evidence to rebut this testimony. 19 C.F.R. § 210.18(c). Thus, the only dispute that remains concerns the Smoke Hollow 8000 model grill. There is no stipulation as to importation, nor did the OLP respondents provide testimony that these products were imported. Thus, the ALJ should consider whether the redesigned OLP Smoke Hollow 8000 model has been imported in his final ID.

**3. Infringement**

As mentioned above, the ALJ ruled on eight different products. The ALJ found that seven of the products did not meet the “openable [] cover” limitations of the asserted independent claims and therefore did not infringe. The ALJ found that a question of fact exists with respect to Char-Broil Model 463724512 combination charcoal/gas grill. The ALJ’s denial of summary determination as to the Char-Broil Model 463724512 combination charcoal/gas grill is not before the Commission.

As discussed above and extensively in the parties’ briefs, A&J has acknowledged that Rankam Model No. GR2034205-SC (Ver 2), Rankam Model No. GR2071001-MM (Ver 2), and Chant Red Stone Model No. 1046761 do not infringe the asserted claims of the ’712. Accordingly, the ALJ’s infringement findings under review with respect to these products are undisputed.

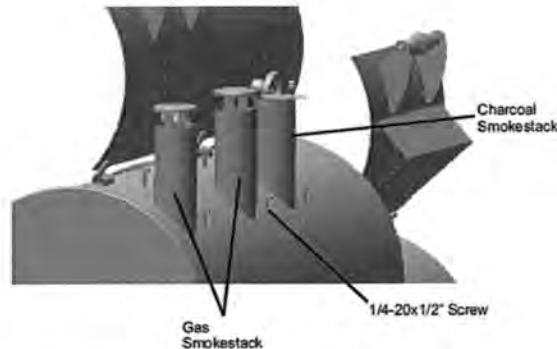
**a. Claims 1 and 17**

**i. Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill, Model Number 12210767**

The Commission affirms the ALJ’s finding of non-infringement of claims 1 and 17 by Oklahoma Joe Longhorn Model 12201767. A&J’s basis for arguing that the “openable [] cover” limitations are met for this product is based on its construction of the “openable [] cover” terms

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in claims 1 and 17. Comp. Rev. Br. at 15-18. Because the Commission adopts the ALJ’s claim construction of the “openable [] cover” terms for claims 1 and 17, the Commission affirms the ALJ’s infringement findings. As illustrated and discussed in the ID (at 8-9), the Oklahoma Joe Longhorn Model 12201767 grill does not have exhausts on the “openable [] covers.”

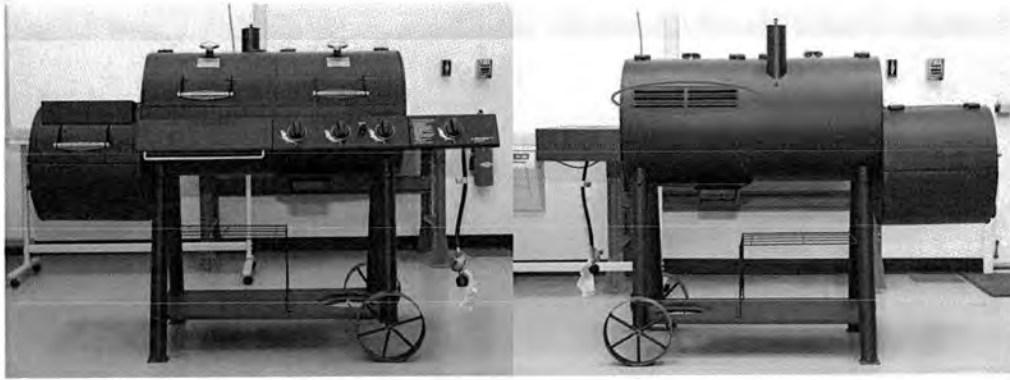


ID at 9 (citing Mot. Ex. 11 at Ex. B at 24).

**ii. Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill, Model Number 14201767;**

The Commission adopts the ALJ’s finding of non-infringement for the Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill, Model Number 14201767 because it does not meet the “openable [] cover” limitations of independent claims 1 and 17. Specifically, the first and second openable grill covers do not include any exhausts. Instead, a single smokestack is located on a fixed portion of the grill to provide ventilation for one of the cooking units and lateral vents are located on the fixed portion of the grill to provide ventilation for the second cooking unit. The smoke stack and vents are illustrated below.

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Mot. Ex. 11 at Ex. G at 1-2.



Mot. Ex. 11 at Ex. G at 5. Accordingly, the Commission finds that this grill does not infringe claims 1 and 17 of the '712 patent.

**iii. Char-Broil Charcoal/Gas Combo 1010 Deluxe, Model No. 463724514;**

The adopts the ALJ's finding of non-infringement for the Char-Broil Charcoal/Gas Combo 1010 Deluxe, Model No. 463724514 because it does not meet the "openable [] cover" limitations of independent claims 1 and 17. Specifically, the first and second openable grill covers do not include any exhausts. Instead, the grills include vents located on the fireboxes, which are fixed portions of the grill, as illustrated below.



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Mot. at Ex. 11 at Ex. E at 1-2.

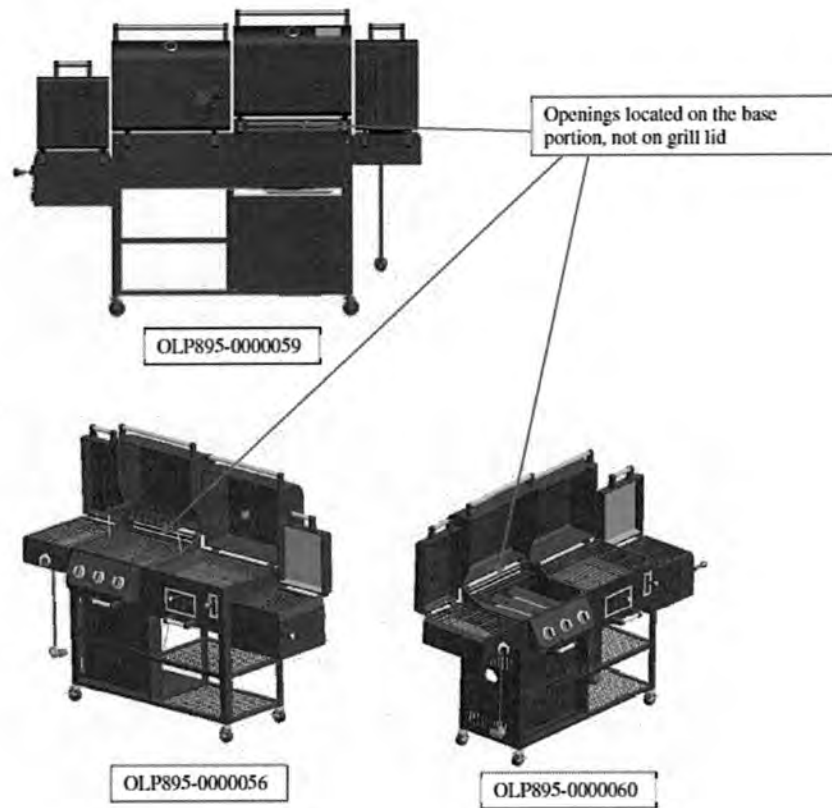


Mot. at Ex. 11 at Ex. E at 5. Accordingly, the Commission finds that this grill does not infringe claims 1 and 17 of the '712 patent.

**iv. Outdoor Leisure Products Smoke Hollow Model Numbers PS9500, 8000, 8500, 3500, 3300, and 6500**

The Commission adopts the ALJ's findings of non-infringement for the Outdoor Leisure Products Smoke Hollow Model Numbers PS9500, 8000, 8500, 3500, 3300, and 6500 because each of the models do not meet at least one of the "openable [] cover" limitations of independent claims 1 and 17. Each of the redesigned OLP grills do not include an exhaust or smokestack on the openable covers of at least one of the cooking units. For example, the PS9500 Model grill has a lateral opening located on the fixed portion of the gas side of the grill unit. The PS9500 model is illustrated below:

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Mot. Ex. 14 at ¶¶ 8-10. This same configuration (*i.e.*, lateral vents on the fixed portion of the grill for the gas cooking unit) is also present in the 8000, 8500, 3500, 3300, and 6500 models.

Mot. Ex. 14 at ¶¶ 6, 11-15.

**b. Claim 10**

The Commission vacates the ALJ’s finding of infringement with respect to claim 10. The Commission cannot reach the issue of whether there is infringement of claim 10 by any of the seven grills at issue because the construction of the “openable [] cover means” limitations of claim 10 as means-plus-function limitations should be determined by the ALJ in the first instance.

*PUBLIC VERSION*

**III. CONCLUSION**

For the forgoing reasons, the Commission affirms in-part and vacates in-part the ID and directs the ALJ to complete the construction of the “openable [] cover means” limitations of claim 10 as means-plus-function limitations and make any further determinations as necessary.

By order of the Commission.

A handwritten signature in black ink, appearing to read "Lisa R. Barton". The signature is stylized and cursive.

Lisa R. Barton

Secretary to the Commission

Issued: July 23, 2014

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, R. Whitney Winston, Esq., and the following parties as indicated, on **July 23, 2014**.



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
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**CERTAIN MULTIPLE MODE OUTDOOR GRILLS AND PARTS THEREOF**

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

Certificate of Service – Page 2

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

**In the Matter of**

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

**Investigation No. 337-TA-895**

**NOTICE OF THE COMMISSION'S DETERMINATION TO REVIEW-IN-PART A  
FINAL INITIAL DETERMINATION FINDING A 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-in-part the final initial determination ("ID") issued by the presiding administrative law judge ("ALJ") on September 26, 2014, finding a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in this investigation.

**FOR FURTHER INFORMATION CONTACT:** Cathy Chen, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2392. 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 this investigation on September 26, 2013, based on a complaint filed on behalf of A&J Manufacturing, LLC of St. Simons, Georgia and A&J Manufacturing, Inc. of Green Cove Springs, Florida (collectively, "A&J" or "Complainants"). 78 *Fed. Reg.* 59373 (Sept. 26, 2013). The complaint alleged violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the sale for importation, importation, or sale within the United States after importation of certain multiple mode outdoor grills and parts thereof by reason of infringement of certain claims of U.S. Patent

No. 8,381,712, U.S. Patent No. D660,646, and U.S. Patent No. D662,773 patent. The Commission's notice of investigation, as amended, named numerous respondents including: The Brinkmann Corporation ("Brinkmann"); Academy Ltd., d/b/a Academy Sports + Outdoors ("Academy"); Ningbo Huige Outdoor Products Co. ("Huige"); Char-Broil, LLC ("Char-Broil"); Zhejiang Fudeer Electric Appliance Co., Ltd ("Fudeer"); Outdoor Leisure Products, Incorporated ("OLP"); Dongguan Kingsun Enterprises Co., Ltd. ("Kingsun"); and Keesung Manufacturing Co., Ltd. ("Keesung") (collectively "the Respondents"). The Office of Unfair Import Investigations (OUII) is also a party to this investigation.

On June 24, 2014, the Commission affirmed-in-part and vacated-in-part an initial determination granting-in-part a motion for summary determination of non-infringement filed by Char-Broil, Fudeer, OLP, Kingsun, Tractor Supply Co. ("TSC"), and Chant Kitchen Equipment (HK) Ltd. ("Chant"). The Commission found that Complainants admit that the following redesigned grills do not infringe the '712 patent: (1) Chant/Tractor Supply's New Model 1046761; (2) Rankam's Member's Mark Grill, Model No. GR2071001-MM (Ver. 2) and (3) Rankam's Smoke Canyon Grill, Model No. GR2034205-SC (Ver. 2). Comm'n Op. at 1 (Jun. 24, 2014). The Commission found the other redesigned products at issue were within the scope of the investigation. *Id.* The Commission adopted the ALJ's construction of the "openable [] cover" limitations of claims 1 and 17 on modified grounds. *Id.* The Commission affirmed the ALJ's finding of non-infringement of claims 1 and 17 for the Char-Broil Oklahoma Joe Longhorn Model 12210767 Grill and adopted the ALJ's findings that the redesigned grills do not infringe claims 1 and 17 on modified grounds. *Id.* The Commission also found that the "openable [] cover means" limitations of claim 10 are means-plus-function limitations and directed the ALJ to make findings consistent with its means-plus-function interpretation. *Id.* at 2.

On September 26, 2014, the ALJ issued the final ID, finding a violation of section 337 as to Respondents Brinkmann, OLP, Kingsun, Academy, and Huige based upon his determinations: (i) that certain, but not all, accused products infringe at least one claim of the '712 patent; (ii) that the domestic industry requirement has been satisfied with respect to the '712 patent; and (iii) that the asserted claims of the '712 patent have not been shown by clear and convincing evidence to be invalid. On October 9, 2014, the ALJ issued his recommended determination on remedy and bonding.

On October 14, 2014, A&J filed a petition for review of the following issues: (1) the ALJ's interpretation of the scope of claim 10 of the '712 patent; (2) the ALJ's finding that certain Char-Broil Grills and the certain redesigned OLP Grills do not satisfy the "openable [] cover means" limitations of claim 10 of the '712 patent; and (3) the ALJ's finding that the Char-Broil Model 463724512 and GHP DGB730SNB-D grills do not satisfy the claim limitation that the first cover "includes at least one exhaust" in claims 1, 10, and 17 of the '712 patent.

On the same day, Respondents Academy, Huige, OLP, and Brinkmann filed three separate petitions for review of the final ID. Brinkmann, OLP, and Academy together seek review of the following determinations: (1) that the asserted claims have not been shown by clear and convincing evidence to be invalid as obvious over U.S. Patent No. 5,632,265 in view of U.S. Patent No. 4,773,319 ("Holland '319") and U.S. Patent No. 6,606,986; and (2) that the

asserted claims have not been shown by clear and convincing evidence to be invalid as obvious over U.S. Patent No. 6,189,528, either alone or in view of Holland '319. OLP separately challenges the ALJ's construction of the claim term "exhaust," and his finding that certain OLP products infringe claims 1-16 of the '712 patent. Academy and Huige petition for review of the ALJ's determination (Order No. 47) to exclude evidence and testimony concerning their redesigns, and the ALJ's refusal to make a determination as to whether those redesigns infringe the '712 patent. A&J, Respondents, and OUII each filed a response to the petitions on October 22, 2014.

Having examined the record of this investigation, including the final ID, the petitions for review, and the responses thereto, the Commission has determined to review the final ID in part. Specifically, the Commission has determined to review: (1) the ID's construction of the "exhaust" and "exhaust means" limitations in claims 10 and 16, and related findings regarding infringement of claims 10-16; (2) the ID's findings regarding infringement of claims 1, 4, and 6-8 by the accused Dyna-Glo grills imported by Respondent GHP; (3) the ID's findings regarding infringement of claims 1, 2, 4-8, 10, 11, and 13-15 by the accused Char-Broil Model No. 463724512 grill; and (4) the ID's finding that the '712 patent was not shown to be invalid.

The parties are requested to brief their positions on the issues under review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission requests responses to the following questions only. Each party's brief responding to the following questions should be no more than 60 pages.

1. Discuss whether the "exhaust" limitation and/or the "exhaust means" limitations in claims 10 and 16 should be interpreted as means-plus-function limitations, including whether any presumption that these limitations are means-plus-function limitations has been rebutted.
2. If the "exhaust" limitation and/or the "exhaust means" limitations in claims 10 and 16 are correctly interpreted as means-plus-function limitations, (a) please identify the functions claimed in these limitations, as well as what structure(s) in the specification perform the claimed functions, and (b) discuss whether the limitations of claims 10-16 are met by the accused products at issue in the final ID.
3. Please discuss whether A&J waived petition of the ID's finding that the Dyna-Glo DGJ810CSB-D grill does not infringe any asserted claim of the '712 patent because it lacks the claimed "exhaust" and "exhaust means" on its openable covers. Assuming that A&J did not waive this finding, please discuss whether the DGJ810CSB-D grill infringes claims 1, 4, and 6-8 of the '712 patent.
4. The Commission is not changing its interpretation of the claim term "includes," which requires that an "exhaust" be located *on* the "openable [] cover," as set forth in the Commission's Opinion on June 27, 2014. Assuming that the asserted claims require that an "exhaust" be located *on* (but not necessarily wholly within) the "openable [] cover," please discuss with citations to the record evidence whether the



Char-Broil Model No. 463724512 grill and the GHP DGB730SNB-D grill satisfy the “includes at least one exhaust” limitation for the claimed “first cover” in claim 1 and/or claim 10.

5. The ID found that the Respondents did not prove by clear and convincing evidence that the asserted claims of the '712 patent have been shown to be invalid as obvious over U.S. Patent No. 5,632,265 (“Koziol”) in view of U.S. Patent No. 4,773,319 (“Holland '319”) and/or U.S. Patent No. 6,606,986 (“Holland '986”). Please discuss what evidence supports or does not support modifying Koziol to include the smoke stacks disclosed in Holland '319 and/or Holland '986. If the “exhaust” limitation and/or the “exhaust means” limitations in claims 10 and 16 are correctly interpreted as means-plus-function limitations, please discuss whether the means-plus-function limitations of claims 10 and 16 are met by the prior art combination.
6. The ID found that the Respondents did not prove by clear and convincing evidence that the asserted claims of the '712 patent have been shown to be invalid as obvious over U.S. Patent No. 6,189,528 (“Oliver”) in view of Holland '319. Please discuss what evidence supports or does not support modifying Oliver to include the smoke stacks disclosed in Holland '319. Please also discuss what evidence supports or does not support interpreting the lid ends **18** as described at column 4, line 67 to column 5, line 2 in Oliver as part of the “openable  cover” and “openable  cover means,” and whether the space between the lid ends and the lid reflector meets the ALJ’s construction of “exhaust.” If the “exhaust” limitation and/or the “exhaust means” limitations in claims 10 and 16 are correctly interpreted as means-plus-function limitations, please discuss whether the means-plus-function limitations of claims 10 and 16 are met by the prior art combination.
7. Please discuss the evidence in the record that shows or does not show that the limitations in each of the dependent claims are disclosed in the prior art.
8. What record evidence supports a finding that OLP maintains commercially significant inventories of its original grills in the United States?
9. What relief, if any, does A&J request as to defaulting respondent Keesung?

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 the respondent(s) 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 *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 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. 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 with respect to the asserted patent. Complainant and OUII are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is further requested to state the date that the patent expires and the HTSUS numbers under which the accused products are imported, and provide identification information for all known importers of the subject articles. A party's written submission on the issues of remedy, the public interest, and bonding do not count towards its 60-page limit. The written submissions and proposed remedial orders must be filed no later than close of business on Friday, December 12, 2014. Reply submissions must be filed no later than the close of business on Friday, December 19, 2014. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit eight (8) true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 C.F.R. 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-895") in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, [http://www.usitc.gov/secretary/fed\\_reg\\_notices/rules/handbook\\_on\\_electronic\\_filing.pdf](http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf)). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to 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 properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with the any confidential filing. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

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 Part 210 of the Commission's Rules of Practice and Procedure (19 C.F.R. Part 210).

By order of the Commission.

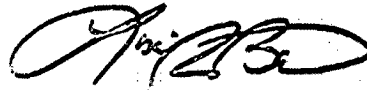
A handwritten signature in black ink, appearing to read "Lisa R. Barton".

Lisa R. Barton  
Secretary to the Commission

Issued: December 2, 2014

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, R. Whitney Winston, Esq., and the following parties as indicated, on **December 2, 2014**.



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U.S. International Trade Commission  
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**CERTAIN MULTIPLE MODE OUTDOOR GRILLS AND PARTS THEREOF**

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

Certificate of Service – Page 2

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**PUBLIC VERSION**

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

**In the Matter of**

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

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

**FINAL INITIAL DETERMINATION**

**Administrative Law Judge David P. Shaw**

Pursuant to the notice of investigation, 78 Fed. Reg. 59372 (2013), this is the Initial Determination in *Certain Multiple Mode Outdoor Grills and Parts Thereof*, United States International Trade Commission Investigation No. 337-TA-895.

It is held that a violation of section 337 (19 U.S.C. § 1337) has occurred with respect to some but not all respondents because certain accused products infringe at least one asserted claim of U.S. Patent No. 8,381,712, while certain accused products do not infringe any asserted claim.

**PUBLIC VERSION**

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The following abbreviations may be used in this Initial Determination:

ALJ	-	Administrative Law Judge
CDX	-	Complainants' Demonstrative Exhibit
CPX	-	Complainants' Physical Exhibit
CX	-	Complainants' Exhibit
Dep.	-	Deposition
EDIS	-	Electronic Document Imaging System
JPX	-	Joint Physical Exhibit
JX	-	Joint Exhibit
P.H.	-	Prehearing
RDX	-	Respondents' Demonstrative Exhibit
RPX	-	Respondents' Physical Exhibit
RWS	-	Rebuttal Witness Statement
RX	-	Respondents' Exhibit
Tr.	-	Transcript
WS	-	Witness Statement



## PUBLIC VERSION

### **I. Background**

#### **A. Institution of the Investigation; Procedural History**

By publication of a notice in the *Federal Register* on September 26, 2013, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, the Commission instituted this investigation 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, or the sale within the United States after importation of certain multiple mode outdoor grills and parts thereof that infringe one or more of claims 1–20 of the ‘712 patent [U.S. Patent No. 8,381,712], the claim of the ‘D646 patent [U.S. Patent No. D660,646], and the claim of the ‘D773 patent [U.S. Patent No. D662,773], and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

78 Fed. Reg. 59372 (2013).

The complainants are A&J Manufacturing, LLC of St. Simons, Georgia; and A&J Manufacturing, Inc. of Green Cove Springs, Florida. The Commission named the following respondents: The Brinkmann Corporation of Dallas, Texas; W.C. Bradley Company of Columbus, Georgia; GHP Group, Incorporated of Morton Grove, Illinois; Kamado Joe Company of Duluth, Georgia; Outdoor Leisure Products, Incorporated of Neosho, Missouri; Rankam Group of Gardena, California; Academy Ltd., d/b/a/Academy Sports + Outdoors of Katy, Texas; HEB Grocery Company, LP, d/b/a H–E–B of San Antonio, Texas; Kmart Corporation of Hoffman Estates, Illinois; Sears Brands Management Corporation of Hoffman Estates, Illinois; Sears Holdings Corporation of Hoffman Estates, Illinois; Sears, Roebuck & Company of Hoffman Estates, Illinois; Tractor Supply Company of Brentwood, Tennessee; Guangdong Canbo Electrical Co.,

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Ltd. of Foshan City, Guangdong Province, China; Chant Kitchen Equipment (HK), Ltd. of Kowloon, Hong Kong, China; Dongguan Kingsun Enterprises Co., Ltd. of Hengli Town, Dongguan City, China; Zhejiang Fudeer Electric Appliance Co. of Taizhou Economic Development Zone, Zhejiang Province, China; Ningbo Huige Outdoor Products Co. of Fenghua City, Zhejiang Province, China; Keesung Manufacturing Co., Ltd. of Guangzhou 511475, China; Ningbo Spring Communication Technologies Co. Ltd. of Ningbo Zhejiang 315104, China; and Wuxi Joyray International Corporation of Wuxi, Jiangsu, China. The Office of Unfair Import Investigations is also a party to this investigation. *Id.*

The target date for completion of this investigation was set at 16 months, *i.e.*, January 26, 2015. Order No. 9 (Nov. 12, 2013). Accordingly, the due date for the Initial Determination on violation is September 26, 2014.

On December 23, 2013, the Commission determined not to review an initial determination amending the Complaint and Notice of Investigation: (i) to change the name of Respondent Kamado Joe Company to Premier Specialty Brands, LLC; (ii) to change the name of Respondent Rankam Group to Rankam Metal Products Manufactory Limited, USA; and (iii) to substitute Char-Broil, LLC for Respondent W.C. Bradley Co. Order No. 12 (Dec. 4, 2013), *aff'd*, Notice of Commission Determination Not to Review an Initial Determination Granting Complainant's Motion to Amend the Complaint and Notice of Investigation (Dec. 23, 2013).

On January 9, 2014, the Commission determined not to review an initial determination finding respondent Keesung Manufacturing Co., Ltd. in default. Order No. 16 (Dec. 20, 2013), *aff'd*, Notice of Commission Determination Not to Review an Initial

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Determination Finding Respondent Keesung Manufacturing Co., Ltd. in Default (Jan. 9, 2014).

On March 4, 2014, the Commission terminated the investigation as to respondents HEB Grocery Company, LP d/b/a H-E-B; Guangdong Canbo Electrical Co., Ltd.; and Ningbo Spring Communication Technologies Co. Ltd. based on consent orders and settlement agreements. Order Nos. 18 (Feb. 5, 2014), 19 (Feb. 6, 2014), and 20 (Feb. 6, 2014), *aff'd*, Notice of the Commission's Determination Not to Review Initial Determinations Terminating Certain Respondents; Issuance of Consent Orders (Mar. 4, 2014).

Also, on March 4, 2014, the Commission terminated the investigation with respect to respondents Kmart Corporation, Sears Brands Management Corporation, Sears Holdings Corporation, and Sears, Roebuck & Company based on the withdrawal of the allegations directed to them in the complaint. Order No. 21 (Feb. 6, 2014), *aff'd*, Notice of the Commission's Determination Not to Review Initial Determination Terminating Certain Respondents Based on Withdrawal of the Complaint (Mar. 4, 2014).

On March 5, 2014, respondents Char-Broil, Fudeer, OLP, Kingsun, TSC, and Chant moved for a summary determination of non-infringement of the asserted claims of the '712 patent with respect to certain accused products having exhausts on fixed portions the grills, as opposed to their openable cover, as the claims require. The parties submitted additional briefing on April 11, 2014, and April 14, 2014 in response to Order No. 28 (Apr. 8, 2014). The motion was granted in part in an initial determination. Order No. 33 (Apr. 17, 2014). The Commission determined to review the ID in its entirety. Notice of the Commission's Determination to Review an Initial Determination Granting

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in Part a Motion for Summary Determination of Non-Infringement; Request for Briefing (May 20, 2014). Thereafter, the Commission affirmed in part and vacated in part, adopting the administrative law judge's construction of the "openable [] cover" limitations of independent claims 1 and 17 on modified grounds. Notice of the Commission's Determination to Affirm-in-Part and Vacate-in-Part an Initial Determination Granting-in-Part a Motion for Summary Determination of Non-Infringement (Jun. 24, 2014) at 2. The Notice instructed the undersigned to take evidence and make findings regarding independent claim 10. *Id.*

Specifically, the Commission affirmed that the following grills do not infringe any of the asserted claims of the '712 patent: (1) Chant/Tractor Supply's New Model 1046761; (2) Rankam's Member's Mark Grill, Model No. GR2071001-MM (Ver. 2); and (3) Rankam's Smoke Canyon Grill, Model No. GR2034205-SC (Ver. 2). *Id.* The Commission also affirmed the finding that the following accused products do not infringe claims 1 and 17 of the '712 patent: (i) Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill Model Number 12210767; (ii) Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill Model Number 14201767; (iii) Char-Broil Charcoal/Gas Combo 1010 Deluxe, Model No. 463724514; and (iv) Outdoor Leisure Products Smoke Hollow Model Numbers PS9500, 8000, 8500, 3500, 3300, and 6500. (*See id.*). The Commission, however, vacated the ID as to claim 10, finding that the "openable [] cover means" limitations of claim 10 are means-plus-function limitations. Finally, the Commission found that the subject products were properly at issue in this investigation. *Id.*

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On May 22, 2014, the Commission terminated the investigation as to respondents Premier Specialty Brands, LLC and Wuxi Joyray International Corporation based on a settlement agreement and consent orders. Order No. 35 (Apr. 22, 2014), *aff'd*, Notice of the Commission's Determination Not to Review an Initial Determination Terminating Certain Respondents Based on Issuance of a Consent Order; Issuance of a Consent Order (May 22, 2014).

On July 2, 2014, A&J filed a motion for partial termination of the investigation based on the withdrawal of allegations in the complaint concerning the '646 and '773 patents. The motion was granted in an unreviewed initial determination. Order No. 50 (Jul. 14, 2014), *aff'd*, Notice of the Commission's Determination Not to Review an Initial Determination Withdrawing Certain Patents (July 31, 2014).

On July 8, 2014, respondent Rankam Metal Products Manufactory Limited, USA ("Rankam") filed a motion seeking termination of the investigation based on a consent order stipulation and proposed consent order. The motion was granted in an unreviewed initial determination. Order No. 51 (Jul. 14, 2014), *aff'd*, Notice of the Commission's Determination Not to Review an Initial Determination Terminating Rankam Metal Products Manufactory Limited, USA Based on Issuance of a Consent Order; Issuance of a Consent Order (Aug. 1, 2014).

On July 11, 2014, A&J and respondent GHP Group, Inc. ("GHP") filed a joint motion to terminate the investigation as to GHP based on a consent order stipulation, a proposed consent order, and a settlement agreement. The motion was granted in an unreviewed initial determination. Order No. 53 (Jul. 24, 2014), *aff'd*, Notice of the Commission's Determination Not to Review an Initial Determination Terminating GHP



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Group, Inc. Based on a Settlement Agreement, Patent License Agreement and Issuance of a Consent Order; Issuance of a Consent Order (Aug. 25, 2014).

On July 16, 2014, A&J, and respondents Chant Kitchen Equipment (HK), Ltd. (“Chant”) and Tractor Supply Company (“TSC”) filed a joint motion to terminate the investigation as to Chant and TSC based on a consent order stipulation, a proposed consent order, and a settlement agreement. The motion was granted in an unreviewed initial determination. Order No. 54 (Aug. 20, 2014), *aff’d*, Notice of the Commission’s Determination Not to Review an Initial Determination Terminating Chant Kitchen Equipment (HK), Ltd. and Tractor Supply Company Based on a Settlement Agreement and Issuance of a Consent Order; Issuance of a Consent Order (Sept. 15, 2014).

A prehearing conference was held on July 15, 2014, with the evidentiary hearing in this investigation commencing immediately thereafter. The hearing concluded on July 18, 2014. *See* Order Nos. 27, 30, and 42; P.H. Tr. 1-29; Tr. 1-1033. The parties were requested to file post-hearing briefs not to exceed 150 pages in length, and to file reply briefs not to exceed 60 pages in length. P.H. Tr. 15. On August 1, 2014, the parties filed a joint outline of the issues to be decided in the in Final Initial Determination. *See* Corrected Joint Outline of the Issues to Be Decided (“Joint Outline” or “Corrected Joint Outline”) (EDIS Doc. ID No. 539336).

### **B. The Parties**

Complainant A&J Manufacturing, LLC is a Georgia corporation with its principal place of business located in St. Simons, Georgia. Amended Complaint, ¶ 6.

Complainant A&J Manufacturing, Inc. is an affiliated Florida corporation under common ownership and management with A&J Manufacturing, LLC. According to the amended

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complaint, A&J is involved in the design, development, manufacture, distribution, and sale of barbecue smokers, grills, and accessories, sold under the CHAR-GRILLER trademark. Amended Complaint, ¶¶ 6-7.

Respondent The Brinkmann Corporation (“Brinkmann”) is a Texas corporation having a principal place of business in Dallas, Texas. Brinkmann Answer, ¶ 9. Brinkmann designs, manufactures, markets, and sells multiple cooking mode outdoor grills. *Id.*, ¶ 2.

Respondent Outdoor Leisure Products, Inc. (“OLP”) is a Missouri corporation having a principal place of business in Neosho, Missouri. Outdoor Leisure Answer, ¶ 13. OLP imports and sells grills in the United States under the SMOKE HOLLOW trademark. *Id.*

Respondent Dongguan Kingsun Enterprises Co., Ltd. (“Kingsun”) is a Chinese corporation having a principal place of business in Hengli Town, Dongguan City, China. Kingsun Answer, ¶ 24. Kingsun manufactures OLP grills in China for importation into the United States. *Id.*

Respondent Char-Broil, LLC (“Char-Broil”) is a Georgia corporation having a principal place of business in Columbus, Georgia. Char-Broil Answer, ¶ 10. Char-Broil imports and sells grills in the United States under the CHAR-BROIL and OKLAHOMA JOE’S trademarks. *Id.*

Respondent Zhejiang Fudeer Electric Appliance Co., Ltd. (“Fudeer”) is a Chinese corporation having a principal place of business in Taizhou Economic Development Zone, Zhejiang Province, China. Fudeer Answer, ¶ 25. Fudeer manufactures grills in China for Char-Broil and imports them into the United States. *Id.*

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Respondent Academy, Ltd. (“Academy”) is a Texas limited partnership having a principal place of business in Katy, Texas. Academy Answer, ¶ 15. Academy is a retailer of sporting and outdoor goods, including grills imported and sold under the OUTDOOR GOURMET trademark. *Id.*

Respondent Ningbo Huige Outdoor Products Co., Ltd. (“Huige”) is a Chinese corporation having a principal place of business in Fenghua City, Zhejiang Province, China. Huige Answer, ¶ 26. Huige manufactures grills in China on behalf of Academy and HEB for importation into the United States. *Id.*

Respondent Keesung Manufacturing Co., Ltd. (“Keesung”) is a Chinese corporation having a principal place of business in Panyu, Guangzhou, China. Amended Complaint, ¶ 27. As noted above, Keesung has not appeared in this investigation and has been found in default.

The Office of Unfair Import Investigations is also a party to this investigation. 78 Fed. Reg. 59372 (2013).

**C. The Accused Products**

This investigation concerns original grills and grills that were redesigned during the course of the investigation. *See* Staff Reply Br. at 10. With respect to the original grills, A&J asserts the following claims:

<b>Respondents</b>	<b>Model Numbers</b>	<b>Asserted Claims</b>	<b>Citations to Complainants’ Brief</b>
Brinkmann	810-3821 & 810-3820	1-4, 6-20	Compls. Br. at 32-34, 55
	810-3800 & 810-3802	1, 4, 6-10, 13, 15-20	Compls. Br. at 34-36, 55-56



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Char-Broil/ Fudeer	463724512	1, 2, 4-8, 10, 11, 13-15	Compls. Br. at 44-48, 60-62
	12201767	10-16	Compls. Br. at 48-50, 62-66
OLP/Kingsun	47180T; 47183T; SH7000; 7000CGS; 1200SH; SH5000; 1800CGS	1-16	Compls. Br. at 36-40, 56-57
Academy/ Huige	DLX2012	1-13, 15, 16	Compls. Br. at 42-44, 59-60
	DLX2013	1-13, 15, 16	Compls. Br. at 42-44, 59-60
	CG3023E	1-13, 15, 16	Compls. Br. at 42-44, 59-60
Huige	Sear & Smoke Triad	1-13, 15, 16	Compls. Br. at 44, 60

See Staff Reply Br. at 10.

As to the redesigned grills, A&J asserts the following claims:

<b>Respondents</b>	<b>Model Numbers</b>	<b>Asserted Claims</b>	<b>Citations to Complainants' Brief</b>
Char-Broil/ Fudeer	463724514	10, 11, 13-15	Compls. Br. at 66-67
	14201767	10	Compls. Br. at 66-67
OLP/Kingsun	8000; 8500; 3500; 3300; 6500; PS9500	10	Compls. Br. at 57-59

See Staff Reply Br. at 10.

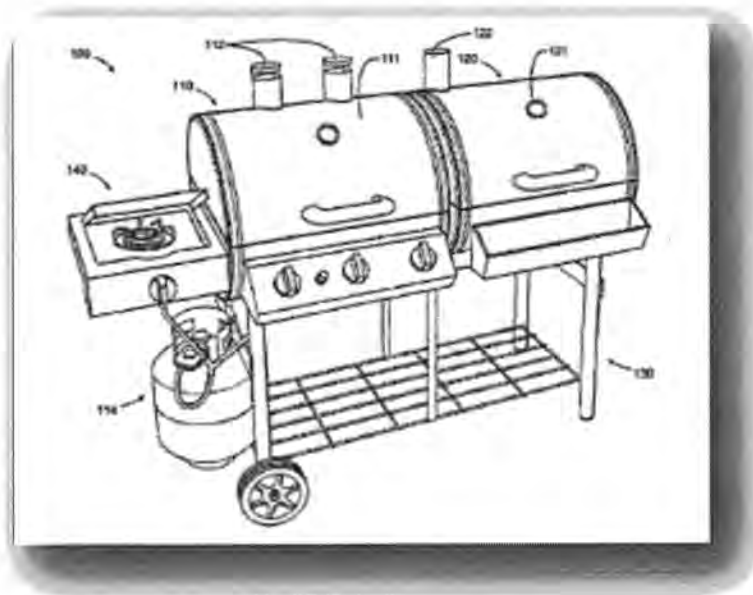
To the extent that A&J contends that Char-Broil/Fudeer Model Nos. 463724514, 14201767, or 12201767 and OLP/Kingsun Model Nos. 8000, 8500, 3500, 3300, 6500, or PS9500 infringe claims 1-9 and/or 17-20 of the '712 patent, the Commission has already determined that those grills do not infringe those claims. *See Certain Multiple Mode Outdoor Grills and Parts Thereof*, Inv. No. 337-TA-895, Comm'n Op. at 13-15 (Jun. 27, 2014). Accordingly, those issues are not presently before the administrative law judge and, thus, have not been listed in the tables above.

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### D. Technological Background

U.S. Patent No. 8,381,712 (“the ‘712 patent”), entitled “Simultaneous Multiple Cooking Mode Barbecue Grill,” issued on February 26, 2013. The patent application was filed on July 30, 2005 and claims priority based on two provisional applications filed on July 31, 2004. *See* JX-0001 (‘712 Patent). The named inventor is John Lee Simms, II. A&J Manufacturing, LLC owns the ‘712 patent by virtue of an assignment executed by Mr. Simms on August 19, 2013. JX-0002 (‘712 Patent Assignment).

The ‘712 patent “generally relates to cooking equipment, and more particularly, to a simultaneous multiple cooking mode barbeque grill.” JX-0001 at col. 1, lns. 22-24. The ‘712 patent discloses that “sometimes barbecuing with a charcoal based fuel (e.g., charcoal briquettes) is needed. Other times, barbecuing with a wood based fuel is needed (e.g., for a smoker process). Yet other times, barbecuing with a gas based fuel (e.g., propane) is needed.” *Id.* at col. 1, lns. 30-35. The figure below shows an embodiment of a dual-mode grill, as described by the ‘712 patent:



JX-0001 ('712 Patent), Fig. 1.

## II. Jurisdiction and Importation

Section 337(a)(1)(B) declares unlawful, *inter alia*, “[t]he importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that . . . infringe a valid and enforceable United States patent.” 19 U.S.C. § 1337(a)(1)(B). A&J has filed a complaint alleging a violation of this subsection, and the Commission therefore has subject matter jurisdiction. *See Amgen, Inc. v. United States Int’l Trade Comm’n*, 902 F.2d 1532, 1535-37 (Fed. Cir. 1990).

No respondent (original or remaining) contested the Commission’s personal jurisdiction. Indeed, Brinkmann, OLP, Kingsun, Char-Broil, Rankam, Fudeer, Academy, Huige, Chant, TSC, and GHP have appeared and participated in the investigation. The Commission therefore has personal jurisdiction over those respondents. *See e.g., Certain Liquid Crystal Display Modules, Products Containing Same, and Methods for Using the Same*, Inv. No. 337-TA-634, Final Initial and Recommended Determinations at 3 (June 12, 2009) (unreviewed).

Finally, the following respondents (original or remaining) have stipulated to facts regarding the importation of the accused products into the United States. JX-0010C (Brinkmann Stip.); JX-0011C (Kingsun Stip.); JX-0012C (OLP Stip.); JX-0013C (GHP Stip.); JX-0014C (Char-Broil Stip.); JX-0015C (Fudeer Stip.); JX-0016C (Rankam Stip.). Further, importation is not disputed, and the Commission therefore has *in rem* jurisdiction over the accused products. *See e.g., Sealed Air Corp. v. United States Int’l Trade Comm’n*, 645 F.2d 976, 985-86 (C.C.P.A. 1981).

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Indeed, the remaining respondents argue that they “have answered the Complaint and participated in this Investigation and, thus, do not dispute jurisdiction.” Resps. Br. at 8.

### III. General Principles of Applicable Law

#### A. Claim Construction

Claim construction begins with the plain language of the claim.<sup>1</sup> Claims should be given their ordinary and customary meaning as understood by a person of ordinary skill in the art, viewing the claim terms in the context of the entire patent.<sup>2</sup> *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-13 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

In some instances, claim terms do not have particular meaning in a field of art, and claim construction involves little more than the application of the widely accepted meaning of commonly understood words. *Phillips*, 415 F.3d at 1314. “In such circumstances, general purpose dictionaries may be helpful.” *Id.*

In many cases, claim terms have a specialized meaning, and it is necessary to determine what a person of skill in the art would have understood the disputed claim language to mean. “Because the meaning of a claim term as understood by persons of

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<sup>1</sup> Only those claim terms that are in controversy need to be construed, and only to the extent necessary to resolve the controversy. *Vanderlande Indus. Nederland BV v. Int’l Trade Comm.*, 366 F.3d 1311, 1323 (Fed. Cir. 2004); *Vivid Tech., Inc. v. American Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999).

<sup>2</sup> Factors that may be considered when determining the level of ordinary skill in the art include: “(1) the educational level of the inventor; (2) type of problems encountered in the art; (3) prior art solutions to those problems; (4) rapidity with which innovations are made; (5) sophistication of the technology; and (6) educational level of active workers in the field.” *Environmental Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 696 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

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skill in the art is often not immediately apparent, and because patentees frequently use terms idiosyncratically, the court looks to “those sources available to the public that show what a person of skill in the art would have understood disputed claim language to mean.” *Phillips*, 415 F.3d at 1314 (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1116 (Fed. Cir. 2004)). The public sources identified in *Phillips* include “the words of the claims themselves, the remainder of the specification, the prosecution history, and extrinsic evidence concerning relevant scientific principles, the meaning of technical terms, and the state of the art.” *Id.* (quoting *Innova*, 381 F.3d at 1116).

In cases in which the meaning of a claim term is uncertain, the specification usually is the best guide to the meaning of the term. *Phillips*, 415 F.3d at 1315. As a general rule, the particular examples or embodiments discussed in the specification are not to be read into the claims as limitations. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) (*en banc*), *aff’d*, 517 U.S. 370 (1996). The specification is, however, always highly relevant to the claim construction analysis, and is usually dispositive. *Phillips*, 415 F.3d at 1315 (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)). Moreover, “[t]he construction that stays true to the claim language and most naturally aligns with the patent’s description of the invention will be, in the end, the correct construction.” *Id.* at 1316.

Claims are not necessarily, and are not usually, limited in scope to the preferred embodiment. *RF Delaware, Inc. v. Pacific Keystone Techs., Inc.*, 326 F.3d 1255, 1263 (Fed. Cir. 2003); *Decisioning.com, Inc. v. Federated Dep’t Stores, Inc.*, 527 F.3d 1300, 1314 (Fed. Cir. 2008) (“[The] description of a preferred embodiment, in the absence of a

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clear intention to limit claim scope, is an insufficient basis on which to narrow the claims.”). Nevertheless, claim constructions that exclude the preferred embodiment are “rarely, if ever, correct and require highly persuasive evidentiary support.” *Vitronics*, 90 F.3d at 1583. Such a conclusion can be mandated in rare instances by clear intrinsic evidence, such as unambiguous claim language or a clear disclaimer by the patentees during patent prosecution. *Elekta Instrument S.A. v. O.U.R. Sci. Int’l, Inc.*, 214 F.3d 1302, 1308 (Fed. Cir. 2000); *Rheox, Inc. v. Entact, Inc.*, 276 F.3d 1319 (Fed. Cir. 2002).

If the intrinsic evidence does not establish the meaning of a claim, then extrinsic evidence may be considered. Extrinsic evidence consists of all evidence external to the patent and the prosecution history, and includes inventor testimony, expert testimony, and learned treatises. *Phillips*, 415 F.3d at 1317. Inventor testimony can be useful to shed light on the relevant art. In evaluating expert testimony, a court should discount any expert testimony that is clearly at odds with the claim construction mandated by the claims themselves, the written description, and the prosecution history, in other words, with the written record of the patent. *Id.* at 1318. Extrinsic evidence may be considered if a court deems it helpful in determining the true meaning of language used in the patent claims. *Id.*

This investigation involves means-plus-function claim limitations. The law pertaining to such claims is discussed below in the more detailed section on claim construction.

### **B. Infringement**

Under 35 U.S.C. §271(a), direct infringement consists of making, using, offering to sell, or selling a patented invention without consent of the patent owner. The



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complainant in a section 337 investigation bears the burden of proving infringement of the asserted patent claims by a “preponderance of the evidence.” *Certain Flooring Products*, Inv. No. 337-TA-443, Comm’n Notice of Final Determination of No Violation of Section 337, 2002 WL 448690, at \*59, (Mar. 22, 2002); *Enercon GmbH v. Int’l Trade Comm’n*, 151 F.3d 1376 (Fed. Cir. 1998).

Literal infringement of a claim occurs when every limitation recited in the claim appears in the accused device, *i.e.*, when the properly construed claim reads on the accused device exactly.<sup>3</sup> *Amhil Enters., Ltd. v. Wawa, Inc.*, 81 F.3d 1554, 1562 (Fed. Cir. 1996); *Southwall Tech. v. Cardinal IG Co.*, 54 F.3d 1570, 1575 (Fed. Cir. 1995).

If the accused product does not literally infringe the patent claim, infringement might be found under the doctrine of equivalents. “Under this doctrine, a product or process that does not literally infringe upon the express terms of a patent claim may nonetheless be found to infringe if there is ‘equivalence’ between the elements of the accused product or process and the claimed elements of the patented invention.” *Warner-Jenkinson Co., Inc. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 21 (1997) (citing *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605, 609 (1950)). “The determination of equivalence should be applied as an objective inquiry on an element-by-element basis.”<sup>4</sup> *Id.* at 40.

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<sup>3</sup> Each patent claim element or limitation is considered material and essential. *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538 (Fed. Cir. 1991). If an accused device lacks a limitation of an independent claim, the device cannot infringe a dependent claim. See *Wahpeton Canvas Co. v. Frontier, Inc.*, 870 F.2d 1546, 1552 n.9 (Fed. Cir. 1989).

<sup>4</sup> “Infringement, whether literal or under the doctrine of equivalents, is a question of fact.” *Absolute Software, Inc. v. Stealth Signal, Inc.*, 659 F.3d 1121, 1130 (Fed. Cir. 2011).

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“An element in the accused product is equivalent to a claim limitation if the differences between the two are insubstantial. The analysis focuses on whether the element in the accused device ‘performs substantially the same function in substantially the same way to obtain the same result’ as the claim limitation.” *AquaTex Indus. v. Techniche Solutions*, 419 F.3d 1374, 1382 (Fed. Cir. 2005) (quoting *Graver Tank*, 339 U.S. at 608); *accord Absolute Software*, 659 F.3d at 1139-40.<sup>5</sup>

As noted, certain of the claim elements at issue in this investigation are written in means-plus-function format. “Literal infringement of a § 112, ¶ 6 [now § 112(f)] limitation requires that the relevant structure in the accused device perform the identical function recited in the claim and be identical or equivalent” to the structure identified in the written description as corresponding to the recited function. *JVW Enter. v. Interact Accessories, Inc.*, 424 F.3d 1324, 1333 (Fed. Cir. 2005) (citing *Odetics, Inc. v. Storage Tech. Corp.*, 185 F.3d 1259, 1267 (Fed. Cir.1999)). For the relevant structure in the accused device to be equivalent to the structure in the written description, differences between the two must be insubstantial. For example, the structure in the accused device must perform the claimed function in substantially the same way to achieve substantially the same result as the structure in the written description. *JVW*, 424 F.3d at 1333.<sup>6</sup>

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<sup>5</sup> “The known interchangeability of substitutes for an element of a patent is one of the express objective factors noted by *Graver Tank* as bearing upon whether the accused device is substantially the same as the patented invention. Independent experimentation by the alleged infringer would not always reflect upon the objective question whether a person skilled in the art would have known of the interchangeability between two elements, but in many cases it would likely be probative of such knowledge.” *Warner-Jenkinson*, 520 U.S. at 36.

<sup>6</sup> “The primary difference between structural equivalents under section 112, paragraph 6 and the doctrine of equivalents is a question of timing.” *Frank’s Casing, Crew & Rental Tools, Inc. v. Weatherford Int’l, Inc.*, 389 F.3d 1370, 1379 (Fed. Cir. 2004) (citing *Al-Site*



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Prosecution history estoppel can prevent a patentee from relying on the doctrine of equivalents when the patentee relinquished subject matter during the prosecution of the patent, either by amendment or argument. *AquaTex*, 419 F.3d at 1382. In particular, “[t]he doctrine of prosecution history estoppel limits the doctrine of equivalents when an applicant makes a narrowing amendment for purposes of patentability, or clearly and unmistakably surrenders subject matter by arguments made to an examiner.” *Id.* (quoting *Salazar v. Procter & Gamble Co.*, 414 F.3d 1342, 1344 (Fed. Cir. 2005)).

### C. Validity

One cannot be held liable for practicing an invalid patent claim. *See Pandrol USA, LP v. AirBoss Railway Prods., Inc.*, 320 F.3d 1354, 1365 (Fed. Cir. 2003). Nevertheless, each claim of a patent is presumed to be valid, even if it depends from a claim found to be invalid. 35 U.S.C. § 282; *DMI Inc. v. Deere & Co.*, 802 F.2d 421 (Fed. Cir. 1986). A respondent that has raised patent invalidity as an affirmative defense must overcome the presumption by “clear and convincing” evidence of invalidity. *Checkpoint Systems, Inc. v. United States Int’l Trade Comm’n*, 54 F.3d 756, 761 (Fed. Cir. 1995).

In this investigation, respondents contend that the asserted claims of the ‘712 patent are invalid as obvious under 35 U.S.C. § 103. *See* Joint Outline at 6; Resps. Br. at 69-123.

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*Corp. v. VSI Int’l, Inc.*, 174 F.3d 1308, 1321 n.2 (Fed. Cir. 1999)). As the Federal Circuit has explained, “[a] proposed equivalent must have arisen at a definite period in time, i.e., either before or after [patent filing]. If before, a § 112, ¶ 6 structural equivalents analysis applies and any analysis for equivalent structure under the doctrine of equivalents collapses into the § 112, ¶ 6 analysis. If after, a non-textual infringement analysis proceeds under the doctrine of equivalents.” *Id.*

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Under section 103 of the Patent Act, a patent claim is invalid “if 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.”<sup>7</sup> 35 U.S.C. § 103. While the ultimate determination of whether an invention would have been obvious is a legal conclusion, it is 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) objective evidence of nonobviousness.” *Eli Lilly and Co. v. Teva Pharmaceuticals USA, Inc.*, 619 F.3d 1329 (Fed. Cir. 2010).

The objective evidence, also known as “secondary considerations,” includes commercial success, long felt need, and failure of others. *Graham v. John Deere Co.*, 383 U.S. 1, 13-17 (1966); *Dystar Textilfarben GmbH v. C.H. Patrick Co.*, 464 F.3d 1356, 1361 (Fed. Cir. 2006). “[E]vidence arising out of the so-called ‘secondary considerations’ must always when present be considered en route to a determination of obviousness.” *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538 (Fed. Cir. 1983). Secondary considerations, such as commercial success, will not always dislodge a determination of obviousness based on analysis of the prior art. *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 426 (2007) (commercial success did not alter conclusion of obviousness).

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<sup>7</sup> The standard for determining whether a patent or publication is prior art under section 103 is the same as under 35 U.S.C. § 102, which is a legal question. *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1568 (Fed. Cir. 1987).

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“One of the ways in which a patent’s subject matter can be proved obvious is by noting that there existed at the time of invention a known problem for which there was an obvious solution encompassed by the patent’s claims.” *KSR*, 550 U.S. at 419-20. “[A]ny need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” *Id.*

Specific teachings, suggestions, or motivations to combine prior art may provide helpful insights into the state of the art at the time of the alleged invention. *Id.* at 420. Nevertheless, “an obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation, or by overemphasis on the importance of published articles and the explicit content of issued patents. The diversity of inventive pursuits and of modern technology counsels against limiting the analysis in this way.” *Id.* “Under the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” *Id.* A “person of ordinary skill is also a person of ordinary creativity.” *Id.* at 421.

The “burden falls on the patent challenger to show by clear and convincing evidence that a person of ordinary skill in the art would have had reason to attempt to make the composition or device, or carry out the claimed process, and would have had a reasonable expectation of success in doing so.” *PharmaStem Therapeutics, Inc. v. ViaCell, Inc.*, 491 F.3d 1342, 1360 (Fed. Cir. 2007); *see KSR*, 550 U.S. at 416 (a combination of elements must do more than yield a predictable result; combining

elements that work together in an unexpected and fruitful manner would not have been obvious).<sup>8</sup>

**D. Domestic Industry**

A violation of section 337(a)(1)(B), (C), (D), or (E) can be found “only if an industry in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2). Section 337(a) further provides:

(3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design 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).

These statutory requirements consist of an economic prong (which requires certain activities)<sup>9</sup> and a technical prong (which requires that these activities relate to the

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<sup>8</sup> Further, “when the prior art teaches away from combining certain known elements, discovery of a successful means of combining them is more likely to be nonobvious.” *KSR*, 550 U.S. at 416 (citing *United States v. Adams*, 383 U.S. 39, 52 (1966)).

<sup>9</sup> The Commission practice is usually to assess the facts relating to the economic prong at the time that the complaint was filed. See *Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same*, Inv. No. 337-TA-560, Comm’n Op. at 39 n.17 (Apr. 14, 2010) (“We note that only activities that occurred before the filing of a complaint with the Commission are relevant to whether a domestic industry exists or is in the process of being established under sections 337(a)(2)-(3).”) (citing *Bally/Midway Mfg. Co. v. U.S. Int’l Trade Comm’n*, 714 F.2d 1117, 1121 (Fed. Cir. 1983)). In some cases, however, the Commission will consider later developments in the alleged industry, such as “when a significant and unusual development occurred after the complaint has

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intellectual property being protected). *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm'n Op. at 13 (May 16, 2008) (“*Stringed Musical Instruments*”). The burden is on the complainant to show by a preponderance of the evidence that the domestic industry requirement is satisfied. *Certain Multimedia Display and Navigation Devices and Systems, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-694, Comm'n Op. at 5 (July 22, 2011) (“*Navigation Devices*”).

With respect to the economic prong, and whether or not section 337(a)(3)(A) or (B) is satisfied, the Commission has held that “whether a complainant has established that its investment and/or employment activities are significant with respect to the articles protected by the intellectual property right concerned is not evaluated according to any rigid mathematical formula.” *Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Comm'n Op. at 27 (Feb. 17, 2011) (“*Printing and Imaging Devices*”) (citing *Certain Male Prophylactic Devices*, Inv. No. 337 TA-546, Comm'n Op. at 39 (Aug. 1, 2007)). Rather, the Commission examines “the facts in each investigation, the article of commerce, and the realities of the marketplace.” *Id.* “The determination takes into account the nature of the investment and/or employment activities, ‘the industry in question, and the complainant’s relative size.’” *Id.* (citing *Stringed Musical Instruments* at 26).

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been filed.” See *Certain Video Game Systems and Controllers*, Inv. No. 337-TA-743, Comm'n Op., at 5-6 (Jan. 20, 2012) (“[I]n appropriate situations based on the specific facts and circumstances of an investigation, the Commission may consider activities and investments beyond the filing of the complaint.”).



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With respect to section 337(a)(3)(C), whether an investment in domestic industry is “substantial” is a fact-dependent inquiry for which the complainant bears the burden of proof. *Stringed Musical Instruments* at 14. There is no minimum monetary expenditure that a complainant must demonstrate to qualify as a domestic industry under the “substantial investment” requirement of this section. *Id.* at 25. There is no need to define or quantify an industry in absolute mathematical terms. *Id.* at 26. Rather, “the requirement for showing the existence of a domestic industry will depend on the industry in question, and the complainant’s relative size.” *Id.* at 25-26.

#### **IV. U.S. Patent No. 8,381,712**

U.S. Patent No. 8,381,712 (“the ‘712 patent”), entitled “Simultaneous Multiple Cooking Mode Barbecue Grill,” issued on February 26, 2013. The patent application was filed on July 30, 2005 and claims priority based on two provisional applications filed on July 31, 2004. *See* JX-0001 (‘712 Patent). The named inventor is John Lee Simms, II. A&J Manufacturing, LLC owns the ‘712 patent by virtue of an assignment executed by Mr. Simms on August 19, 2013. JX-0002 (‘712 Patent Assignment).

The ‘712 patent “generally relates to cooking equipment, and more particularly, to a simultaneous multiple cooking mode barbecue grill.” JX-0001 at col. 1, lns. 22-24. The ‘712 patent discloses that “sometimes barbecuing with a charcoal based fuel (e.g., charcoal briquettes) is needed. Other times, barbecuing with a wood based fuel is needed (e.g., for a smoker process). Yet other times, barbecuing with a gas based fuel (e.g., propane) is needed.” *Id.* at col. 1, lns. 30-35.

A&J asserts apparatus claims 1-20 of the ‘712 patent, of which claims 1, 10, and 17 are independent. *Compls. Br.* at 31-67; *Amended Complaint*, ¶¶ 91-131.

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With respect to the original grills, A&J asserts the following claims for the specific accused products:

<b>Respondent</b>	<b>Model Number</b>	<b>Asserted Claims</b>	<b>Citation</b>
Brinkmann	810-3821 & 810-3820	1-4, 6-20	Compls. Br. at 32-34, 55
	810-3800 & 810-3802	1, 4, 6-10, 13, 15-20	Compls. Br. at 34-36, 55-56
Char-Broil/ Fudeer	463724512	1, 2, 4-8, 10, 11, 13-15	Compls. Br. at 44-48, 60-62
	12201767	10-16	Compls. Br. at 48-50, 62-66
OLP/Kingsun	47180T; 47183T; SH7000; 7000CGS; 1200SH; SH5000; 1800CGS	1-16	Compls. Br. at 36-40, 56-57
Academy/ Huige	DLX2012	1-13, 15, 16	Compls. Br. at 42-44, 59-60
	DLX2013	1-13, 15, 16	Compls. Br. at 42-44, 59-60
	CG3023E	1-13, 15, 16	Compls. Br. at 42-44, 59-60
Huige	Sear & Smoke Triad	1-13, 15, 16	Compls. Br. at 44, 60

See Staff Br. at 10.

For the redesigned grills, A&J asserts the following claims:

<b>Respondent</b>	<b>Model Number</b>	<b>Asserted Claims</b>	<b>Citation</b>
Char-Broil/ Fudeer	463724514	10, 11, 13-15	Compls. Br. at 66-67
	14201767	10	Compls. Br. at 66-67
OLP/Kingsun	8000; 8500; 3500; 3300; 6500; PS9500	10	Compls. Br. at 57-59

See Staff Br. at 10.

To the extent that A&J contends that Char-Broil/Fudeer Model Nos. 463724514, 14201767, or 12201767 and OLP/Kingsun Model Nos. 8000, 8500, 3500, 3300, 6500, or

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PS9500 infringe claims 1-9 and/or 17-20 of the '712 patent, the Commission has already determined that those grills do not infringe those claims. *See* Comm'n Op. at 13-15 (Jun. 27, 2014). Accordingly, those issues are not presently before the administrative law judge and, thus, have not been listed in the tables above.

The asserted independent claims 1, 10, and 17 read as follows:

1. A barbecue grill having multiple cooking units, comprising:
  - a support structure configured to support a plurality of cooking units;
  - a first cooking unit configured to cook food using gas cooking fuel, the first cooking unit attached to the support structure and including at least one first grill, the first cooking unit further including an openable first cover attached to the first cooking unit that selectively covers the first grill, wherein the first cover includes at least one exhaust; and
  - a second cooking unit configured to cook food using solid cooking fuel, the second cooking unit attached to the support structure and including at least one second grill, the second cooking unit further including an openable second cover attached to the second cooking unit that selectively covers the second grill, wherein the second cover includes at least one exhaust,wherein the first cooking unit and the second cooking unit are simultaneously operable to cook food and the first grill and second grill are selectively and independently coverable.
10. A barbecue grill having multiple means for cooking, comprising:
  - a first means for cooking food using gas cooking fuel, the first means for cooking including at least one first grill and an openable first cover means for selectively covering the first grill, wherein the first cover means is attached to the first means for cooking and includes at least one exhaust;
  - a second means for cooking food using solid cooking fuel, the second means for cooking including at least one second grill and an openable second cover means for selectively covering the second grill, wherein the second cover means is attached to the second means for cooking and includes at least one exhaust means; and



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a structure means for supporting the first means for cooking and the second means for cooking;

wherein the first means for cooking and the second means for cooking are simultaneously operable to cook food and the first grill and second grill are selectively and independently coverable.

17. A barbecue grill having multiple cooking units, comprising:

a support structure configured to support a plurality of cooking units;

a first cooking unit supported by the support structure, the first cooking unit having a substantially cylindrical shape, the first cooking unit configured to cook food using gas cooking fuel, the first cooking unit including at least one first grill and an openable first cover attached to the first cooking unit that selectively covers the first grill, wherein the first cover includes at least one exhaust; and

a second cooking unit supported by the support structure, the second cooking unit having a substantially cylindrical shape, the second cooking unit configured to cook food using solid cooking fuel, the second cooking unit including at least one second grill and an openable second cover attached to the second cooking unit that selectively covers the second grill, wherein the second cover includes at least one exhaust,

wherein the first cooking unit and the second cooking unit are simultaneously operable to cook food and the first grill and second grill are selectively and independently coverable.

JX-0001 at col. 4, ln. 54 – col. 5, ln. 8; col. 5, lns. 40-59; col. 6, lns. 25-47.

### A. Claim Construction

The parties agree that the claim terms “exhaust,” “openable [] cover means,” and “substantially vertical panel” are the only disputed claim terms remaining to be considered for purposes of claim construction. Joint Outline at 1.

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### 1. Applicable Law

Claim construction begins with the plain language of the claim.<sup>10</sup> Claims should be given their ordinary and customary meaning as understood by a person of ordinary skill in the art at the time of the effective date of the patent application, viewing the claim terms in the context of the entire patent.<sup>11</sup> *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-13 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

In some instances, claim terms do not have particular meaning in a field of art, and claim construction involves little more than the application of the widely accepted meaning of commonly understood words. *Phillips*, 415 F.3d at 1314. “In such circumstances, general purpose dictionaries may be helpful.” *Id.*

In many cases, claim terms have a specialized meaning, and it is necessary to determine what a person of skill in the art would have understood the disputed claim language to mean. “Because the meaning of a claim term as understood by persons of skill in the art is often not immediately apparent, and because patentees frequently use terms idiosyncratically, the court looks to ‘those sources available to the public that show what a person of skill in the art would have understood disputed claim language to mean.’” *Phillips*, 415 F.3d at 1314 (quoting *Innova/Pure Water, Inc. v. Safari Water*

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<sup>10</sup> Only those claim terms that are in controversy need to be construed, and only to the extent necessary to resolve the controversy. *Vanderlande Indus. Nederland BV v. Int’l Trade Comm.*, 366 F.3d 1311, 1323 (Fed. Cir. 2004); *Vivid Tech., Inc. v. American Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999).

<sup>11</sup> Factors that may be considered when determining the level of ordinary skill in the art include: “(1) the educational level of the inventor; (2) type of problems encountered in the art; (3) prior art solutions to those problems; (4) rapidity with which innovations are made; (5) sophistication of the technology; and (6) educational level of active workers in the field.” *Environmental Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 696 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

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*Filtration Sys., Inc.*, 381 F.3d 1111, 1116 (Fed. Cir. 2004)). The public sources identified in *Phillips* include “the words of the claims themselves, the remainder of the specification, the prosecution history, and extrinsic evidence concerning relevant scientific principles, the meaning of technical terms, and the state of the art.” *Id.* (quoting *Innova*, 381 F.3d at 1116).

In cases in which the meaning of a claim term is uncertain, the specification usually is the best guide to the meaning of the term. *Phillips*, 415 F.3d at 1315. As a general rule, the particular examples or embodiments discussed in the specification are not to be read into the claims as limitations. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) (*en banc*), *aff'd*, 517 U.S. 370 (1996). The specification is, however, always highly relevant to the claim construction analysis, and is usually dispositive. *Phillips*, 415 F.3d at 1315 (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)). Moreover, “[t]he construction that stays true to the claim language and most naturally aligns with the patent’s description of the invention will be, in the end, the correct construction.” *Id.* at 1316.

Claims are not necessarily, and are not usually, limited in scope to the preferred embodiment. *RF Delaware, Inc. v. Pacific Keystone Techs., Inc.*, 326 F.3d 1255, 1263 (Fed. Cir. 2003); *Decisioning.com, Inc. v. Federated Dep’t Stores, Inc.*, 527 F.3d 1300, 1314 (Fed. Cir. 2008) (“[The] description of a preferred embodiment, in the absence of a clear intention to limit claim scope, is an insufficient basis on which to narrow the claims.”). Nevertheless, claim constructions that exclude the preferred embodiment are “rarely, if ever, correct and require highly persuasive evidentiary support.” *Vitronics*, 90 F.3d at 1583. Such a conclusion can be mandated in rare instances by clear intrinsic

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evidence, such as unambiguous claim language or a clear disclaimer by the patentees during patent prosecution. *Elekta Instrument S.A. v. O.U.R. Sci. Int'l, Inc.*, 214 F.3d 1302, 1308 (Fed. Cir. 2000); *Rheox, Inc. v. Entact, Inc.*, 276 F.3d 1319 (Fed. Cir. 2002).

If the intrinsic evidence does not establish the meaning of a claim, then extrinsic evidence may be considered. Extrinsic evidence consists of all evidence external to the patent and the prosecution history, and includes inventor testimony, expert testimony, and learned treatises. *Phillips*, 415 F.3d at 1317. Inventor testimony can be useful to shed light on the relevant art. In evaluating expert testimony, a court should discount any expert testimony that is clearly at odds with the claim construction mandated by the claims themselves, the written description, and the prosecution history, in other words, with the written record of the patent. *Id.* at 1318. Extrinsic evidence may be considered if a court deems it helpful in determining the true meaning of language used in the patent claims. *Id.*

This investigation involves means-plus-function claim limitations. When a claim uses the term “means” to describe a limitation, a presumption arises that the inventor used the term to invoke the means-plus-function format authorized by 35 U.S.C. § 112, ¶ 6.<sup>12</sup> *Altiris, Inc. v. Symantec Corp.*, 318 F.3d 1363, 1375 (Fed. Cir. 2003). “This presumption can be rebutted when the claim, in addition to the functional language, recites structure sufficient to perform the claimed function in its entirety.” *Id.*

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<sup>12</sup> The relevant portion of section 112 provides:

An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

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Once a court concludes that a claim limitation is a means-plus-function limitation, two steps of claim construction remain: (1) the court must first identify the function of the limitation; and (2) the court must then look to the specification and identify the corresponding structure for that function. *Biomedino LLC v. Waters Technologies Corp.*, 490 F.3d 946, 950 (Fed. Cir. 2007). If there is no structure in the specification corresponding to the means-plus-function limitation, the claim will be found invalid as indefinite. *Id.*

While the specification must contain structure linked to claimed means, “[a]ll one needs to do in order to obtain the benefit of [§ 112, ¶ 6 (now § 112(f))] is to recite some structure corresponding to the means in the specification, as the statute states, so that one can readily ascertain what the claim means and comply with the particularity requirement of [§ 112,] ¶ 2.” *Id.* (citing *Atmel Corp. v. Info. Storage Devices, Inc.*, 198 F.3d 1374, 1382 (Fed. Cir. 1999)). Additionally, interpretation of what is disclosed in the specification must be made in light of the knowledge of one skilled in the art. *Id.* at 1380.

Thus, under section 112, the corresponding structure of the limitation “must be disclosed in the written description in such a manner that one skilled in the art will know and understand what structure corresponds to the means limitation. Otherwise, one does not know what the claim means.” *Id.* at 1382. Yet, “the testimony of one of ordinary skill in the art cannot supplant the total absence of structure from the specification.” *Id.* (quoting *Default Proof Credit Card Sys., Inc. v. Home Depot U.S.A., Inc.*, 412 F.3d 1291, 1302 (Fed. Cir. 2005)).

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35 U.S.C. § 112(f).



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“A means-plus-function claim encompasses all structure in the specification corresponding to that element and equivalent structures.” The statute does not, however, permit limitation of a means-plus-function claim by adopting a function different from that explicitly recited in the claim. Nor does the statute permit incorporation of structure from the written description beyond that necessary to perform the claimed function.

*Micro Chem. Inc. v. Great Plains Chem. Co., Inc.*, 194 F.3d 1250, 1258 (Fed. Cir. 1999).

### **2. A Person of Ordinary Skill in the Art**

A&J argues that “it is inappropriate to define the person of ordinary skill in the art solely as a person with mechanical engineering training. Rather, the skilled artisan should be a person with a bachelor’s degree in industrial design or mechanical engineering, combined with some experience in the design of metal fabricated grilling products, cooking appliances, or similar products; or alternately, a person with at least 3 to 4 years experience in designing metal fabricated grilling products.” Compls. Br. at 11.

Respondents argue that “[a]t the time the application for the ‘712 patent was filed in July 2004, a person of ordinary skill in the art of grill design would be someone with an engineering degree *or* equivalent experience in the engineering field, plus approximately two to four years of experience in the field of mechanical engineering designing barbecue grills.” Resps. Br. at 69 (emphasis in original).

The Staff argues that “the evidence adduced at trial shows that the level of ordinary skill in the art with respect to the ‘712 patent is ‘someone with an engineering degree *or* equivalent experience in the engineering field, plus two to four years of experience in the field of mechanical engineering designing barbecue grills.’” Staff Br.

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at 11 (citing RX-0190C (Stevick WS) at Q/A 71 and RX-0591 (Davidson WS) at Q/A 133).

A&J argues that respondents' proposed level of ordinary skill with respect to the '712 is incorrect to the extent that it would necessarily require a degree in mechanical engineering. Compls. Br. at 10-11. In this regard, however, A&J misstates respondents' position. Contrary to A&J's argument, respondents did not argue that a mechanical engineering degree is required. Indeed, they acknowledge that experience may substitute for a degree. Specifically, respondents argued that the level of ordinary skill in the art with respect to the '712 patent is "someone with an engineering degree *or* equivalent experience in the engineering field, plus approximately two to four years of experience in the field of mechanical engineering designing barbecue grills." Resps. Br. at 69 (emphasis in original), citing RX-0190C (Stevick WS) at Q/A 71 and RX-0591 (Davidson WS) at Q/A 133.

Although A&J's expert, Mr. Thuma, offered a different opinion as to the level of ordinary skill in the art (*see* CX-0890C (Thuma WS) at Q/A 10), he did not dispute the opinions of Dr. Stevick or Mr. Davidson on this issue in his rebuttal testimony. *See* RX-0900C (Thuma RWS). Moreover, A&J did not dispute respondents' contention regarding this issue in its pre-hearing brief. Nor did A&J advance a different contention regarding the level of ordinary skill in the art with respect to the '712 patent. *See* Compls. Pre-Hearing Br. A&J is thus precluded from doing so now.

Accordingly, as argued by respondents and the Staff, the administrative law judge finds that a person of ordinary skill in the art with respect to the '712 patent is a person with an engineering degree or equivalent experience in the engineering field, plus

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approximately two to four years of experience in the field of mechanical engineering designing barbecue grills.

3. “exhaust”

Below is a chart showing the parties’ proposed claim constructions.

Claim Term	Complainants’ Construction	Respondents’ Construction	Staff’s Construction
“exhaust”	plain and ordinary meaning  <i>or</i> “a passage in the cover through which smoke, waste gases and/or cooking vapors pass out of the cooking unit”	“a pipe, duct or similar structure that is attached to and extends from an openable cover, through which exhaust gases are expelled”	plain and ordinary meaning

Compls. Br. at 14; Compls. Reply Br. at 10; Resps. Br. at 18; Staff Br. at 14-15.

Complainants argue: “This term is a simple mechanical term, and would be understood broadly by a person of skill in the art. To the extent the term ‘exhaust’ requires construction, Complainants’ contingent construction of ‘a passage in the cover through which smoke, waste gases and/or cooking vapors pass out of the cooking unit’ is an appropriate interpretation.” Compls. Br. at 14; *see* Compls. Reply Br. at 10.

Respondents argue that “both ‘exhaust’ and ‘exhaust means[]’ (of Claim 10) refer to ‘a pipe, duct or similar structure that is attached to and extends from an openable cover, through which exhaust gases are expelled.’” Resps. Br. at 18.<sup>13</sup> It is argued that

<sup>13</sup> In its pre-hearing brief, A&J did not address the “exhaust means” limitation of claim 10, and did not refute respondents’ argument that the term should be construed in the same manner as “exhaust.” Thus, it appeared that A&J agreed with respondents that the “exhaust” and “exhaust means” limitations should be construed in the same manner. However, A&J now states that the “exhaust means” limitation of claim 10 should be



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“Respondents’ construction clearly aligns with the plain and ordinary meaning of this term as confirmed by the intrinsic evidence.” *Id.*

The Staff argues that “the term ‘exhaust’ need not be construed, and should be afforded its plain and ordinary meaning.” Staff Br. at 14. Similarly, the Staff argues: “The private parties contend that the term ‘exhaust means’ in claim 10 of the ‘712 patent should be construed in the same manner as the term ‘exhaust’ as it is used in claims 1 and 17. The Staff agrees, and thus it is the Staff’s view, that this term need not be construed, and that the plain and ordinary meaning should apply.” *Id.* at 15 (citations omitted).

As noted above, the Joint Outline shows that the parties dispute the term “exhaust” (but not the term “exhaust means”) for purposes of claim construction. Joint Outline at 1.

As discussed below, as complainants and the Staff argued, the claim term “exhaust” should be given its plain and ordinary meaning.

The parties’ dispute concerns what structure, if any, the term requires. A&J argues that no construction is necessary. Compls. Br. at 11-15. However, if it is construed, complainants assert that the term “exhaust” means “a passage in the cover through which smoke, waste gases, and/or cooking vapors pass out of the cooking unit.” *Id.* Respondents argue that the term “exhaust” should be construed to mean “a pipe, duct

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construed differently as a means-plus-function limitation. *See* Compls. Br. at 14-15. In this regard, A&J does not argue that the term “exhaust means” should be limited to structures set forth in the specification and equivalents thereof, as § 112, ¶ 6 requires. *See id.* at 17. Instead, A&J argues that the term “exhaust means” should be afforded its plain and ordinary meaning. *Id.* Accordingly, despite A&J’s statement that “exhaust means” should be construed differently than “exhaust,” A&J fails to articulate any construction of “exhaust means” that is different than its proposed construction for the term “exhaust.” Thus, there can be no dispute that the terms “exhaust” and “exhaust means” should be afforded the same meaning.

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or similar structure that is attached to and extends from an openable cover, through which exhaust gases are expelled.” Resps. Br. at 18. Respondents’ construction, however, has already been rejected by the administrative law judge. *See* Order No. 34 (Apr. 17, 2014) at 4-5.

The patent specification contains no language instructing the reader, or a person of skill in this art, that exhaust should be limited to the smokestack-type exhaust shown in the preferred embodiments.

Mr. Shankwiler, who has experience in grill design in addition to his other academic and professional qualifications, testified that a person of ordinary skill in the art of grill design would understand that in the context of the ‘712 patent specification, exhaust would refer to a means by which smoke, vapor and/or gas may escape from the cover of the cooking unit, and would not be limited to a particular type of smokestack structure such as that shown in the exemplary embodiments of the ‘712 patent. CX-0891C (Shankwiler WS) Q/A 19. In Mr. Shankwiler’s opinion, the person of skill would interpret “exhaust” broadly, to include channels, ducts, vents, pipes, louvers, dampers or smokestacks, or any other structure that defines an opening or passage to allow smoke, vapor and/or gas to escape the cooking unit. *Id.*

Mr. Thuma, an expert in industrial design and new product development, similarly testified that, in the context of the ‘712 patent specification, “exhaust” is not a term of art implying solely a smokestack-type structure. Instead, that term would be understood to be a passage allowing smoke, vapor and/or gas to escape the cooking unit. In particular, a person of skill in the art of grill design would be aware of terms used in metal fabrication such as exhaust ducting, exhaust fans, exhaust vents and similar terms,

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and would interpret the term “exhaust” broadly. CX-0890C (Thuma WS) at Q/A 16.

To the extent that respondents argue that the term “exhaust” should be limited to those structures used in the described embodiments based on prosecution disclaimer, respondents are incorrect. In this regard, respondents identify no statements or amendments made during prosecution that give rise to a clear and unmistakable disavowal of claim scope. *See Dealertrack, Inc. v. Huber*, 674 F.3d 1315, 1322 (Fed. Cir. 2013). For example, respondents argue that the patentee distinguished the claimed invention from Nemec (RX-0023) and Ganard (RX-0065) by arguing that the exhausts were smokestacks. Resps. Br. at 26. Respondents are mistaken on this point. The applicant distinguished the claimed invention based on the location of the exhaust, not on the type of exhaust employed. *See JX-0007.0271-.0272* (“Thus, Applicant submits that Nemec and Ganard failed to teach or suggest ... ‘an openable first cover...include[ing] at least one exhaust’ and ‘an openable second cover attached to the second cooking unit...include[ing] at least one exhaust.’”).

The patentee referred to the exhausts in the referenced prior art as “smokestacks,” because they were smokestacks. *See id.* at 0271-0272; RX-0023; RX-0065. However, the patentee did not argue that smokestacks were required. The patent applicant, in distinguishing the prior art Nemec and Ganard references, did not limit the term exhaust to smokestack configurations; this is apparent when one notes that both Nemec and Ganard have smokestacks. That is, the applicant did not limit the term “exhaust” in the claims for the purpose of distinguishing the ‘712 smokestacks from prior art references also having smokestacks. Thus, there is no prosecution disclaimer that would limit the scope of the claimed exhaust, in the manner argued by respondents.

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Respondents argue for a narrow construction for “exhaust,” partially based on an extrinsic source, the McGraw-Hill Dictionary of Scientific and Technical Terms, the noted field being Mechanical Engineering. Resps. Br. at 19. Respondents argue that “Complainants’ proposed construction of this term is largely, if not *entirely*, divorced from the intrinsic evidence and should be rejected.” *Id.* at 18.

The *Phillips* opinion recognizes that in some cases “the ordinary meaning of claim language is 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 to commonly understood words.” 415 F.3d at 1314. *Phillips* also recognizes that “sources available to the public that show what a person of skill in the art would have understood disputed claim language to mean” include “the words of the claims themselves.” *Id.*

Indeed, respondents’ expert Dr. Stevick acknowledged on cross-examination that exhaust is “occasionally used” by a person of skill in the art to describe a simple vent structure in the cover of the grill. Stevick Tr. 918-919. For example, Dr. Stevick agreed that the Holland ‘986 patent (RX-0072) upon which he relied, uses the term “exhaust” to describe a conventional vent (*see* RX-0072 at col. 4, lns. 14-22), as shown in Figure 10:

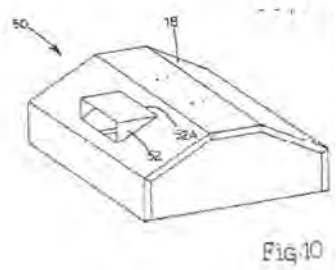


FIGURE 10  
RX-0072.0008

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A person of ordinary skill in the art, familiar with prior art, would recognize that the term exhaust as used in the '712 patent would not be confined to a smokestack or chimney.

For the reasons discussed above, the administrative law judge agrees with complainants and the Staff that the term “exhaust” should be afforded its plain and ordinary meaning. Accordingly, as proposed by complainants, the claim term “exhaust” is construed to mean “a passage in the cover through which smoke, waste gases, and/or cooking vapors pass out of the cooking unit.”

**4. “openable [] cover means”**

Below is a chart showing the parties’ proposed claim constructions.

<b>Claim Term</b>	<b>Complainants’ Construction</b>	<b>Respondents’ Construction</b>	<b>Staff’s Construction</b>
“openable [] cover means” (function)	“selectively covering the [] grill”	“selectively covering the [] grill”	“selectively covering the [] grill”
“openable [] cover means” (structure)	plain and ordinary meaning	“openable first cover means” refers to “a structure that is moveable between open and non-open positions relative to fixed portions of the barbeque grill”  <i>and</i> “openable second cover means” refers to “a structure that is moveable between open and non-open positions relative to the second grill”	“a lid attached to a fixed portion of the cooking unit to selectively cover the cooking surface of the [first/second] means for cooking”

Compls. Br. at 18-31; Resps. Br. at 9-10; Staff Br. at 16-17.

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Complainants argue that the disputed claim term “openable [] cover means” “should be construed to have its plain and ordinary meaning, and nowhere in the prosecution history is there any disclaimer of structural equivalents.” Compl. Br. at 18.

Respondents argue that “an ‘openable first cover means’ refers to a structure that is moveable between open and non-open positions relative to fixed portions of the barbeque grill.” Resps. Br. at 9. Similarly, respondents argue that “[a]n ‘openable second cover means’ refers to a structure that is moveable between open and non-open positions relative to the second grill.” *Id.* It is argued that “the construction of ‘openable [] cover means’ does not differ in any material way from the construction of ‘openable [] cover’ and the disclaimers limiting the scope of that term in claims 1 and 17 equally limit the scope of the related *means* term in claim 10.” *Id.* at 10 (emphasis in original).

The Staff argues that for the claim term “openable [] cover means,” “the Commission found that the claimed function is ‘selectively covering the [] grill.’” Staff Br. at 16. The Staff argues that “the ‘openable [] cover means’ should be construed as ‘a lid attached to a fixed portion of the cooking unit to selectively cover the cooking surface of the [first/second] means for cooking.’” *Id.* at 17.

By way of background, the proper construction of the “openable [] cover” limitations of claims 1 and 17 was the subject of respondents’ motion for summary determination of noninfringement. The Commission has affirmed the undersigned’s finding that the term “openable [] cover” means “a cover that excludes any portion of the grill enclosure that is not openable (*i.e.*, fixed).” *Certain Multiple Mode Outdoor Grills and Parts Thereof*, Inv. No. 337-TA-895, Comm’n Op. at 15 (Jun. 27, 2014).



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The proper construction of the “openable [] cover means” limitations of claim 10 was also the subject of respondents’ motion for summary determination of noninfringement. The Commission found that the “openable [] cover means” limitations should be construed pursuant to 35 U.S.C. § 112(f). *Id.* at 13-15. In this regard, the Commission found that the claimed function is “selectively covering the [] grill.” *Id.* at 13. Thus, now one must identify corresponding structures, and determine whether the scope of § 112(f) equivalents are limited by the patentee’s disclaimer.

### **Corresponding Structure of “openable [] cover means”**

With respect to the first openable cover, the ‘712 patent discloses a lid, depicted as item 111 in Figure 1, item 211 in Figure 2, and item 311 in Figure 3. JX-0001 (‘712 Patent) at col. 2, lns. 32-34; col. 3, lns. 4-7; and col. 3, lns. 36-39. With respect to the second openable cover, the ‘712 patent discloses a lid depicted as item 121 in Figure 1, item 221 in Figure 2, and item 321 in Figure 3. *Id.* at col. 2, lns. 32-34; col. 3, lns. 4-7; and col. 3, lns. 36-39.

As noted, the Commission found that the claimed function of the term “openable [] cover means” is “selectively covering the [] grill.” Moreover, for claims 1 and 17, the Commission affirmed the undersigned’s finding that the term “openable [] cover” means “a cover that excludes any portion of the grill enclosure that is not openable (*i.e.*, fixed).” Accordingly, the administrative law judge has determined that the claimed function of the disputed claim term “openable [] cover means” of claim 10 is “selectively covering the [] grill,” and the corresponding structure is “a cover or a lid that excludes any portion of the grill enclosure that is not openable (*i.e.*, fixed).”

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### Prosecution History Disclaimer

With respect to “openable [] cover means” of claim 10, the Commission states: “As we discussed in detail above with respect to claims 1 and 17, we find that the applicant clearly and unmistakably disclaimed any construction of the term “openable [] cover” that includes portions of the grill enclosure that are not openable. The ALJ should consider the Commission’s finding in determining whether the applicant’s disclaimer applies to the means-plus-function limitations of claim 10.” Comm’n Op. at 15.

The administrative law judge finds that the same prosecution history disclaimer that applies to claims 1 and 17 also applies to claim 10.

Prosecution history disclaimer applies to means-plus-function limitations in the same manner that it applies to other claim limitations. *Regents of the Univ. of Minn. v. AGA Medical Corp.*, 717 F.3d 929, 942 (Fed. Cir. 2013) (“Our law makes clear that ‘[j]ust as prosecution history estoppel may act to estop an equivalence argument under the doctrine of equivalents, positions taken before the PTO may bar an inconsistent position on claim construction under § 112, ¶ 6.’”), citing *Alpex Computer Corp. v. Nintendo Co.*, 102 F.3d 1214, 1221 (Fed. Cir. 1996). Accordingly, “prosecution history disclaimer may limit the range of equivalent structures that fall within the scope of a means-plus-function limitation.” *Regents of the Univ. of Minn.*, 717 F.3d at 942. Here, A&J’s disclaimer applies to all of the “openable [] cover” limitations of the ‘712 patent, including the “openable [] cover means” limitations of claim 10. This disclaimer limits the range of equivalents that would fall within the scope of the “openable [] cover” limitations.



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A&J's originally filed claims sought broad coverage. *See* JX-0007 at 0010-0014. However, those claims had to be amended to distinguish the claimed invention from the prior art of record. A&J therefore amended its claims on August 25, 2011 to add the following narrowing limitations:

- (i) that the recited cover be "openable"; and
- (ii) that the cover include "at least one exhaust."

*Id.* at 0259-0263. However, even its narrowed claims were finally rejected over U.S. Patent No. 4,787,477 ("McLane") in view of Cox. *Id.* at 0295. A&J then appealed the examiner's final rejection. *Id.* at 0372-0402. In its appeal to the Board of Patent Appeal and Interferences, A&J argued that its claimed invention was not rendered obvious over McLane in view of Cox:

The Office suggests that combining the barbecue grill of McLane with the oven/smoker enclosures and chimneys described in Cox would render obvious "wherein the first cover includes at least one exhaust," and "wherein the second cover includes at least one exhaust," as recited in claim 22. Office Action, pp. 7-8. Assuming, for the sake of argument, that this combination is even possible (which it is not), **at best it would result in a barbecue grill with chimneys connected to exit ports on the fixed portions of the oven/smoker enclosures which are not openable (i.e., not covers).** Thus, even if the references could be combined in the manner suggested in the Office Action, the combination still fails to teach "wherein the first cover includes at least one exhaust," and "wherein the second cover includes at least one exhaust," as recited in claim 22.

*Id.* at 0387 (emphasis added). This argument with respect to Cox makes it clear that the applicant did not regard the fixed portion of the grill enclosure 39 as "openable." The "openable cover" of Cox is the door 38 that can be opened to provide access to the inside of the grill enclosure. RX-0026 at Fig. 2. This is consistent with the plain meaning of the term "openable cover."

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The prosecution history “provides evidence of how the PTO and the inventor understood the patent.” *Phillips v. A.W.H. Corp.*, 415 F.3d 1303, 1317 (Fed. Cir. 2005) (*en banc*). As such, “it may inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be.” *Id.*; *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582-83; *see also Chimie v. PPG Indus., Inc.*, 402 F.3d 1371, 1384 (Fed. Cir. 2005) (“The purpose of consulting the prosecution history in construing a claim is to exclude any interpretation that was disclaimed during prosecution.”). It is clear that the claimed “openable cover” does not include fixed portions of a grill enclosure. The recited exhausts must be located on the “openable” portion of the grill. This amounts to a clear and unambiguous disclaimer of claim scope. The Commission thus correctly found that the prosecution history shows that the patentee did not regard the fixed portions of grill enclosures as “openable.” Comm’n Op. at 12.

Moreover, A&J’s disclaimer applies to all of the “openable [] cover” limitations of claims 1, 10, and 17. Indeed, A&J’s appeal brief applied the same arguments to overcome the rejection of each of the independent claims (including the means-plus-function claim) based on the combination of McLane and Cox. JX-0007 at 0389-0391. It is appropriate to apply the same disclaimer to each independent claim.

Accordingly, the ‘712 patent applicant clearly and unambiguously, via prosecution history disclaimer, disclaimed claim scope for the “openable [] cover” limitations of the asserted independent claims so as to exclude fixed portions of the grill. Thus, based on the plain language of the claims and the ‘712 applicant’s disclaimer, the

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“openable [] cover” limitations of claims 1, 10, and 17 of the ‘712 patent cannot be read to re-capture fixed portions of a grill.

### **“fourth cooking mode unit 324”**

Complainants seek in an untimely manner to rely upon certain disclosures in the ‘712 patent specification relating to fourth cooking mode unit 324. *See* Comps. Br. at 20-23. Neither of complainants’ experts relied upon, or even mentioned, fourth cooking mode unit 324 as support for their plain and ordinary meaning of “openable [] cover means,” in any of their expert reports or their direct or rebuttal witness statements. *See e.g.* CX-0890C (Thuma WS); CX-0900C (Thuma RWS); CX-0891C (Shankwiler WS). Thus, there is no record evidence underlying complainants’ reliance on fourth cooking mode unit 324 as support for a broad construction of “openable [] cover means.”<sup>14</sup>

Nevertheless, the disclosure of fourth cooking mode unit 324 is immaterial to the construction of the “openable [] cover means” attached to the first and second means for cooking food in claim 10 for the following reasons.

First, the structure disclosed in the written description of the specification is the corresponding structure only if the written description of the specification or the prosecution history clearly links or associates that structure to the function recited in a means- (or step-) plus-function claim limitation under 35 U.S.C. § 112(f). *B. Braun Med. Inc., v. Abbott Labs.*, 124 F.3d 1419, 1424 (Fed. Cir. 1997); *Telcordia Techs., Inc. v.*

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<sup>14</sup> Moreover, in the Joint List of Disputed Claim Terms & Proposed Constructions, complainants did not offer a construction under § 112, ¶ 6 (now § 112(f)) – complainants did not identify the recited function, and did not identify any corresponding structures in the specification of the ‘712 patent. Joint List of Disputed Terms & Proposed Constructions (May 7, 2014) (EDIS Doc ID No. 533353) at 2-3 (merely stating “such as the cover described in the specification of the ‘712 patent and structural equivalents thereof”).

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*Cisco Sys., Inc.*, 612 F.3d 1365, 1376 (Fed. Cir. 2010). The requirement that a particular structure be clearly linked with the claimed function in order to qualify as corresponding structure is the quid pro quo for the convenience of employing 35 U.S.C. § 112(f) and is also supported by the requirement of 35 U.S.C. § 112(b) that an invention must be particularly pointed out and distinctly claimed. *See Med. Instrumentation & Diagnostics Corp. v. Elekta AB*, 344 F.3d 1205, 1211 (Fed. Cir. 2003).

There is nothing in the '712 patent that clearly links or associates the structure of fourth cooking mode unit 324 with the function of selectively covering the first or second cooking units. In fact, nowhere in the '712 patent is any cover portion, or openable lid of fourth cooking mode unit 324 described separately or designated by lead lines in the drawings; rather, the sum total of the patent disclosure refers to fourth cooking mode unit 324 as a whole – either as a firebox for second cooking unit 320 or as a separate barbecue smoker grill. JX-0001 at col. 3, lns. 41-54. The “openable [] cover means” at issue in this case are the ones contained on the first cooking unit and the second cooking unit – not a fourth cooking mode. The configuration of the lid on a fourth cooking mode that “may operate separately to prepare food in another cooking mode” (JX-0001 at col. 3, lns. 42-45) has nothing to do with the construction of the “openable cover means” of the first or second cooking units. The patent describes fourth cooking mode 324 only in conjunction with Fig. 3, and not in conjunction with Figs. 1-2.

Second, nothing in the prosecution history clearly links or associates the structure of fourth cooking mode unit 324 with the function of selectively covering the first or second cooking units. *See B. Braun Medical*, 124 F.3d at 1424. After the examiner rejected the newly added means claims for lack of written description support (JX-

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0007.0214), Applicant responded by identifying lids 110 and 210 of Figs. 1 and 2 as support for the first cover means, and to lids 120 and 220 of Figs. 1 and 2 as support for the second cover means. JX-0007.0268. Applicant did not identify fourth cooking mode unit 324 of Figure 3 as support for the openable cover means of the first and second cooking units during prosecution, and otherwise failed to provide any disclosure that clearly links or associates that fourth cooking unit to the function of selectively covering the first and second cooking units. Nor did applicant otherwise add the term “openable [] cover means” to the specification or describe it in conjunction with any of the cooking units, let alone fourth cooking unit 324.

Accordingly, complainants’ argument regarding fourth cooking mode unit 324 as support for a broad construction of “openable [] cover means” is rejected.

### **Conclusion**

The administrative law judge has determined that the claimed function of the disputed claim term “openable [] cover means” of claim 10 is “selectively covering the [] grill,” and the corresponding structure is “a cover or a lid that excludes any portion of the grill enclosure that is not openable (*i.e.*, fixed).” The administrative law judge finds that the same prosecution history disclaimer that applies to claims 1 and 17 also applies to claim 10.

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5. “substantially vertical panel”

Below is a chart showing the parties’ proposed claim constructions.

Claim Term	Complainants’ Construction	Respondents’ Construction	Staff’s Construction
“substantially vertical panel”	“a simple planar structure oriented in a mostly vertical fashion”	“a panel which extends in a plane substantially parallel to the sides of the first and second cooking units which is between the first cooking unit and second cooking unit and which is not part of the first cooking unit or second cooking unit”	plain and ordinary meaning

Compls. Br. at 16; Resps. Br. at 37; Staff Br. at 20.

The parties dispute the meaning of the “substantially vertical panel” limitation of claims 5 and 14.

Complainants argue that “[u]nder the plain meaning of the term, therefore, ‘substantially vertical panel’ should be construed to be a simple planar structure oriented in a mostly vertical fashion.” Compls. Br. at 16.

Respondents argue that the claim term “substantially vertical panel” means “A panel which extends in a plane substantially parallel to the sides of the first and second cooking units which is between the first cooking unit and second cooking unit and which is not part of the first cooking unit or second cooking unit.” Resps. Br. at 37.

Respondents argue that this proposed construction “clarifies that the panel is not part of the first cooking unit or second cooking unit.” *Id.*

The Staff argues that “this phrase need not be construed, and that it should be given its plain and ordinary meaning.” Staff Br. at 20.



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Claim 5, which is representative, reads as follows:

5. The barbecue grill of claim 1, further comprising:  
at least one substantially vertical panel positioned between the first cooking unit and the second cooking unit.

JX-0001 ('712 Patent) at col. 5, lns. 27-29.

As argued by the Staff, the administrative law judge finds that the claim term “substantially vertical panel” need not be construed, and that it should be given its plain and ordinary meaning.

The claim term “substantially vertical panel” appears in claims 5 and 14. Respondents argue that the phrase “substantially vertical panel” should be construed to mean “a panel which extends in a plane substantially parallel to the sides of the first and second cooking units which is between the first cooking unit and second cooking unit and which is not part of the first cooking unit or second cooking unit.” Resps. Br. at 37. However, as shown above in claim 5, the language of the claim itself already requires that the recited “panel” be positioned *between* the cooking units (“at least one substantially vertical panel positioned between the first cooking unit and the second cooking unit”). There is no reason to modify further the claim term “substantially vertical panel” inasmuch as the language of the claim is clear, and the term does not need further clarification.

### B. Infringement Analysis of the '712 Patent

With respect to the original grills, A&J asserts the following claims:

Respondent	Model Number	Asserted Claims	Citation
Brinkmann	810-3821 & 810-3820	1-4, 6-20	Compls. Br. at 32-34, 55

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	810-3800 & 810-3802	1, 4, 6-10, 13, 15-20	Compls. Br. at 34-36, 55-56
Char-Broil/ Fudeer	463724512	1, 2, 4-8, 10, 11, 13-15	Compls. Br. at 44-48, 60-62
	12201767	10-16	Compls. Br. at 48-50, 62-66
OLP/Kingsun	47180T; 47183T; SH7000; 7000CGS; 1200SH; SH5000; 1800CGS	1-16	Compls. Br. at 36-40, 56-57
Academy/ Huige	DLX2012	1-13, 15, 16	Compls. Br. at 42-44, 59-60
	DLX2013	1-13, 15, 16	Compls. Br. at 42-44, 59-60
	CG3023E	1-13, 15, 16	Compls. Br. at 42-44, 59-60
Huige	Sear & Smoke Triad	1-13, 15, 16	Compls. Br. at 44, 60

*See Staff Br. at 10.*

For the redesigned grills, A&J asserts the following claims:

<b>Respondent</b>	<b>Model Number</b>	<b>Asserted Claims</b>	<b>Citation</b>
Char-Broil/ Fudeer	463724514	10, 11, 13-15	Compls. Br. at 66-67
	14201767	10	Compls. Br. at 66-67
OLP/Kingsun	8000; 8500; 3500; 3300; 6500; PS9500	10	Compls. Br. at 57-59

*See Staff Br. at 10.*

To the extent that A&J contends that Char-Broil/Fudeer Model Nos. 463724514, 14201767, or 12201767 and OLP/Kingsun Model Nos. 8000, 8500, 3500, 3300, 6500, or PS9500 infringe claims 1-9 and/or 17-20 of the '712 patent, the Commission has already determined that those grills do not infringe those claims. *See Comm'n Op. at 13-15 (Jun. 27, 2014).* Accordingly, those issues are not presently before the administrative law judge and, thus, have not been listed in the tables above.



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### 1. Applicable Law

Under 35 U.S.C. §271(a), direct infringement consists of making, using, offering to sell, or selling a patented invention without consent of the patent owner. The complainant in a section 337 investigation bears the burden of proving infringement of the asserted patent claims by a “preponderance of the evidence.” *Certain Flooring Products*, Inv. No. 337-TA-443, Comm’n Notice of Final Determination of No Violation of Section 337, 2002 WL 448690, at \*59, (Mar. 22, 2002); *Enercon GmbH v. Int’l Trade Comm’n*, 151 F.3d 1376 (Fed. Cir. 1998).

Literal infringement of a claim occurs when every limitation recited in the claim appears in the accused device, *i.e.*, when the properly construed claim reads on the accused device exactly.<sup>15</sup> *Amhil Enters., Ltd. v. Wawa, Inc.*, 81 F.3d 1554, 1562 (Fed. Cir. 1996); *Southwall Tech. v. Cardinal IG Co.*, 54 F.3d 1570, 1575 (Fed Cir. 1995).

If the accused product does not literally infringe the patent claim, infringement might be found under the doctrine of equivalents. “Under this doctrine, a product or process that does not literally infringe upon the express terms of a patent claim may nonetheless be found to infringe if there is ‘equivalence’ between the elements of the accused product or process and the claimed elements of the patented invention.” *Warner-Jenkinson Co., Inc. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 21 (1997) (citing *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605, 609 (1950)). “The

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<sup>15</sup> Each patent claim element or limitation is considered material and essential. *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538 (Fed. Cir. 1991). If an accused device lacks a limitation of an independent claim, the device cannot infringe a dependent claim. See *Wahpeton Canvas Co. v. Frontier, Inc.*, 870 F.2d 1546, 1552 n.9 (Fed. Cir. 1989).

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determination of equivalence should be applied as an objective inquiry on an element-by-element basis.”<sup>16</sup> *Id.* at 40.

“An element in the accused product is equivalent to a claim limitation if the differences between the two are insubstantial. The analysis focuses on whether the element in the accused device ‘performs substantially the same function in substantially the same way to obtain the same result’ as the claim limitation.” *AquaTex Indus. v. Techniche Solutions*, 419 F.3d 1374, 1382 (Fed. Cir. 2005) (quoting *Graver Tank*, 339 U.S. at 608); accord *Absolute Software*, 659 F.3d at 1139-40.<sup>17</sup>

As noted, certain of the claim elements at issue in this investigation are written in means-plus-function format. “Literal infringement of a § 112, ¶ 6 limitation requires that the relevant structure in the accused device perform the identical function recited in the claim and be identical or equivalent” to the structure identified in the written description as corresponding to the recited function. *JVW Enter. v. Interact Accessories, Inc.*, 424 F.3d 1324, 1333 (Fed. Cir. 2005) (citing *Odetics, Inc. v. Storage Tech. Corp.*, 185 F.3d 1259, 1267 (Fed. Cir.1999)). For the relevant structure in the accused device to be equivalent to the structure in the written description, differences between the two must be insubstantial. For example, the structure in the accused device must perform the claimed

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<sup>16</sup> “Infringement, whether literal or under the doctrine of equivalents, is a question of fact.” *Absolute Software, Inc. v. Stealth Signal, Inc.*, 659 F.3d 1121, 1130 (Fed. Cir. 2011).

<sup>17</sup> “The known interchangeability of substitutes for an element of a patent is one of the express objective factors noted by *Graver Tank* as bearing upon whether the accused device is substantially the same as the patented invention. Independent experimentation by the alleged infringer would not always reflect upon the objective question whether a person skilled in the art would have known of the interchangeability between two elements, but in many cases it would likely be probative of such knowledge.” *Warner-Jenkinson*, 520 U.S. at 36.

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function in substantially the same way to achieve substantially the same result as the structure in the written description. *JWW*, 424 F.3d at 1333.<sup>18</sup>

Prosecution history estoppel can prevent a patentee from relying on the doctrine of equivalents when the patentee relinquished subject matter during the prosecution of the patent, either by amendment or argument. *AquaTex*, 419 F.3d at 1382. In particular, “[t]he doctrine of prosecution history estoppel limits the doctrine of equivalents when an applicant makes a narrowing amendment for purposes of patentability, or clearly and unmistakably surrenders subject matter by arguments made to an examiner.” *Id.* (quoting *Salazar v. Procter & Gamble Co.*, 414 F.3d 1342, 1344 (Fed. Cir. 2005)).

### 2. Brinkmann Grills

A&J argues that the following models of Brinkmann grills infringe certain claims of the ‘712 patent: (i) Brinkmann 3800 (Model Nos. 810-3800-S and 810-3800-SB); (i) Brinkmann 3802 (Model Nos. 810-3802-S and 810-3802-SB); (iii) Brinkmann 3820 (Model Nos. 810-3820-S and 810-3820-SB); and (iv) Brinkmann 3821 (Model Nos. 810-3821-S and 810-3821-SB). Compls. Br. 32-36, 55-56. The parties have stipulated that the Brinkmann 3802 grill is representative of the Brinkmann 3800 grill. CX-0223, Joint

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<sup>18</sup> “The primary difference between structural equivalents under section 112, paragraph 6 and the doctrine of equivalents is a question of timing.” *Frank’s Casing, Crew & Rental Tools, Inc. v. Weatherford Int’l, Inc.*, 389 F.3d 1370, 1379 (Fed. Cir. 2004) (citing *Al-Site Corp. v. VSI Int’l, Inc.*, 174 F.3d 1308, 1321 n.2 (Fed. Cir. 1999)). As the Federal Circuit has explained, “[a] proposed equivalent must have arisen at a definite period in time, i.e., either before or after [patent filing]. If before, a § 112, ¶ 6 structural equivalents analysis applies and any analysis for equivalent structure under the doctrine of equivalents collapses into the § 112, ¶ 6 analysis. If after, a non-textual infringement analysis proceeds under the doctrine of equivalents.” *Id.*

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Stipulation Regarding Representative Products (May 2, 2014). Each of these grills is addressed below.

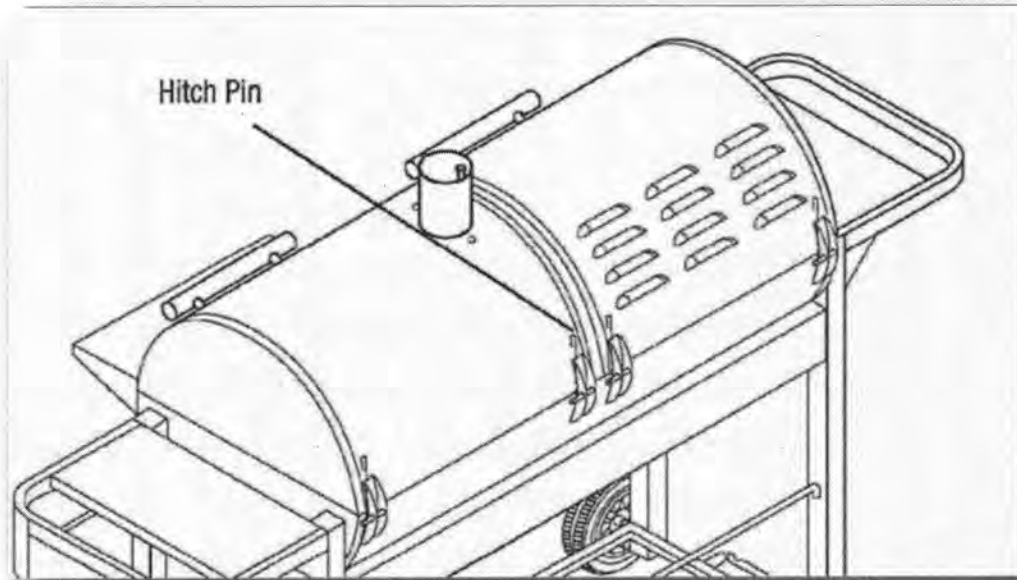
**Brinkmann 3800 and 3802**

A&J alleges that the Brinkmann 3800 and 3802 grills satisfy each limitation of claims 1, 4, 6-10, 13, and 15-20 of the '712 patent. Compls. Br. at 32-34, 55; CX-0890C (Thuma WS) at Q/A 30-38; CPX-0002; CX-0013; CX-0014; RX-0184; RX-0185. For the reasons set forth below, the evidence shows that the Brinkmann 3800 and 3802 grills infringe claims 1, 4, 6-10, 13, and 15-20 of the '712 patent.

Brinkmann argues that those grills do not infringe any asserted claim because those grills: (1) lack the requisite “exhaust” or “exhaust means” on the openable cover of the gas cooking unit (Resps. Br. at 52-53); and (2) lack separate first and second “cooking units” (Resps. Br. at 53-55). Brinkmann is incorrect.

With respect to the “exhaust” and “exhaust means” limitations, the evidence shows that the openable covers of the gas cooking units of the Brinkmann 3800 and 3802 grills include lateral vents as shown in the following figure:

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RX-0184.0037. As discussed above, the administrative law judge determined that the claim term “exhaust” should be afforded its plain and ordinary meaning, and construed the term to mean “a passage in the cover through which smoke, waste gases, and/or cooking vapors pass out of the cooking unit.” As demonstrated by Mr. Thuma, these lateral vents satisfy the “exhaust” and “exhaust means” limitations of the asserted claims. CX-0890C (Thuma WS) at Q/A 30-38. Mr. Thuma testified that these lateral vents constitute “exhaust.” CX-0890C (Thuma WS) at Q/A 32 (“The next limitation is that the first cover includes at least one exhaust, and a number of exhaust vents, I count 12 of them, are included in the cover of the Brinkmann gas grill.”)

As to the first and second “cooking unit” limitations, the Brinkmann 3800 and 3802 grills include a first cooking unit configured to cook with gas fuel, and a second cooking unit configured to cook with charcoal. *Id.*; CPX-0002; CX-0013; CX-0014; RX-0184; RX-0185. As discussed above, the administrative law judge determined that the

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claim term “substantially vertical panel” need not be construed, and that it should be given its plain and ordinary meaning. Thus, the claims do not require that the “first cooking unit” and the “second cooking unit” be separate, distinct, and independent structures, as respondents contend.

Brinkmann does not dispute that those grills satisfy the remaining limitations of the asserted claims. *See* Resps. Br. at 52-55; Resps. Reply Br. at 20-21. Accordingly, the evidence shows that the Brinkmann 3800 and 3802 grills infringe claims 1, 4, 6-10, 13, and 15-20 of the ‘712 patent.

### **Brinkmann 3820**

The evidence shows that Brinkmann discontinued the 3820 grill in late 2008, after only four to six months of production, and well before the ‘712 patent issued on February 26, 2013. Sedberry Tr. 646. In this regard, A&J offers no evidence that the 3820 grill was imported, sold, or offered for sale at any time during the term of the ‘712 patent. *Id.* at 646. Accordingly, there is no infringement, and the Brinkmann 3820 cannot serve as a basis for finding a violation of Section 337. *Certain Drill Bits and Products Containing Same*, Inv. No. 337-TA-844, Notice (Aug. 22, 2012), 77 Fed. Reg. 51825-26 (Aug. 27, 2012) (terminating the investigation where the alleged importation occurred before the issuance of the asserted patent).

### **Brinkmann 3821**

A&J argues that the Brinkmann 3821 grill satisfies each limitation of claims 1-4, and 6-20. Compls. Br. at 32-34, 55; CX-0890C (Thuma WS) at Q/A 20-27; CPX-0003; CX-0018; CX-0019. Brinkmann argues that those grills do not infringe claim 3 and 12 because they are not imported with a side firebox, as the claims require. Resps. Br. at 55-



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56. Instead, Brinkmann offers a side firebox as an accessory that can be separately purchased and installed. *Id.* Indeed, with respect to claims 3 and 12, which require a side firebox, the evidence shows that the Brinkmann 3821 grill is not imported with a side firebox, and thus it does not infringe claims 3 and 12. RX-0192C (May RWS) at Q/A 60.

With respect to claim 14, A&J did not assert this claim in its pre-hearing brief. *See* Compls. Pre-Hearing Br. at 57-59. Thus, pursuant to Ground Rule 7.c, A&J's assertion of claim 14 as to the Brinkmann 3821 grill is deemed waived or abandoned.

With respect to the remaining claims, Brinkmann does not dispute that those grills satisfy the remaining limitations of the asserted claims. *See* Resps. Br. at 55-56; Resps. Reply Br. at 20-21. Accordingly, the evidence shows that the Brinkmann 3821 infringes claims 1, 2, 4, 6-11, 13, and 15-20 of the '712 patent.

### **Conclusion**

Accordingly, the evidence shows that the Brinkmann 3800 and the Brinkmann 3802 infringe claims 1, 4, 6-10, 13, and 15-20 of the '712 patent, and that the Brinkmann 3821 infringes claims 1, 2, 4, 6-11, 13, and 15-20 of the '712 patent. However, the evidence does not show that the Brinkmann 3820 infringes any claim of the '712 patent.

### **3. Char-Broil/Fudeer Grills**

A&J argues that the following models of Char-Broil/Fudeer grills infringe certain claims of the '712 patent: (i) the 1010 Deluxe Grill, Model No. 463724512; (ii) the Oklahoma Joe's Grill, Model No. 12201767; (iii) the 2014 1010 Deluxe Grill, Model No. 463724514; and (iv) the Oklahoma Joe's Grill, Model No. 14201767. Compls. Br. at 44-50, 60-67. Each of these four grills is addressed below.

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**1010 Deluxe Grill, Model No. 463724512**

A&J argues that the Char-Broil 1010 Deluxe Grill (Model No. 463724512) satisfies each limitation of claims 1, 2, 4-8, 10, 11, and 13-15 of the '712 patent. Compls. Br. at 44-48, 60-62; CX-0890C (Thuma WS) at Q/A 41-45; RX-0606C.0005.

Char-Broil and Fudeer argue that those grills do not infringe any asserted claim because they do not provide exhausts on their openable covers as the claims require. Resps. Br. at 57-59.

Indeed, the evidence shows that the Char-Broil 1010 Deluxe Grill (Model No. 46374512) does not have an exhaust on its openable cover, as the asserted claims require. RX-2178C (Stevick RWS) at Q/A 105-107; RX-0606C.0005. Instead, the Char-Broil 1010 Deluxe Grill provides a gap between the openable cover and the fixed portion of the grill. *Id.*; Thuma Tr. 341 (confirming that the alleged exhaust is “the space between the openable lid and the grill body”). Accordingly, the alleged exhaust is below the openable cover, and not on the openable cover as the claim requires. Thus, the evidence shows that the 1010 Deluxe Grill (Model No. 463724512) does not infringe any asserted claim of the '712 patent. RX-2178C (Stevick RWS) at Q/A 97-107.

**Remaining Char-Broil/Fudeer Grills**

With respect to the remaining Char-Broil/Fudeer grills (*i.e.*, the Oklahoma Joe's Grill, Model No. 12201767; the 2014 1010 Deluxe Grill, Model No. 463724514; and the Oklahoma Joe's Grill, Model No. 14201767), the Commission affirmed the undersigned's finding that those grills do not infringe claims 1 and 17 of the '712 patent. Comm'n Op. at 21-24. As discussed above, the same prosecution history disclaimer that applies to the “openable [] cover” limitations of claim 1 and 17 also applies to the



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“openable [] cover means” limitation of claim 10. Therefore, these grills do not satisfy the “openable [] cover means” limitations of claim 10 for the same reasons.

Accordingly, these grills (the Oklahoma Joe’s Grill, Model No. 12201767; the 2014 1010 Deluxe Grill, Model No. 463724514; and the Oklahoma Joe’s Grill, Model No. 14201767) do not infringe any asserted claim of the ‘712 patent.

### **Conclusion**

The evidence shows that the Char-Broil grills at issue do not infringe any asserted claim of the ‘712 patent.

#### **4. OLP/Kingsun Grills**

A&J contends that the following seven models of Outdoor Leisure Products grills infringe certain claims of the ‘712 patent: (i) Model No. 47180T; (ii) Model No. 47183T; (iii) Model No. SH7000; (iv) Model No. 7000CGS; (v) Model No. 1800CGS; (vi) Model No. 1200SH; and (vii) Model No. SH5000 (“OLP/Kingsun Original Grills”). Compl. Br. at 36-40, 56-57. In addition, A&J contends that the following redesigned grills infringe certain claims of the ‘712 patent: (i) Model No. 8000; (ii) Model No. 8500; (iii) Model No. 3500; (iv) Model No. 3300; (v) Model No. 6500; and (vi) Model No. PS9500 (collectively, “OLP/Kingsun Redesigned Grills”). Compl. Br. at 40-42, 57-59.

#### **OLP/Kingsun Original Grills**

A&J argues that the OLP/Kingsun Original Grills satisfy each limitation of claims 1-16 of the ‘712 patent. Compl. Br. at 36-40, 56-57; CX-0890C (Thuma WS) at Q/A 69-75. OLP and Kingsun argue that those grills do not infringe because: (1) they lack the requisite “exhaust” or “exhaust means” on the openable cover of the gas cooking unit

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(Resps. Br. at 48-50); and (2) and they lack separate first and second “cooking units”

(Resps. Br. at 50-52). OLP and Kingsun are incorrect.

The openable covers of the gas cooking units of the OLP/Kingsun Original Grills include lateral vents as shown in the following figure:



(RX-0490.0013). As discussed above, the administrative law judge determined that the claim term “exhaust” should be afforded its plain and ordinary meaning, and construed the term to mean “a passage in the cover through which smoke, waste gases, and/or cooking vapors pass out of the cooking unit.” As the testimony of Mr. Thuma demonstrates, these lateral vents satisfy the “exhaust” and “exhaust means” limitations of the claims. (CX-0890C (Thuma WS) at Q/A 69-75).

Furthermore, the OLP/Kingsun Original Grills include a first cooking unit configured to cook with gas fuel, and a second cooking unit configured to cook with charcoal. (*Id.*; RX-0490C.0013). As discussed above, the administrative law judge determined that the claim term “substantially vertical panel” need not be construed, and

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that it should be given its plain and ordinary meaning. Thus, the claims, properly construed, do not require that the “first cooking unit” and the “second cooking unit” be separate, distinct, and independent structures, as respondents contend.

OLP and Kingsun do not dispute that those grills satisfy the remaining limitations of the asserted claims. *See* Resps. Br. at 48-52; Resps. Reply Br. at 19-20. Indeed, the evidence shows that the OLP/Kingsun Original Grills infringe claims 1-16 of the ‘712 patent. (CX-0890C (Thuma WS) at Q/A 69-75; CX-0068 (47180T Assembly & Operation Manual); CX-0073 (photographs); CX-0074 (SH7000 Assembly & Operation Manual); CX-0077 (photographs); CX-0078 (7000CGS Assembly & Operation Manual); CX-0081 (photographs); CX-0083 (photographs)). Accordingly, the evidence shows that the OLP/Kingsun Original Grills infringe claims 1-16 of the ‘712 patent.

### **OLP/Kingsun Redesigned Grills**

With respect to the OLP/Kingsun Redesigned Grills, the Commission affirmed the undersigned’s finding that these grills do not infringe claims 1 and 17 of the ‘712 patent. Comm’n Op. at 24. As discussed above, the same prosecution history disclaimer that applies to the “openable [] cover” limitations of claim 1 and 17 also applies to the “openable [] cover means” limitation of claim 10. Thus, these grills do not satisfy the “openable [] cover means” limitations of claim 10 for the same reasons. Accordingly, the evidence shows that these grills do not infringe any asserted claim of the ‘712 patent.

### **Conclusion**

The evidence shows that the OLP/Kingsun Original Grills infringe claims 1-16 of the ‘712 patent. However, the evidence does not show that any of the OLP/Kingsun Redesigned Grills infringe any asserted claim of the ‘712 patent.

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### 5. Academy & Huige Grills

A&J argues that the following models of Academy and Huige grills infringe claims 1-13, 15, and 16 of the '712 patent: (i) DLX2012; (ii) DLX2013; CG3023E; and Sear & Smoke Triad CG3023D. Compls. Br. at 42-44, 59-60; CX-0890C (Thuma WS) at Q/A 95-99, 105-107.

Academy and Huige argue that those grills do not infringe any asserted claim because they lack separate first and second cooking units. Resps. Br. at 56-57. As discussed above, the administrative law judge determined that the claim term “substantially vertical panel” need not be construed, and that it should be given its plain and ordinary meaning. Thus, the claims, as construed by the undersigned, do not require that the “first cooking unit” and the “second cooking unit” be separate, distinct, and independent structures.

The evidence shows that the Academy/Huige DLX2012, DLX2013 and CG3023E grills, and the Huige Sear & Smoke CG3023D grills satisfy the first and second cooking unit limitations of the asserted claims. Mr. Thuma’s testimony concerning those grills and the assembly instructions as well as the photographs of those grills, plainly show the first and second cooking units. *See* CX-0890C (Thuma WS) at Q/A 95-99, 105-107; CPX-0004; CX-0041 (CG3023E Assembly Instructions); CX-0044 (CG3023E photographs); CX-0027 (DLX2013 photographs); CX-0025 (DLX2013 Assembly Instructions); CX-0036 (DLX2012 photographs); CX-0033 (DLX2012 Assembly Instructions); CX-0110 (Sear & Smoke Triad photographs).

With respect to claims and 3 and 12, Academy and Huige argue that “[t]he Academy/Huige Grills and the HEB/Huige Grill are not imported or sold into the United

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States with a side firebox. [ ] Accordingly, a user must assemble each grill after purchase to attach a firebox to the grill.” Resps. Br. at 57. For the same reasons discussed below in a later section, the administrative law judge rejects the “unassembled at the time of importation” argument. In contrast to the Brinkmann 3821 which offers a side firebox as an accessory that can be separately purchased and installed, there is no evidence that Academy and Huige offers a side firebox as an accessory that can be separately purchased and installed. *See* RX-2178C (Stevick RWS) at Q/A166; Stevick Tr. 1018.

Academy and Huige do not dispute that those grills satisfy the remaining limitations of the asserted claims. *See* Resps. Br. at 56-57; Resps. Reply Br. at 21-22.

Accordingly, the evidence shows that the Academy/Huige DLX2012, DLX2013 and CG3023E grills, and the Huige Sear & Smoke Triad CG3023D grills infringe claims 1-13, 15, and 16 of the ‘712 patent.

### **6. GHP/Dyna-Glo Grills**

A&J argues that GHP Dyna-Glo products Model Nos. DGJ810CSB-D manufactured by Kingsun and DGB730SNB-D manufactured by Keesung, infringe claims 1, 4, and 6-8 of the ‘712 patent. Compls. Br. at 51-52. However, on July 11, 2014, A&J and respondent GHP Group, Inc. (“GHP”) filed a joint motion to terminate the investigation as to GHP based on a consent order stipulation, a proposed consent order, and a settlement agreement. The motion was granted in an initial determination. Order No. 53 (Jul. 24, 2014), *aff’d*, Notice of the Commission’s Determination Not to Review an Initial Determination Terminating GHP Group, Inc. Based on a Settlement Agreement, Patent License Agreement and Issuance of a Consent Order; Issuance of a

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Consent Order (Aug. 25, 2014). In light of the settlement agreement, presumably the accused Dyna-Glo grills are licensed and thus do not infringe any asserted claim of the '712 patent. Accordingly, in view of the GHP settlement, it does not appear that any GHP grills (including those manufactured by Keesung or Kingsun) should be subject to any exclusion order.

Furthermore, the evidence shows that the Kingsun and Keesung grills do not infringe any asserted claim because they lack the claimed "exhaust" or "exhaust means" on their openable covers, as the claims require. *See* RX-0411.0023. In particular, GHP argued that the cover of its DGB730SNB-D gas cooking unit does not include an exhaust. *Id.* Instead, the grill provides a gap between the openable cover and the fixed portion of the grill. *Id.* Thus, the alleged exhaust is below the openable cover, and not on the openable cover as the claim requires.

Accordingly, the accused Dyna-Glo grills do not infringe any asserted claim of the '712 patent.

### **7. Importation of Unassembled Grills**

Respondents argue that none of the accused products infringe any asserted claim of the '712 patent because they are unassembled at the time of importation. Resps. Br. at 61-67, citing *Certain Electronic Devices with Image Processing Systems, Components Thereof, and Associated Software*, Inv. No. 337-TA-724, Comm'n Op. at 13-14 (Dec. 21, 2011) ("*Electronic Devices*"). According to respondents, the asserted claims explicitly require that certain claimed components be attached or supported for purposes of infringement. Inasmuch as these components are not attached or supported as the claims purportedly require at the time of importation, they argue that there can be no



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infringement. *Id.* Respondents' reliance on *Electronic Devices* is misplaced. In *Electronic Devices*, the accused products were imported without a required component, unlike the unassembled grills at issue in this investigation. Moreover, even if infringement is analyzed at the time of importation, an unassembled device may be found to infringe. See *High Tech Medical Instrumentation, Inc. v. New Image Industries, Inc.*, 49 F.3d 1551 (Fed. Cir. 1995) ("if a device is designed to be altered or assembled before operation, the manufacturer may be held liable for infringement if the device, as altered or assembled, infringes a valid patent."); see also *Kreplik v. Couch Patents Co.*, 190 F. 565 (C. C. Mass. 1911) (finding that the sale of an unassembled combination constituted direct infringement). In this case, as in *High Tech*, the grills are designed to be assembled before operation. See, e.g. *Sedberry Tr.* 634-635.

Accordingly, respondents' defense fails because the law does not require accused products to be assembled at the time of importation for infringement purposes.

### **C. Validity of the '712 Patent**

One cannot be held liable for practicing an invalid patent claim. See *Pandrol USA, LP v. AirBoss Railway Prods., Inc.*, 320 F.3d 1354, 1365 (Fed. Cir. 2003). Each claim of a patent is presumed to be valid, even if it depends from a claim found to be invalid. 35 U.S.C. § 282; *DMI Inc. v. Deere & Co.*, 802 F.2d 421 (Fed. Cir. 1986). A respondent that has raised patent invalidity as an affirmative defense must overcome the presumption by "clear and convincing" evidence of invalidity. *Checkpoint Systems, Inc. v. United States Int'l Trade Comm'n*, 54 F.3d 756, 761 (Fed. Cir. 1995).

In this investigation, respondents argue that the asserted claims of the '712 patent are invalid as obvious under 35 U.S.C. § 103. See Joint Outline at 6; Resps. Br. at 69-

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123. Complainants argue that none of the asserted claims is invalid. *See* Compls. Br. at 70-82. The Staff argues that the evidence shows that the asserted patents are not invalid. *See* Staff Br. at 32-36.

For the reasons set forth below, respondents have not shown by clear and convincing evidence that the asserted claims of the '712 patent are invalid.

### 1. Obviousness Under 35 U.S.C. § 103

Respondents rely on the following two primary references in support of their obviousness argument:

Reference	Filing Date	Publication/Issue Date
Oliver U.S. Patent No. 6,189,528 (RX-0064)	May 25, 1999	February 20, 2001
Koziol U.S. Patent No. 5,632,265 (RX-0048)	June 1, 1995	May 27, 1997

Resps. Br. at 76-120.

As discussed below, the evidence shows that all the prior art references relied upon by respondents were either considered by the examiner during prosecution, or are cumulative to prior art considered by the examiner. CX-0900C (Thuma RWS) at Q/A 49; Thuma Tr. 486-489.

#### a. Applicable Law

Under section 103 of the Patent Act, a patent claim is invalid "if 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



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person having ordinary skill in the art to which said subject matter pertains.”<sup>19</sup> 35 U.S.C. § 103. While the ultimate determination of whether an invention would have been obvious is a legal conclusion, it is 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) objective evidence of nonobviousness.” *Eli Lilly and Co. v. Teva Pharmaceuticals USA, Inc.*, 619 F.3d 1329 (Fed. Cir. 2010).

The objective evidence, also known as “secondary considerations,” includes commercial success, long felt need, and failure of others. *Graham v. John Deere Co.*, 383 U.S. 1, 13-17 (1966); *Dystar Textilfarben GmbH v. C.H. Patrick Co.*, 464 F.3d 1356, 1361 (Fed. Cir. 2006). “[E]vidence arising out of the so-called ‘secondary considerations’ must always when present be considered en route to a determination of obviousness.” *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538 (Fed. Cir. 1983). Secondary considerations, such as commercial success, will not always dislodge a determination of obviousness based on analysis of the prior art. *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 426 (2007) (commercial success did not alter conclusion of obviousness).

“One of the ways in which a patent’s subject matter can be proved obvious is by noting that there existed at the time of invention a known problem for which there was an obvious solution encompassed by the patent’s claims.” *KSR*, 550 U.S. at 419-20. “[A]ny

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<sup>19</sup> The standard for determining whether a patent or publication is prior art under section 103 is the same as under 35 U.S.C. § 102, which is a legal question. *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1568 (Fed. Cir. 1987).

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need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” *Id.*

Specific teachings, suggestions, or motivations to combine prior art may provide helpful insights into the state of the art at the time of the alleged invention. *Id.* at 420. Nevertheless, “an obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation, or by overemphasis on the importance of published articles and the explicit content of issued patents. The diversity of inventive pursuits and of modern technology counsels against limiting the analysis in this way.” *Id.* “Under the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” *Id.* A “person of ordinary skill is also a person of ordinary creativity.” *Id.* at 421.

The “burden falls on the patent challenger to show by clear and convincing evidence that a person of ordinary skill in the art would have had reason to attempt to make the composition or device, or carry out the claimed process, and would have had a reasonable expectation of success in doing so.” *PharmaStem Therapeutics, Inc. v. ViaCell, Inc.*, 491 F.3d 1342, 1360 (Fed. Cir. 2007); *see KSR*, 550 U.S. at 416 (a combination of elements must do more than yield a predictable result; combining elements that work together in an unexpected and fruitful manner would not have been obvious).<sup>20</sup>

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<sup>20</sup> Further, “when the prior art teaches away from combining certain known elements, discovery of a successful means of combining them is more likely to be nonobvious.” *KSR*, 550 U.S. at 416 (citing *United States v. Adams*, 383 U.S. 39, 52 (1966)).

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### b. Scope and Content of the Prior Art

Respondents argue that “there is no question that dual function grills capable of cooking with gas and charcoal simultaneously were well known in the art before 2004, the earliest filing date to which the ‘712 patent may be entitled. There is also no dispute that every individual element of the claims of the ‘712 patent was known in the art prior to 2004.” Resps. Br. at 69 (citations omitted). It is argued: “As reflected in the language of the claims, the alleged invention is nothing but the combination on the same support structure of two elements long-known and certainly not invented in the ‘712 patent, *i.e.*, a lidded, vented charcoal grill and a lidded, vented gas grill. Complainants do not purport to have invented a charcoal grill with exhausts in the openable lid, and they do not purport to have invented a gas grill with an openable lid containing one or more exhausts.” *Id.* at 73.

Complainants disagree. Compl. Br. at 67-82; Compl. Reply Br. at 29-33.

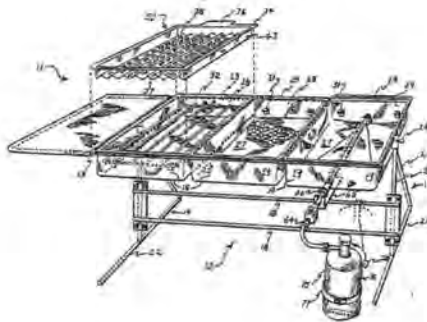
The Staff argues that “[a]lthough it is a close question, the Staff believes that Respondents are unable to show by clear and convincing evidence that the prior art renders the asserted claims obvious.” Staff Reply Br. at 16. The Staff argues: “While it appears beyond dispute that each element of the claimed invention was found in the prior art, the Examiner found that it would not have been obvious to cobble together those elements from the cited prior art.” *Id.* at 17.

The evidence shows that dual-mode grills capable of cooking food simultaneously using both charcoal and gas were known in the art before the earliest priority date of the ‘712 patent. Respondents’ expert witness Mr. Davidson testified that Oklahoma Joe’s sold grills in the 1980’s that included a gas side burner, enabling a user simultaneously to

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cook using both charcoal (in the grill) and gas (on the side burner). RX-0591 (Davidson WS) at Q/A 93-112. He also testified that he built custom grills beginning in approximately 1990 that could be used as a charcoal grill, gas grill, or both. *Id.* at Q/A 117. Mr. Davidson testified that a company called Lyfe Tyme built special order grills no later than 1996 that could be used as a charcoal grill, a gas grill, or a combination of both. *Id.* at Q/A 118-23.

U.S. Patent No. 4,878,477 to McLane (“McLane”) also discloses a dual function grill: a barbecue grill having a foldable stand 12 that supports a plurality of grill housings that can be each used with conventional charcoal or with the gas burner. RX-0032. The grill housings are shown in Fig. 1 below to be independent of one another and, thus, can be used simultaneously.



RX-0032 at Fig. 1.

As discussed in the claim construction section of this ID, McLane was considered by the PTO.

U.S. Patent No. 5,632,265 issued to Koziol and U.S. Patent No. 6,189,528 issued to Oliver are discussed in depth in separate sections below.

As discussed in the claim construction section of this ID, the PTO found that none of the prior art references considered by the PTO discloses a multi-mode grill having a gas

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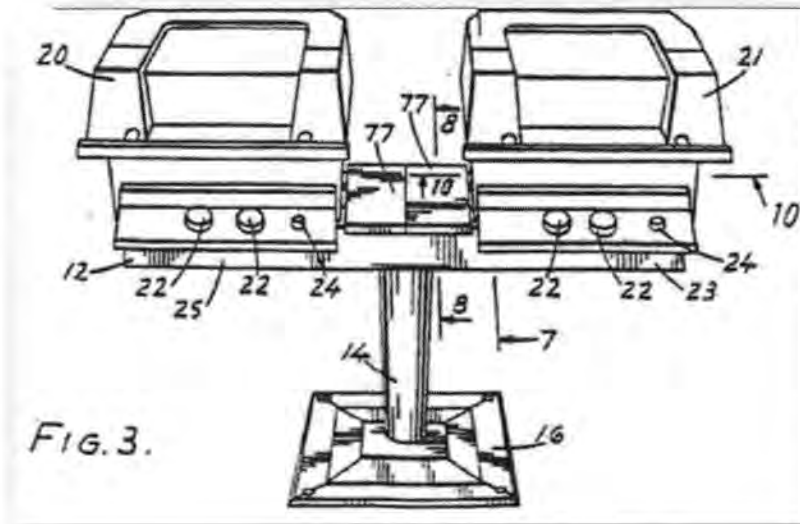
cooking unit and a solid fuel cooking unit with exhausts provided on openable covers, as the claims require, and the evidence fails to show that it would have been obvious to modify the prior art references as the claims require. Consistent with the PTO, Mr. Thuma testified that the asserted claims are not rendered obvious by the combinations relied upon by respondents. CX-0900C (Thuma RWS) at Q/A 30-73.

### c. U.S. Patent No. 5,632,265 (“Koziol”) (RX-0048)

Respondents argue that “[t]he claims of the ‘712 patent are invalid under 35 U.S.C. § 103(a) as obvious over Koziol in view of one or more additional prior art references.” Resps. Br. at 76; *see id.* at 76-101. Koziol was not before the examiner during prosecution of the asserted ‘712 patent.

U.S. Patent No. 5,632,265 (“the ‘265 patent” or “Koziol”) issued on May 27, 1997, more than one year before the filing date of the asserted ‘712 patent. RX-0048. Koziol, therefore, qualifies as prior art under 35 U.S.C. § 102(b). In general, Koziol discloses an assembly for mounting multiple barbecue grills on a common post or support. RX-0048 at Abstract. A multiple cooking unit embodiment is shown in the following figure:

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JX-0048 at Fig. 3.

As noted above, respondents argue that the Koziol combined with other prior art would render obvious the independent claims of the '712 patent. Koziol, however, does not teach a simultaneous multimode cooking apparatus. Koziol discloses an assembly structure on which a variety of outdoor cooking apparatus may be mounted. Koziol is not directed to a grilling apparatus, nor a multiple mode grill for simultaneous cooking using gas and charcoal, and does not focus on the use of grills or any details of the cooking-related devices to be mounted on the mounting assembly. Stevick Tr. 935.

Koziol, which describes a mounting assembly, does not teach:

(1) the details of grilling devices, such as grills having openable covers, either attached to the grill body or not; RX-0190C (Stevick WS) at Q/A 196 (“Koziol does not specifically teach that the covers were lids are openable.”);



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(2) the use of an exhaust in a grill, much less placement of an exhaust in an openable cover versus exhaust below the cooking area of the grill; RX-0190C (Stevick WS) at Q/A 181 and 198;

(3) the placement or use of a cooking grate, or cooking grill; RX-0190C (Stevick WS) at Q/A 194;

(4) any disclosure of cooking simultaneously with two different fuels; the Koziol patent is directed to a mounting assembly, and Koziol does not disclose a device for simultaneous multi-mode cooking. CX-0900C (Thuma RWS) at Q/A 60-64.

Respondents cannot show that a person of skill in the art would have necessarily modified the Koziol assembly into the multimode grill the '712 patent teaches.

“Inherency requires more than probabilities or possibilities. *Bettcher Indus. v. Bunzl USA, Inc.*, 661 F.3d 629, 639 (Fed. Cir. 2011). To show inherency, the respondent must “present clear and convincing evidence that the [reference] necessarily required [the claimed element to be present].” *Motorola Mobility, LLC v. ITC*, 737 F.3d 1345, 1350 (Fed Cir. 2013). There has been no such showing here; in fact, the evidence shows the opposite. The other Koziol patent, the '445 patent (RX-0013), shows the exact two gas grills of Koziol (RX-0048), but without any exhaust. Stevick Tr. 903-904.

Dr. Stevick himself demonstrated that Koziol is cumulative of Oliver. He testified that Oliver teaches every limitation in claim 1 except for an exhaust stack. Stevick Tr. 908. He testified that Koziol teaches every limitation in claim 1 except exhaust because “the pictures imply an openable cover, the pitures imply a grill.” Stevick Tr. 909. To determine whether a reference is cumulative of the prior art disclosed to the PTO, the Federal Circuit uses an element-by-element approach to compare the disclosed



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prior art reference and the undisclosed prior art reference with the claimed invention. *Taltech Ltd. v. Esquel Enterprises Ltd.*, 604 F.3d 1324, 1336 (Fed. Cir. 2010). Where, as Dr. Stevick believes, a reference considered by the PTO teaches the same or more limitations than a reference not considered, the reference not considered is merely cumulative, and need not be cited by the patent applicant nor considered by the examiner.

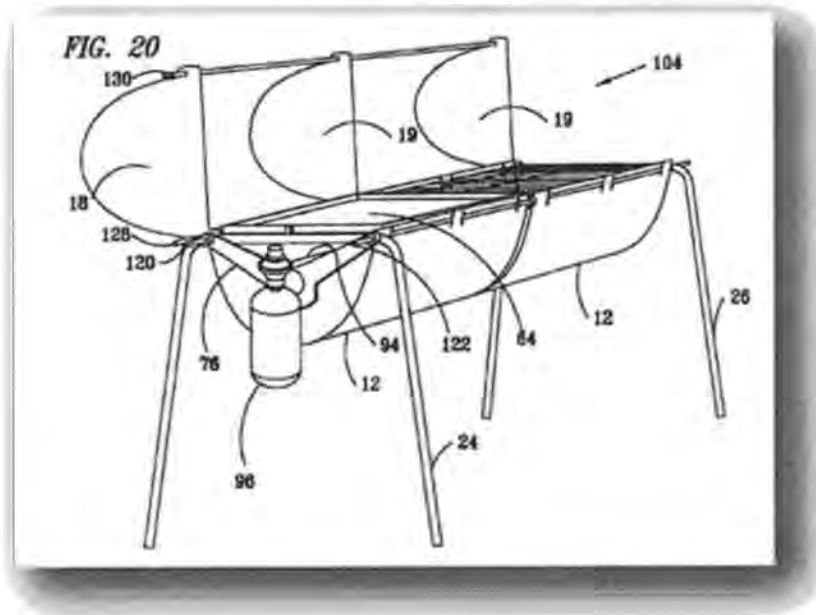
Respondents argue that the only possible missing element in Koziol is the exhaust requirement, and that that missing element is taught by “Holland ‘319 and/or Holland ‘986.” Resps. Br. at 78. It is noted that Holland ‘319 was analyzed and cited by the examiner. *See* JX-0007.0301, .0307. Respondents argue that “Holland ‘319 (RX-0028) clearly teaches two smoke stacks on the openable covers of both gas and charcoal grills,” and that Holland ‘986 “also discloses a smoke stack on the openable cover of a grill.” As discussed in the claim construction section, the administrative law judge determined that the claim term “exhaust” should be afforded its plain and ordinary meaning, and construed the term to mean “a passage in the cover through which smoke, waste gases, and/or cooking vapors pass out of the cooking unit.” Consequently, the claim term “exhaust” does not require a smoke stack or chimney-type exhaust. Thus, respondents’ obviousness argument based on the combination of Koziol and the two Holland prior art references, is rejected.

Accordingly, respondents have not shown by clear and convincing evidence that the asserted claims of the ‘712 patent are invalid as obvious in view of Koziol combined with other prior art.

**d. U.S. Patent No. 6,189,528 (“Oliver”) (RX-0064)**

Respondents argue that “[t]he claims of the ‘712 patent are also invalid under 35 U.S.C. § 103(a) as obvious over Oliver alone, or in view of one or more additional prior art references.” Resps. Br. at 101; *see id.* at 101-120.

U.S. Patent No. 6,189,528 (“the ‘528 patent” or “Oliver”) issued on February 20, 2001, more than one year before the filing date of the asserted ‘712 patent. RX-0064. Oliver, therefore, qualifies as prior art under 35 U.S.C. § 102(b). Oliver is generally directed to a grill designed from generally flat parts to facilitate portability. RX-0064 at Abstract. Oliver discloses multi-cooking unit grills as shown in the following figure:



RX-0064 at Fig. 20.

Oliver was before the Patent Office and considered by the examiner. Indeed, Oliver was cited by examiner St. Clair against the then-pending claim set in the first office action dated March 31, 2008. JX0007.0050. The examiner made specific reference to col. 2, ln 51-55 of Oliver as showing both gas and charcoal or wood based

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fuel cooking. *Id.* at .0050 and 0051. In response, the patentee pointed out that Oliver taught assembly “without body ends 16” to provide heat for cooking. JX-0007.0070. This configuration results in a trough for the body rather than two cooking units. Oliver was cited again, this time by examiner Ndubizu, in an office action dated May 25, 2011, to demonstrate substantially cylindrical shaped cooking units. JX-0007.0298. Oliver’s teachings were discussed at length in the patentee’s Appeal Brief, JX-0007.-0388, and primary examiner Basichas referenced Oliver in the Notice of Allowance for the ‘712 patent. JX-0007.0413.

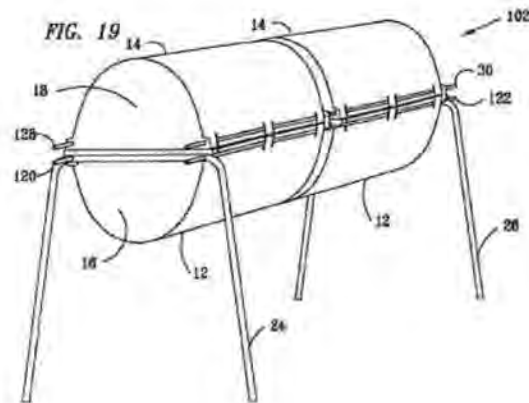
Respondents argue that every independent claim in the ‘712 patent is rendered obvious by Oliver and that the patent applicant misrepresented the Oliver reference to the examiner. Resps. Br. at 6-7.

Oliver shows that whenever propane gas is used, the apparatus must be reconfigured into a trough, omitting the “body ends 16” (as pointed out by patentee’s counsel to examiner St. Clair); these body ends are the parts that would constitute a “cooking unit.” This trough configuration is contrary to, and teaches away from, the multiple cooking units taught and claimed in the ‘712 patent. CX-0900C (Thuma RWS) at Q/A 33.

While Oliver teaches forming two separate lids, it does not teach two cooking units – Oliver does not disclose two charcoal cooking units and does not disclose a gas grilling unit with a charcoal grilling unit. RX-0064 at Fig. 19. The Oliver patent describes the grill shown in Figure 19 as a double width cooker assembled with longer rods (longer than used for the single unit), two lid reflectors and four lid ends 18; the assembly of two lid reflectors and four lid ends means two entire lid structures are

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assembled. RX0064 at col. 6, Ins. 7-16. The description of that configuration in Oliver does not disclose using four body ends with two body reflectors to make two separate body pieces. Thus, this configuration, as described in the patent, is a single large trough on the bottom, and the trough is closed by two body ends 16, one on each end, then there are separate lids on top, one at each end of the trough. Oliver discloses that “cooker 102 may be assembled with body ends 16 for use with one or two grates 48 to support fuel such as charcoal or wood.” RX-0064 at col. 6, Ins. 27-29; CX-0900C (Thuma RWS) at Q/A 36.

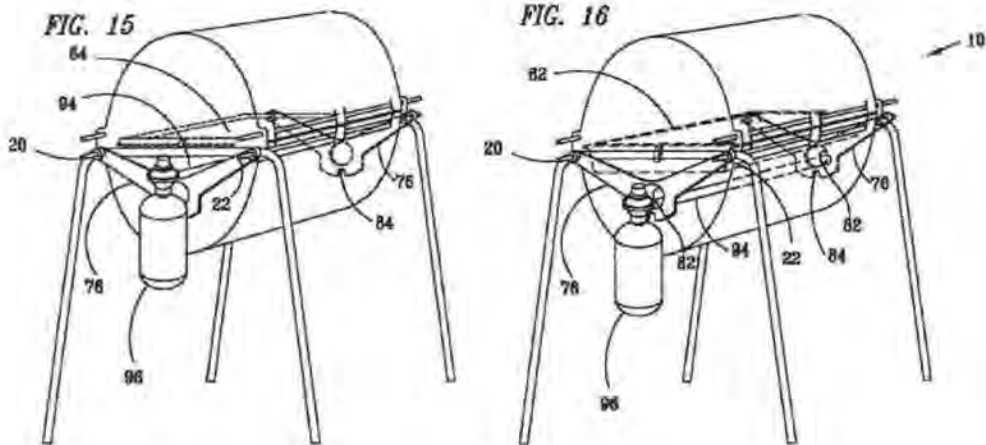


RX-0064 at Fig. 19.

The Oliver patent does not disclose how many body ends are used in this configuration. Oliver does not specify using four body ends as required to form these parts into two separate cooking units.

Oliver also does not teach the use of a separate gas cooking unit. Oliver shows a propane tank and propane burner, although never for cooking over a grill. Oliver discloses a single lid configuration for cooking with gas fuel on a griddle 64 in Figure 15, and for cooking with gas fuel and a Dutch oven pan 62 in Figure 16. RX-0064 at col. 2, Ins. 33-43. Figures 15 and 16 are reproduced below.

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RX-0064 at Figs. 15, 16.

In every case in which Oliver describes a configuration that can use gas fuel to cook, the body ends 16 are omitted; they are not used, so that the long propane burner connected to the gas tank can reach into the interior space formed by the body reflector. In the description for Figure 15, Oliver teaches “the body ends 16 are omitted in this configuration to allow for access for the burner 94 to extend through the cooker.” RX-0064 at col. 5, lns. 62-64. Oliver also requires that the body ends be omitted in double lid configurations where gas is used, such as in Figures 20 and 21. CX-0900C (Thuma RWS) at Q/A 38.

Oliver also does not teach simultaneous cooking with gas and charcoal. Oliver describes Figure 20: “FIG. 20 illustrates a double width cooker, generally at 104, respectively. This double width cooker is provided with support rods 120, 122, 128 and 130, which are longer than rods 20, 22, 28 and 30, and are assembled and used in a similar manner to rods 20, 22, 28 and 30. Two each reflectors 12 and 14 are assembled on rods 120, 122, 128 and 130. Two or three lid ends 19 as illustrated may be used. Brackets 76 are used to support a propane burner 94 and propane tank 96. In this

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embodiment, one can griddle and grill simultaneously.” RX-0064 at col. 6, lns. 17-27. Oliver discloses: “Cooker 104 may be assembled with brackets 76, propane burner 94 and propane tank 96 and without body ends 16 to provide propane heat for cooking.” *Id.* at col. 6, lns. 30-32. Thus, Oliver shows omission of the body ends 16 in this configuration where the gas burner is used. CX-0900C (Thuma RWS) at Q/A 40.

The omission of body ends is also shown in Figure 21, which shows the use of the propane burner to start charcoal. Oliver states that after the charcoal fire is started “the propane burner 94 is removed and body end 16 installed.” RX-0064 at col. 6, lns. 38-39; CX-0900C (Thuma RWS) at Q/A 40.

Therefore, the only suggestion in Oliver of simultaneous cooking with both gas and solid fuel is in the configuration of Figure 20 which is not a configuration of two cooking units because there is a trough at the bottom. The removal of body ends 16 means that the body is an open trough without any separation into a first cooking unit and a second cooking unit capable of independent operation, which the ‘712 patent requires. Also, the claims of the ‘712 patent require that the cooking unit configured to cook with gas includes at least one first grill, whereas Oliver at Figure 20 shows cooking on a griddle. A person of skill in the art would not confuse a griddle with a grill; Oliver does not teach cooking on a grill over gas. CX-0900C (Thuma RWS) at Q/A 41.

Respondents argue that “Oliver does not teach a pipe, duct or similar structure that extends from the openable cover,” but that that missing element is taught by “Holland ‘319 [which] discloses gas and charcoal grills with openable lids and at least one exhaust on the openable lids, closely resembling that described in the ‘712 patent.” Resps. Br. at 107. As noted, Holland ‘319 was analyzed and cited by the examiner. *See*



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JX-0007.0301, .0307. As discussed in the claim construction section, the administrative law judge determined that the claim term “exhaust” should be afforded its plain and ordinary meaning, and construed the term to mean “a passage in the cover through which smoke, waste gases, and/or cooking vapors pass out of the cooking unit.” Consequently, the claim term “exhaust” does not require a smoke stack or chimney-type exhaust. Thus, respondents’ obviousness argument based on the combination of Oliver and Holland ‘319, is rejected.

Accordingly, respondents have not shown by clear and convincing evidence that the asserted claims of the ‘712 patent are rendered obvious by Oliver alone or by Oliver in combination with other prior art.

### **e. Secondary Considerations of Nonobviousness**

Complainants argue that “there are a number of secondary considerations of nonobviousness, also referred to as objective evidence of nonobviousness, that demonstrate that the grill of the ‘712 patent was nonobvious.” Compl. Br. at 79.

Respondents argue that complainants do not provide any evidence of secondary indicia of non-obviousness because complainants have not established the nexus between the alleged evidence and the merits of the claimed invention. Resps. Reply Br. at 45-51.

The Staff argues that “evidence of copying weighs against a finding of obviousness, and the evidence shows that competitors have copied A&J’s patented Char-Griller Duo grill.” Staff Reply Br. at 17.

### **Commercial Success**

A showing of commercial success of the claimed invention is a relevant consideration in resolving the issue of obviousness under section 103 because it is



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objective evidence of the nonobviousness of the claimed invention. *See, e.g., Bio-Rad Laboratories Inc. v. Nicolet Instrument Corp.*, 739 F.2d 604, 611–12 (Fed. Cir. 1984), cert. denied, 469 U.S. 1038 (1984); *Lindemann Maschinenfabrik GmbH v. American Hoist and Derrick Co.*, 730 F.2d 1452, 1461 (Fed. Cir. 1984). Complainants’ multimode grill has been commercially successful. [

] CX-0902C (Simms RWS), Q/A 39.

Respondents have enjoyed considerable sales success with their virtually identical multiple mode grills.

The evidence tends to show that this commercial success of the multimode was due to the merits of the invention. *ArcelorMittal France v. AK Steel Corp.*, 700 F.3d 1314, 1326 (Fed. Cir. 2012). Mr. Simms testified that the growth in sales and popularity of the Duo comes from the innovative design of the Duo. CX-0902C (Simms RWS) Q/A 41.

### Copying

Copying of the invention by others is considered a secondary consideration courts must take into account when determining obviousness. *Allen Archery, Inc. v. Browning Mfg. Co.*, 819 F.2d 1087, 1092 (Fed. Cir. 1987); *Diversitech Corp. v. Century Steps, Inc.*, 850 F.2d 675, 679 (Fed. Cir. 1988) (“Copying is an indicium of nonobviousness, and is to be given proper weight.”); *Ecolochem, Inc. v. Southern California Edison Co.*, 227 F.3d 1361, 1380 (Fed. Cir. 2000) (“Another indicia of non-obviousness of a product is . . . the copying that occurs.”).

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The evidence shows that competitors have copied A&J's patented Char-Griller Duo grill. CX-0902C (Simms RWS) at Q/A 44. For example, [

] Reardon Tr. 667; CX-0730C. [

] Reardon Tr. 665; CX-0733C.

Brinkmann purchased A&J's Char-Griller Duo grill for the purpose of performing a competitive analysis. May Tr. 702. Brinkmann developed its competing product that has been referred to by another respondent as a "knockoff of the Char-Griller Duo grill." *See* CX-0729C. [

] Gafford

Tr. 778-779; CX-620C.

### **Long Felt, Unmet Need**

The non-obviousness of an invention can be inferred if the invention satisfied a long-felt need that was previously unmet, and can be highly persuasive evidence of non-obviousness. *Minnesota Min. and Mfg. Co. v. Johnson & Johnson Orthopaedics, Inc.*, 976 F.2d 1559, 1573 (Fed. Cir. 1992); *Advanced Display Systems, Inc. v. Kent State University*, 212 F.3d 1272, 1285 (Fed. Cir. 2000). Mr. Simms testified that the multimode grill claimed in the '712 patent solved the problem of barbecue enthusiasts needing more than one grill in order to cook food simultaneously using both gas-based and solid cooking fuels. CX-0902C (Simms RWS) Q/A 6.

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### **Industry Praise and Initial Skepticism**

Non-obviousness can be inferred when the others working in the art, or in the press, have made laudatory statements about the merits of the invention. *See United States v. Adams*, 383 U.S. 39, 52 (1966); *In re Piasecki*, 745 F.2d 1468, 1473-74 (Fed. Cir. 1984). The “Be a Grill Master” article, cited in the ‘646 and ‘773 patents shows accolades for the Duo. CX-0543.

Initial skepticism of a new invention, followed by acceptance, can demonstrate nonobviousness. *Adams*, 383 U.S. at 52. The Home Depot initially rejected selling the Duo because it was a very different product from what was available on the market, and their buyer said he didn’t get it. A year later the buyer changed his mind because Home Depot’s competitor Lowe’s was having a lot of success selling it. When A&J was unable to provide him with the Duo, Home Depot stores began carrying a similar multimode product that respondent Brinkmann introduced. CX-0902C (Simms RWS) Q/A 40.

### **Acquiescence**

Acquiescence of the industry to patent validity by accepting licenses is evidence of nonobviousness. *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1539 (Fed. Cir. 1983) (“Recognition and acceptance of the patent by competitors who take licenses under it to avail themselves of the merits of the invention is evidence of nonobviousness.”); *RCA Corp. v. Data General Corp.*, 701 F. Supp. 456, 471 (D. Del. 1988) (finding evidence of licensing to be probative of secondary considerations of nonobviousness) *aff’d*, 887 F.2d 1056 (Fed. Cir. 1989). Complainants have licensed the invention to companies such as [ ] and as noted, licensed to several of the respondents who settled with complainants. CX-0792.

**Conclusion**

For the reasons discussed above, the evidence concerning secondary considerations of nonobviousness tends to favor finding that the '712 patent is not obvious.

**D. Domestic Industry**

**1. Applicable Law**

A violation of section 337(a)(1)(B), (C), (D), or (E) can be found “only if an industry in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2). Section 337(a) further provides:

(3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design 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).

These statutory requirements consist of an economic prong (which requires certain activities)<sup>21</sup> and a technical prong (which requires that these activities relate to the

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<sup>21</sup> The Commission practice is usually to assess the facts relating to the economic prong at the time that the complaint was filed. *See Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same*, Inv. No. 337-TA-560, Comm'n Op. at 39 n.17 (Apr. 14, 2010) (“We note that only activities that occurred before the filing of a complaint with the Commission are relevant to whether a domestic industry exists or is in the process of being established under sections 337(a)(2)-(3).”) (citing *Bally/Midway*

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intellectual property being protected). *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm'n Op. at 13 (May 16, 2008) ("*Stringed Musical Instruments*"). The burden is on the complainant to show by a preponderance of the evidence that the domestic industry requirement is satisfied. *Certain Multimedia Display and Navigation Devices and Systems, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-694, Comm'n Op. at 5 (July 22, 2011) ("*Navigation Devices*").

With respect to the economic prong, and whether or not section 337(a)(3)(A) or (B) is satisfied, the Commission has held that "whether a complainant has established that its investment and/or employment activities are significant with respect to the articles protected by the intellectual property right concerned is not evaluated according to any rigid mathematical formula." *Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Comm'n Op. at 27 (Feb. 17, 2011) ("*Printing and Imaging Devices*") (citing *Certain Male Prophylactic Devices*, Inv. No. 337 TA-546, Comm'n Op. at 39 (Aug. 1, 2007)). Rather, the Commission examines "the facts in each investigation, the article of commerce, and the realities of the marketplace." *Id.* "The determination takes into account the nature of the investment and/or employment activities, 'the industry in question, and the complainant's relative size.'" *Id.* (citing *Stringed Musical Instruments* at 26).

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*Mfg. Co. v. U.S. Int'l Trade Comm'n*, 714 F.2d 1117, 1121 (Fed. Cir. 1983)). In some cases, however, the Commission will consider later developments in the alleged industry, such as "when a significant and unusual development occurred after the complaint has been filed." See *Certain Video Game Systems and Controllers*, Inv. No. 337-TA-743, Comm'n Op., at 5-6 (Jan. 20, 2012) ("[I]n appropriate situations based on the specific facts and circumstances of an investigation, the Commission may consider activities and investments beyond the filing of the complaint.").

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With respect to section 337(a)(3)(C), whether an investment in domestic industry is “substantial” is a fact-dependent inquiry for which the complainant bears the burden of proof. *Stringed Musical Instruments* at 14. There is no minimum monetary expenditure that a complainant must demonstrate to qualify as a domestic industry under the “substantial investment” requirement of this section. *Id.* at 25. There is no need to define or quantify an industry in absolute mathematical terms. *Id.* at 26. Rather, “the requirement for showing the existence of a domestic industry will depend on the industry in question, and the complainant’s relative size.” *Id.* at 25-26.

### **2. Domestic Industry (Technical Prong)**

Complainants argue that “four of their multiple mode grilling products satisfy the technical prong. Complainants’ Char-Griller Duo and Trio, and Double Play and Triple Play are products covered by claims of the ‘712 patent.” Compl. Br. at 83.

Respondents do not address the technical prong of the domestic industry requirement in their posthearing briefs. *See* Resps. Br. at 123-35; Resps. Reply Br. at 51-54.

The Staff argues that “the evidence shows that A&J satisfies the technical prong of the domestic industry requirement.” Staff Br. at 39.

At the hearing, Mr. Thuma testified that the Char-Griller Duo satisfies each limitation of claims 1, 2, 4, 6-11, 13, 15, and 16-20 of the ‘712 patent, and that the Char-Griller Trio satisfies claims 1-4, 6-13, 15, and 16-20 of the ‘712 patent. CX-0890C (Thuma WS) at Q/A 114-119. In addition, Mr. Thuma testified that the King Griller Double Play satisfies each limitation of claims 1, 2, 4, 6, 7, 10, 11, 13, and 15 of the ‘712



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patent, and that the King Griller Triple Play satisfies each limitation of claims 1-4, 6, 7, 10-13, and 15 of the '712 patent. *Id.* at Q/A 120-124.

Accordingly, the administrative law judge finds that the evidence shows that A&J has satisfied the technical prong of the domestic industry requirement.

### 3. Domestic Industry (Economic Prong)

A&J argues that it “satisfies the economic prong of the domestic industry requirement under 19 U.S.C. § 1337(a)(3)(A), (B) and/or (C) through at least its domestic engineering, R&D, warranty service, and customer service related to the Domestic Industry Products.” Compl. Br. at 84. It is argued: “The evidence demonstrates that A&J conducts qualifying domestic engineering, R&D, and post-sale warranty and customer service related to the Domestic Industry Products. In connection with these activities, A&J has made and continues to make a significant investment in plant and equipment, has employed and continues to employ significant labor or capital, and has made and continues to make substantial investments in the exploitation of the '712 patent through engineering and R&D related to the Domestic Industry Products.” *Id., see id.* at 82-126.

Respondents argue that “[i]nvestments in the DI Products made before the issue date do not qualify as cognizable DI investments, and the majority of Complainants’ investments occurred before the issuance of the '712 patent.” Resps. Br. at 128. It is argued that “Complainants have failed to properly allocate their domestic investments to the DI Products.” *Id.* at 130. Respondents argue that “[c]ertain of Complainants’ investments in quality control, customer support, distribution, and warehousing do not count towards Complainant’s domestic industry.” *Id.* at 132. Respondents argue that



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“Complainants’ claimed expenses are neither significant nor substantial, either qualitatively or quantitatively, when analyzed under Commission precedent.” *Id.* at 134.

The Staff argues that “the evidence shows that Complainants satisfy the economic prong of the domestic industry requirement with respect to the ‘712 patent.” Staff Br. at 39.

As noted above in the Technical Prong section, complainants argue that four of their multiple mode grilling products, *i.e.*, Char-Griller Duo and Trio, and Double Play and Triple Play (“Domestic Industry Products” or “DI Products”), are products covered by claims of the ‘712 patent.

As discussed below, complainants have satisfied the economic prong of the domestic industry requirement with respect to the asserted ‘712 patent under subsections (a)(3)(A), and (B) through investments in plant and equipment, and labor and capital.

### **a. Plant and Equipment**

The evidence shows that A&J has made significant investments in plant and equipment under subsection (a)(3)(A).

A&J has made, and continues to make, investments in plant and equipment through its domestic facilities in Atlanta, Georgia; Tifton, Georgia; and St. Simons Island, Georgia. *See generally* CX-0889C (Button WS) at Q/A 119-134. A&J’s investments in plant and equipment generally fall into two categories: plant related investments for facility space to conduct its domestic activities; and investments in equipment necessary for A&J to conduct its domestic warranty service and customer service operations. As to the first category, A&J’s investment in plant is shown by one metric used by the Commission to evaluate investments in plant: square footage. As to



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0267C; CDX-0009C. Thus, the net book value of A&J's plant and equipment

investments related to the DI Products was [

] *Id.* at Q/A 127-128; CX-0257C; CX-

0263; CX-0266C; CX-0267C; CDX-0009C.

**Capital Expenditure**

[

] CX-0889C (Button WS) at Q/A

130-131; *see* CX-0248C; CX-0249C; CX-0251C; CX-0255C; CX-0257; CX-0260C; CX-

0263C; *see also* CDX-0010C [

] Certain of A&J's capital expenditures relate specifically to

A&J's warranty/customer service. CX-0889C (Button WS) at Q/A 132. A portion of

these warranty service/customer support capital expenditure values can be allocated to

the DI Products. *Id.* at ¶ 133. Thus, A&J's capital expenditure from [

] *Id.* at 133-134; *see* CX-0248C; CX-0249C; CX-

0251C; CX-0255C; CX-0257; CX-0260C; CX-0263C; *see also* CDX-0011C.

**b. Labor and Capital**

The evidence shows that A&J has made significant investments in labor and

capital under subsection (a)(3)(B).

A&J's employment of labor or capital generally falls into two categories: A&J's

employment of qualifying employees and their associated labor cost; and A&J's

employment of working capital to run its business, otherwise known as its operational

expense. As to the first category, A&J's significant employment of labor is shown by

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two metrics used by the Commission to evaluate employment of labor: full time equivalent (FTE) employees and labor cost. A&J's employment in capital is shown by one metric used by the Commission to evaluate employment of capital: operational expense. In this context, A&J's operational expense includes expenses for labor, materials, overhead, and related expense line items incurred to carry out normal-course of business operations, such as A&J's engineering, R&D, warranty service, and customer service.

### **i. Labor**

A&J employs two main types of labor related to the DI Products: employees working on engineering/R&D; and employees working on warranty/customer service.

#### **Engineering and R&D**

For 2006 through 2013, time spent by Mr. Simms, and other A&J engineers can be monetized by applying the estimates of their time spent on engineering related to the DI Products to their salary. In particular, Mr. Simms provided, with input from Michael Hermes where appropriate, estimates for himself (CX-0887C (Simms WS) at Q/A 109-116) and two other A&J engineers, Pherra Khun (CX-0887C (Simms WS) at Q/A 118-119, 122-123; CX-0888C (Hermes WS) at Q/A 72-73), and Michael Jourden (CX-0887C (Simms WS) at Q/A 125-126; CX-0888C (Hermes WS) at Q/A 74). Mr. Hermes also worked with Mr. Simms to provide estimates of his own time. CX-0888C (Hermes WS) at Q/A 61-70; CX-0887C (Simms WS) at Q/A 118-120. The specific estimates are summarized on CDX.0003C.0004 (showing on a yearly basis each employees' estimated time spent first on engineering/R&D as a whole, and then what portion of that time was spent on engineering/R&D related to the DI Products).

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Based on the estimates, and the salaries paid to these employees (*see* CX-0289C through CX-0299C (collectively showing, on a yearly basis, A&J's labor cost for each employee)), the aggregate of A&J's in-house engineering/R&D labor expense related to the DI Products is [

] *See* CX-0889C (Button WS) at Q/A 60-69, 81-82; CDX-0003C (identifying for each year (i) A&J employees engaged in engineering/R&D activities in each year, (ii) the salary and other labor costs for those individuals, (iii) the proportion of each individual's time that was engaged in engineering/R&D activities, and (iv) the proportion of that individual's total engineering/R&D time that was dedicated to work related to the DI Products). These aggregate amounts represent [ ] and [ ] respectively, of A&J's total domestic payroll during those two main time periods. CX-0889C (Button WS) at Q/A 69, 82.

Additionally, Mr. Simms and Mr. Shankwiler testified about certain A&J [

] *See, e.g.*, CX-0887C (Simms WS) at Q/A 94-108; CX-0891C (Shankwiler WS) at Q/A 41-57; CX-0886C [ ]<sup>22</sup> A&J's

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<sup>22</sup> It is noted that complainants did not discuss the [ ] under subsection (a)(3)(B) but addressed it under subsection (a)(3)(C). Complainants, however, included the [ ] in their calculation of total investment that falls under subsection (a)(3)(B). *See* Compls. Br. at 109 (the total amount of [ ] includes

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economic expert Dr. Button also testified about [

] See CX-0889C (Button WS) at Q/A 70-75, 83-84. Dr. Button determined, with input from A&J, which [

] *Id.* at ¶ 71; CX-0886C. Dr. Button then determined what amount or percent of those [ ] related specifically to the DI Products. *Id.* at Q/A 73. The sum of such [

] *Id.* at 75; CX-0887C (Simms WS); see CDX-0004C (summarizing the data [

] CX-0889C (Button WS) at Q/A 84; CX-0886C; see CDX-0004C. Thus, the total [ ]

**Warranty Service and Customer Support**

A&J has employed labor for its domestic warranty service and customer support operations. Each Domestic Industry Product comes with a one-year warranty and a 5-year warranty on some specific grill parts, such as the burner tubes, which A&J provides at no additional cost. CX-0889C (Button WS) at Q/A 109; CX-0887C (Simms WS) at Q/A 64. During the warranty period, customers are able to contact A&J customer service representatives to make warranty claims for defective parts, components, grills, or any other defects in manufacturing. *Id.*

A&J's warranty/customer service operations are provided at [

---

[ ] (citing CX-0889C (Button WS) at Q/A 164-165, 167-186; CDX-0016C).

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] CX-0889C (Button WS) at Q/A 110. [

*Id.* The number of A&J's employees dedicated to the customer support and warranty service [

*Id.*

] *Id.*

A&J's economic expert Dr. Button, testified about A&J's domestic employment of labor related to warranty/customer service for the DI Products. *See* CX-0889C (Button WS) at Q/A 135-142; CX-0289C – CX-0299C; *see also* CDX-0012C; CDX-0013C. That employment of labor can be represented by two metrics: labor cost, and FTE.

First, labor cost refers to the cost to A&J for labor wages, salaries, and related employment taxes and expenses for its employees. CX-0889C (Button WS) at Q/A 141. A&J's payroll records indicate [

] CX-0289C – CX-0299C; *see* CDX-0012C (summarizing A&J's total labor cost for [ ]).

After identifying which specific employees were engaged in warranty/customer service operations, Dr. Button determined A&J's employment costs for employees engaged in activities related to customer service and warranty service operations. CX-0889C (Button WS) at Q/A 142; CX-0289C – CX-0299C; *see* CDX-0013C. He then applied the sales allocation percentages to estimate the labor costs for warranty/customer service operations related to the DI Products. CX-0889C (Button WS) at Q/A 142. The evidence shows that A&J's total labor cost for warranty/customer service related to the DI Products is [



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] CX-0289C – CX-0299C; *see* CDX-0013C.0002.

Second, Dr. Button also testified about A&J's full time equivalent (FTE) values for each employee that worked in warranty/customer service. *See* CX-0889C (Button WS) at Q/A 137-140. Full time employees who worked the full year in warranty/customer service have a 1.0 FTE. For part-time employees, or full-time employees that did not work the entire year, or did not work the entire year in warranty/customer service, the FTE is based A&J's labor cost, [ ] and 2,080 gross workweek hours in a year. *See* CX-0889C (Button WS) at Q/A 137-140. A&J pays [

] *Id.* at Q/A

138; CX-0887C (Simms WS) at Q/A 58. Dr. Button also determined the FTE values for warranty/customer service related to the DI Products by applying the sales based allocation percentage. *Id.* at Q/A 139.

A&J's FTE value for warranty/customer service related to the DI Products are [ ] *See* CDX-0013C.0002.

**ii. Capital**

A&J has employed, and continues to employ, capital through its total operational expense, which includes expenses for labor, material, overhead, and related expense line items incurred to carry out normal-course of business operations. CX-0889C (Button WS) at Q/A 143. Consistent with Generally Accepted Accounting Principles ("GAAP"), the costs incurred to carry out normal-course of business operations also include those

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related to R&D/engineering operations. *Id.* The pool of operational expenses normally excludes the cost to acquire goods for resale (cost of goods sold), but does include the

[

] *Id.*

A&J's employment of capital includes A&J's cost for [

]

**Warranty Parts and Shipping**

A&J has incurred expenses related to its provision of warranty parts for the DI Products. Mr. Simms testified about how A&J provides replacement parts through its warranty service. *See, e.g.*, CX-0887C (Simms WS) at Q/A 62-65. [

] *See* CX-0887C (Simms

WS) at Q/A 65-69; CX-0300C through CX-0307C. From these data, the warranty parts can be identified [

] CX-0887C (Simms WS) at

Q/A 70. Of those, the parts associated with the DI Products can be identified by [

] *Id.* at Q/A 71, 74-75. [

] *Id.* at Q/A 72-73.

Dr. Button testified about A&J's [

] *See generally* CX-0889C (Button WS) at

Q/A 144-151; CX-0300C – CX-0307C. Specifically, A&J's total warranty parts cost for

the DI Products [

] *Id.* at Q/A 150; CX-0300C –

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CX-0307C; *see* CDX-0014C (summarizing and breaking down A&J's [

] Button Tr. 583-584.

Associated with A&J's provision of replacement parts, A&J has incurred expenses for [ ] *See* CX-0887C (Simms WS) at Q/A 76-82. Mr. Simms testified that [

] CX-0887C (Simms

WS) at Q/A 80-82. Dr. Button testified about A&J's total [

] *See* CX-0889C (Button WS) at Q/A 146-151. Specifically,

Dr. Button testified that A&J's total [

] CX-0889C (Button WS) at Q/A 150; *see*

CDX-0014C (summarizing and breaking down [

]

When summed, A&J's total [

] CX-0889C (Button WS) at Q/A 150.

**Warranty and Customer Service Operating Expenses**

A&J incurred operating expenses for warranty/customer service related to the DI Products. *See generally* CX-0889C (Button WS) at Q/A 152-154. [

] *Id.* at Q/A 153; CX-0248C – CX-0266C; *see*

CDX-0015C (analyzing and summarizing A&J's total operating expenditures that relate to the DI Products). Of those, the amount that related to the DI Products is determined by applying the sales based allocation percentages. CX-0889C (Button WS) at Q/A 153.

Specifically, A&J's total operational expenditures associated with warranty/customer

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service for the DI Products [ ] CX-0889C (Button WS) at Q/A 154; CX-0248C – CX-0266C; *see* CDX-0015C.

### c. Engineering & Research and Development (R&D)

A&J argues that its “total R&D/engineering investment [ ].” Compl. Br. at 113; *see id.* 109-113. A&J has however, attributed those labor expenses to the domestic industry that exists under subsection (a)(3)(B). The administrative law judge does not, therefore, rely on those expenses again to find a domestic industry under subsection (a)(3)(C).

### d. The Significance of A&J’s Investments

The evidence shows that A&J’s domestic investments related to the DI Products are significant. *See generally* CX-0889C (Button WS) at Q/A 180-209; CX-0887C (Simms WS) at Q/A 16-19, 61, 83.

#### **Quantitative Analysis**

A&J’s investment in plant and equipment and employment of labor or capital related to the DI Products are quantitatively significant for the following reasons.

First, the comparison of A&J’s domestic investments to those found significant in other investigations highlights their significance when considering that the market for multiple mode outdoor grills is far smaller than, for example, the market for LCD televisions. *See Certain Devices for Improving Uniformity Used in a Backlight Module & Components Thereof & Prods. Containing Same*, Inv. No. 337-TA-805, Initial Determination at 56-61 (Oct. 22, 2012) (affirmed in relevant part) (finding a domestic industry based on post-sale customer and technical support and service and repair activities).

Second, A&J’s continuous domestic investments to research, develop, engineer,

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and provide warranty/customer service for the DI Products is significant when compared to the investment necessary to start such a product line. [

]

For example, the cost [

] *See* Compls. Br. at 134-35 (explaining how [

] Even if considering [

] For example, [

] CX-0889C

(Button WS) at Q/A 458; CX-0193C. [

] *See* CX-

0889C (Button WS) at Q/A 418; JX-0025C (Yeung Dep. Tr.) at 78-79. [

] (*see* CX-0889C (Button

WS) at Q/A 443-459) [

]

Moreover, A&J presented evidence regarding development costs for a proposed new line of Duo-related grills [

] *See generally* CX-

0892C (Kippes WS) at Q/A 36-40; CX-0325C; *see also* CX-0887C (Simms WS) at Q/A

128-130 (discussing A&J's relationship [

] Specifically, [

] developed two

prototypes of a new stainless steel Duo-style grill for [

] CX-0325C; CX-

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0892C (Kippes WS) at Q/A 36-40 (including summary of costs, [

] testified [

] See CX-0892C (Kippes WS) at Q/A 41-45.

[

] (*id.* at Q/A 46-51), [

] puts A&J's

annual domestic investment in further context. Indeed, in each year since [

] (*see* CX-0300C –

CX-0307C; CDX-0014C), the total investment made by [

] Finally, A&J's relationship [

] See CX-0887C (Simms WS) at Q/A

130.

The economic and financial facts in this investigation warrant analyzing certain qualitative factors concerning A&J's investment in its domestic industry. CX-0889C (Button WS) at Q/A 182. These qualitative factors, described below, provide the context for evaluating the quantitative measures of A&J's investment size. *Id.*

**Qualitative Analysis**

Six qualitative factors provide additional context for evaluating the quantitative measure of A&J's domestic investment size. *See generally* CX-0889C (Button WS) at Q/A 180-209.

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First, A&J is a small business. CX-0889C (Button WS) at Q/A 183. A&J has [ ] employees, which indicates that it falls within the definition of a small business used by the census bureau and others. *Id.* at Q/A 184; CX-0299C (first half 2013 payroll summary). Within the context of section 337, which is intended to provide intellectual property protection not only for large companies, but also for small companies and even inventor individuals, the “significance” of the absolute levels of A&J’s investment in R&D/engineering should take into consideration the fact that A&J is a small business. CX-0889C (Button WS) at Q/A 185. Thus, while the absolute levels of A&J’s R&D/engineering investment might not be considered quantitatively large or significant in the context of a very large company, they should be viewed as significant in relation to A&J’s small business operations. *Id.*

Second, A&J’s R&D/engineering investments resulted in a [ ] CX-0889C (Button WS) at Q/A 186. A&J’s R&D/engineering investment in the DI Products resulted in creation of a new outdoor grill product category which consumers found useful and desirable and which resulted in [ ]

[ ] *Id.*; see CDX-0006C (detailing A&J’s sales increases for the DI Products and relying on CX-00248C through CX-0288C). For example, sales of the DI Products were [ ] The first sales [ ]

[ ] CX-0889C (Button WS) at Q/A 186; CDX-0006. However, in [ ]

[ ] CX-0889C (Button WS) at Q/A 186; CDX-0006. [ ]

]



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[ ] CX-0889C (Button WS) at Q/A 186; CDX-0006. [

] CX-0889C (Button WS) at Q/A 186; CDX-0006. Thus, [

] CX-0889C (Button WS) at Q/A 186. Over those [

] *Id.* Thus, A&J's R&D/engineering investment [

] *Id.*

It is noteworthy that this growth in A&J's DI Products sales appears generally not to have "cannibalized" sales of A&J's other grill products, but rather have represented substantially new sales. *Id.* During the [ ] period, A&J's sales of [

] *Id.* It appears that [

] CX-0889C (Button WS) at Q/A 186; *see* CDX-0017C (detailing A&J's [ ] and relying on CX-0267C through CX-0288C). As Dr. Button testified, A&J's sales documents show how the sales of the DI Products has grown over the years, and further demonstrate that sales of non-DI Products was not cannibalized in the years A&J introduced the DI Products. CX-0889C (Button WS) at Q/A 187; *see* CDX-0017C.

Third, A&J's investments [ ] CX-0889C (Button WS) at Q/A 188. With respect to the [

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] *Id.* For example, in [

] *Id.* at Q/A 188-189; *see* CDX-0018C (detailing (1) A&J's [

]

(2) A&J's [

], and relying on A&J's [ ] CX-0248C

through CX-0266C). [

] CX-0889C (Button WS) at Q/A 188; *see* CDX-0018C.

In particular, A&J's sales and financial records show that the gross profit associated only with the DI Products across this period was considerable. CX-0889C (Button WS) at Q/A 190. A&J's gross profit generated by sales of the DI Products aggregated to [ ] over the 2006 – June 2013 period, which constitutes a [ ] return to A&J on its investment in R&D/engineering for those products during just those few years, following their introduction in 2006. *Id.*; *see* CDX-0019C (detailing A&J's gross profit generated by sales of the DI Products and relying on A&J's sales documents, CX-0267C through CX-0288C). In total, the DI Products have generated [ ] in gross profit for A&J, which represents [ ]% of A&J's total gross profit since 2006. CX-0889C (Button WS) at Q/A 191; *see* CDX-0019C.

Fourth, [ ] despite depressive impacts of the recession. CX-0889C (Button WS) at Q/A 192. Specifically, according to the HPBA, total North American U.S. grill sales for charcoal, gas, and electric grills increased in 2006 and 2007 and then declined in the 2008-2011 period, as the recession had its

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demand-dampening impact. *Id.*; CX-0482. When adding data for 2013, total grill sales declined, in each year but one, from a peak in 2007 to its current level in 2013. CX-0482C; CX-0435; CX-0889C (Button WS) at Q/A 195-196; *see* CDX-0020C (summarizing HBPA grill sales data from 2003 through 2013). These statistics do not include multiple-mode grills. CX-0889C (Button WS) at Q/A 195.

[  
] CX-0889C (Button WS) at Q/A 197; *see* CDX-0002C.

Fifth, the evidence tends to show that A&J created a new grill market category and segment that has benefitted respondents as well. CX-0889C (Button WS) at Q/A 183. It is reasonable to conclude that A&J's ability to earn profit margins on Multiple-Mode Grill sales was noted by the respondents and played a role in incentivizing them to enter the U.S. market for Multiple-Mode Grills, which is shown by when respondents started selling multiple-mode outdoor grills. CX-0889C (Button WS) at Q/A 198-199 (citing JX-0017C at 26:17-27:3, 32:19-33:7, and 50:2-8; JX-0020C at 37:22-38:8; JX-0026C at 32:24-33:9; JX-0027C at 13:14-14:25 and 16:16-17:14).

Sixth, A&J's [  
] A&J's R&D/engineering efforts. *Id.* at 208-209; CX-0887C (Simms WS) at Q/A 128-130; CX-0892C (Kippes WS) at Q/A 17-51. Following meetings between A&J representatives and [  
] CX-0889C (Button WS) at Q/A 209; CX-0580C. [  
] encompasses the key characteristics and features of the Duo but is constructed of stainless steel, and, thus, is intended to appeal to an expanded group of

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consumers seeking a more durable, more aesthetically pleasing, and more easily cleaned grill. CX-0889C (Button WS) at Q/A 205; CX-0580C. A&J's [

] shows that A&J's R&D/engineering efforts toward further development of its Duo-style grill, and in particular its Duo, are continuing. CX-0889C (Button WS) at Q/A 207-209.

For the reasons discussed above, the evidence shows that A&J's domestic investments related to the DI Products are significant as required by subsections (a)(3)(A) and (B).

### **V. Conclusions of Law**

1. The Commission has subject matter, personal, and *in rem* jurisdiction in this investigation.
2. Certain accused products have been imported or sold for importation into the United States.
3. Certain accused products infringe at least one asserted claim of U.S. Patent No. 8,381,712, while certain accused products do not infringe any asserted claim.
4. The domestic industry requirement has been satisfied with respect to U.S. Patent No. 8,381,712.
5. It has not been shown by clear and convincing evidence that the asserted claims of U.S. Patent No. 8,381,712 are invalid.

### **VI. Initial Determination and Order**

Accordingly, it is the INITIAL DETERMINATION of the undersigned that a violation of section 337 (19 U.S.C. § 1337) has occurred in the importation into the

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United States, the sale for importation, or the sale within the United States after importation, of certain accused products that infringe at least one asserted claim of U.S. Patent No. 8,381,712, while certain accused products do not infringe any asserted claim.

Further, this Initial Determination, together with the record of the hearing in this investigation consisting of (1) the transcript of the hearing, with appropriate corrections as may hereafter be ordered, and (2) the exhibits received into evidence in this investigation, is CERTIFIED to the Commission.

In accordance with 19 C.F.R. § 210.39(c), all material found to be confidential by the undersigned under 19 C.F.R. § 210.5 is to be given *in camera* treatment.

The Secretary shall serve a public version of this ID upon all parties of record and the confidential version upon counsel who are signatories to the Protective Order, as amended, issued 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 pursuant to § 210.43(a) or the Commission, pursuant to § 210.44, orders on its own motion a review of the ID or certain issues herein.

\* \* \*

To expedite service of the public version, each party is hereby ordered to file with the Commission Secretary no later than October 3, 2014, a copy of this initial determination with brackets to show any portion considered by the party (or its suppliers of information) to be confidential, accompanied by a list indicating each page on which

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such a bracket is to be found. At least one copy of such a filing shall be served upon the office of the undersigned, and the brackets shall be marked in red. If a party (and its suppliers of information) considers nothing in the initial determination to be confidential, and thus makes no request that any portion be redacted from the public version, then a statement to that effect shall be filed.<sup>23</sup>



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David P. Shaw  
Administrative Law Judge

Issued: September 26, 2014

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<sup>23</sup> Confidential business information (“CBI”) is defined in accordance with 19 C.F.R. § 201.6(a) and § 210.5(a). When redacting CBI or bracketing portions of documents to indicate CBI, a high level of care must be exercised in order to ensure that non-CBI portions are not redacted or indicated. Other than in extremely rare circumstances, block-redaction and block-bracketing are prohibited. In most cases, redaction or bracketing of only discrete CBI words and phrases will be permitted.

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **Final Initial Determination on Violation** has been served by hand upon the Commission Investigative Attorney, **R. Whitney Winston, Esq.**, and the following parties as indicated, on OCT 23 2014.



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
500 E Street SW, Room 112A  
Washington, DC 20436

<b>FOR COMPLAINANTS A&amp;J MANUFACTURING, LLC; AND A&amp;J MANUFACTURING, INC.:</b>	
V. James Adduci, II, Esq. <b>ADDUCI MASTRIANI &amp; SCHAUMBERG LLP</b> 1133 Connecticut Avenue NW Washington, DC 20036	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____
<b>FOR RESPONDENTS CHAR-BROIL LLC; AND ZHEJIANG FUDEER ELECTRIC APPLIANCE CO., LTD.:</b>	
Jeffrey M. Telep, Esq. <b>KING &amp; SPALDING LLP</b> 1700 Pennsylvania Avenue, NW Washington, DC 20006	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____
<b>FOR RESPONDENTS ACADEMY LTD. d/b/a ACADEMY SPORTS &amp; OUTDOORS; AND NINGBO HUIGE OUTDOOR PRODUCTS, CO., LTD.:</b>	
James B. Coughlan, Esq. <b>PERKINS COIE</b> Thirteenth Street NW, Suite 600 Washington, DC 20005	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____



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

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

<b>FOR RESPONDENT THE BRINKMANN CORPORATION:</b>	
<p>Gary A. Clark, Esq. <b>SHEPPARD MULLIN, RICHTER &amp; HAMPTON LLP</b> 333 South Hope Street, 43<sup>rd</sup> Floor Los Angeles, CA 90071</p>	<p><input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____</p>
<b>FOR RESPONDENTS DONGGUAN KINGSUN ENTERPRISES, CO., LTD.; AND OUTDOOR LEISURE PRODUCTS, INCORPORATED:</b>	
<p>Michael R. Dzwonczyk, Esq. <b>SUGHRUE MION PLLC</b> 2100 Pennsylvania Avenue NW, Suite 800 Washington, DC 20037</p>	<p><input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Express Delivery <input type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____</p>

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

**In the Matter of**

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

**Investigation No. 337-TA-895**

**COMMISSION OPINION**

This investigation was instituted on September 26, 2013, based on a complaint filed on behalf of A&J Manufacturing, LLC of St. Simons, Georgia and A&J Manufacturing, Inc. of Green Cove Springs, Florida (collectively “A&J” or “Complainants”). 78 *Fed. Reg.* 59373 (Sept. 26, 2013). The complaint, as amended, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the sale for importation, importation, or sale within the United States after importation of certain multiple mode outdoor grills and parts thereof by reason of infringement of claims 1-20 of U.S. Patent No. 8,381,712 (“the ’712 patent”), the claim of U.S. Patent No. D660,646, and the claim of U.S. Patent No. D662,773. Only the allegations pertaining to the ’712 patent remain in the investigation. On July 31, 2014, the Commission determined not to review an initial determination granting a motion for partial termination of the investigation based on withdrawal of allegations in the complaint concerning the two asserted design patents. *See* Order No. 50 (Jul. 14, 2014).

The investigation is now before the Commission for a final disposition on the issues under review, remedy, the public interest, and bonding. The Commission has determined to affirm, with modified reasoning, the administrative law judge’s (“ALJ”) final initial determination (“ID”) finding that there is a violation of section 337 of the Tariff Act of 1930, as

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amended (19 U.S.C. § 1337), in the unlawful importation, sale for importation, and sale after importation by respondents The Brinkmann Corporation (“Brinkmann”) of Dallas, Texas; Outdoor Leisure Products, Inc. (“OLP”) of Neosho, Missouri; Dongguan Kingsun Enterprises Co., Ltd. (“Kingsun”) of Dongguan City, China; Academy, Ltd. (“Academy”) of Katy, Texas; and Ningbo Huige Outdoor Products Co., Ltd. (“Huige”) of Zhejiang Province, China; of certain multiple mode outdoor grills and parts thereof by reason of infringement of one or more claims of the ’712 patent. The Commission also found respondent Keesung Manufacturing Co., Ltd. (“Keesung”) of Guangzhou, China in default pursuant to section 337(g)(1) and 19 C.F.R. § 210.16 for failing to respond to the Notice of Investigation and the complaint. The Commission has further determined to affirm, with modified reasoning, the ID’s finding that respondents Char-Broil, LLC (“Char-Broil”) of Columbus, Georgia; and Zhejiang Fudeer Electric Appliance Co., Ltd. (“Fudeer”) of Zhejiang Province, China have not violated section 337 in connection with the ’712 patent. The Commission adopts the final ID to the extent it does not conflict with this opinion.

Having found a violation of section 337 in this investigation, the Commission has determined that the appropriate form of relief is: (1) a limited exclusion order (“LEO”) prohibiting the unlicensed entry of covered multiple mode outdoor grills and parts thereof manufactured by, for, or on behalf of Brinkmann, OLP, Kingsun, Academy, Huige, and Keesung, or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns; and (2) cease and desist orders (“CDO”) prohibiting Brinkmann, OLP, and Academy from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, transferring (except for exportation), and soliciting U.S. agents or distributors for multiple mode outdoor grills and parts

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thereof that infringe one or more claims of the '712 patent. The orders include the following exemptions: (1) conduct licensed or authorized by the owner of the '712 patent; (2) conduct related to covered products imported by or for the United States; and (3) the importation, distribution, and sale of parts for use in the maintenance, service, or repair of covered products purchased prior to the date the orders become final within the meaning of 19 U.S.C. § 1337(j).

The Commission has further determined that the public interest factors enumerated in section 337(d), (f), and (g) (19 U.S.C. §§ 1337(d), (f), and (g)) do not preclude issuance of the orders. During the period of Presidential review (19 U.S.C. § 1337(j)), the Commission has determined to set a bond in the amount of 100 percent of the entered value for all covered products manufactured by, for, or on behalf of defaulted respondent Keesung, and to set a bond in the amount of zero percent of the entered value for all covered products manufactured by, for, or on behalf of Brinkmann, OLP, Kingsun, Academy, and Huige.

### I. BACKGROUND

#### A. Procedural History

The Commission instituted this investigation on September 26, 2013, based on a complaint filed on behalf of A&J. 78 *Fed. Reg.* 59373 (Sept. 26, 2013). The complaint, as amended, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the sale for importation, importation, or sale within the United States after importation of certain multiple mode outdoor grills and parts thereof by reason of infringement of claims 1-20 of the '712 patent, the claim of U.S. Patent No. D660,646, and the claim of U.S. Patent No. D662,773.<sup>1</sup> The Commission's notice of investigation, as amended, named numerous respondents, including Brinkmann, OLP, Kingsun, Academy, Huige, Char-Broil, and Fudeer

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<sup>1</sup> See *supra* at 1.

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(collectively “the Remaining Respondents”). The Office of Unfair Import Investigations was also a party to this investigation.

Numerous respondents named in the notice of investigation were terminated from the investigation based on:

- Substitution of respondent Char-Broil for respondent W.C. Bradley Co.;
- Name change of respondent Kamado Joe Company to Premier Specialty Brands, LLC;
- Withdrawal of allegations in the complaint directed to Kmart Corporation; Sears Brands Management Corporation; Sears Holdings Corporation; and Sears, Roebuck & Company;
- Consent orders and/or settlement agreements: HEB Grocery Company, LP d/b/a H-E-B; Guangdong Canbo Electrical Co., Ltd.; Ningbo Spring Communication Technologies Co. Ltd.; Premier Specialty Brands, LLC; Wuxi Joyray International Corporation; GHP Group, Incorporated (“GHP”); Tractor Supply Co. (“TSC”), Chant Kitchen Equipment (HK) Ltd. (“Chant”); and Rankam Metal Products Manufactory Limited, USA (“Rankam”); and
- A finding that Keesung was in default.

*See* ID at 2-3, 5-6.

On March 5, 2014, respondents Char-Broil, Fudeer, OLP, Kingsun, TSC, and Chant filed a motion for summary determination of non-infringement of the asserted claims of the ’712 patent. On March 24, 2014, A&J opposed the motion, and the Commission Investigative Attorney (“IA”) filed a response in partial support of the motion. On April 17, 2014, the ALJ granted the motion in part. Order No. 33. The ALJ construed the term “openable [] cover” to mean “a cover that excludes any portion of the grill enclosure that is not openable (*i.e.* fixed).” *Id.* at 4. The ALJ found that the applicant had disclaimed any construction of the term “openable [] cover” that included non-openable/fixed portions of the grill as a result of the claim amendments made on August 25, 2011. *Id.* at 7-8. The ALJ also found that the applicant’s

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argument in his appeal brief to the PTO's Board of Patent Appeal and Interferences ("BPAI") clearly and unmistakably showed that the applicant did not regard the fixed portion of the grill enclosure as "openable." *Id.* at 6.

In Order No. 33, the ALJ ruled on eight different products/product lines:

- (i) Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill, Model Number 12210767 ("the Char-Broil 12210767 grill");
- (ii) Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill, Model Number 14201767 ("the Char-Broil 14201767 grill");
- (iii) Char-Broil Model 463724512 Charcoal/Gas Grill Combination ("the Char-Broil 463724512 grill");
- (iv) Char-Broil Charcoal/Gas Combo 1010 Deluxe, Model No. 463724514 ("the Char-Broil 463724514 grill");
- (v) Rankam Model No. GR2034205-SC (Ver 2);
- (vi) Rankam Model No. GR2071001-MM (Ver 2);
- (vii) Outdoor Leisure Products Smoke Hollow Model Numbers PS9500, 8000, 8500, 3500, 3300, and 6500 ("the OLP/Kingsun Redesigned Grills"); and
- (viii) Chant Red Stone Model 1046761.

*Id.* at 8. The ALJ found that seven of the products did not meet the "openable [ ] cover" limitations of the asserted independent claims and therefore did not infringe. The ALJ also found that a question of fact existed with respect to the Char-Broil 463724512 grill. Accordingly, the ALJ denied the motion for summary determination with respect to that grill, but granted it as to the other grills.

On June 24, 2014, the Commission affirmed-in-part and vacated-in-part Order No. 33.

The Commission adopted the ALJ's construction of the term "openable [ ] cover," which the Commission summarized as follows:

The ALJ determined that the plain language of the disputed claim term "openable [ ] cover" requires that the cover be openable, and that in view of the prosecution history of the '712 patent, the "openable [ ] cover" limitations cannot be met by grills having exhausts *on fixed portions of the grill*.

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Comm'n SD Op. at 6 (Jun. 27, 2014) (emphasis added). The Commission also determined that the term “openable [] cover means” in claim 10 is a means-plus-function limitation and vacated the ALJ’s grant of summary determination as to that claim because the ALJ had not construed “openable [] cover means” as a means-plus function limitation. *Id.* at 13. The Commission found that the claimed function was “selectively covering the [] grill,” and instructed the ALJ to identify structure in the specification that performed the claimed function. *Id.* at 14-15.

The Commission also found that A&J acknowledged that Rankam Model No. GR2034205-SC (Ver 2), Rankam Model No. GR2071001-MM (Ver 2), and Chant Red Stone Model No. 1046761 do not infringe the asserted claims of the '712 patent. *Id.* at 16. The Commission determined that the other four products/product lines at issue did not infringe claims 1 and 17 of the '712 patent. Specifically, the Commission found that:

- The Char-Broil 12201767 grill does not infringe because it does not have exhausts on the “openable [] covers,” *id.* at 22;
- The Char-Broil 14201767 grill does not infringe because “the first and second openable grill covers do not include any exhausts. Instead, a single smokestack is located on a fixed portion of the grill to provide ventilation for one of the cooking units and lateral vents are located on the fixed portion of the grill to provide ventilation for the second cooking unit,” *id.*;
- The Char-Broil 463724514 grill does not infringe because “the first and second openable grill covers do not include any exhausts. Instead, the grills include vents located on the fireboxes, which are fixed portions of the grill,” *id.* at 23; and
- Each of the OLP/Kingsun Redesigned Grills does not infringe because each grill “does not include an exhaust or smokestack on the openable covers of at least one of the cooking units,” *id.* at 24.

An evidentiary hearing was held in this investigation from July 15-18, 2014.

Respondents Brinkmann, OLP, Kingsun, Char-Broil, Fudeer, Academy, and Huige appeared at the hearing.



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On September 26, 2014, the ALJ issued his final ID, finding a violation of section 337 as to Brinkmann, OLP, Kingsun, Academy, and Huige based upon his determinations: (i) that certain, but not all, accused products infringe at least one claim of the '712 patent; (ii) that the domestic industry requirement has been satisfied with respect to the '712 patent; and (iii) that the asserted claims of the '712 patent have not been shown by clear and convincing evidence to be invalid.

The ID also found that the following products do not infringe any asserted claim of the '712 patent: (i) Char-Broil/Fudeer Model Nos. 463724512, 12201767, 463724514, and 14201767 (collectively, “the Char-Broil/Fudeer Grills”); (ii) the OLP/Kingsun Redesigned Grills; and (iii) GHP’s Dyna-Glo Model Nos. DGJ810CSB-D and DGB730SNB-D (collectively, “the GHP Grills”). ID at 57, 59, 62. Thus, the ID found no violation as to Respondents Char-Broil, Fudeer, and GHP.<sup>2</sup> *See id.* at 1, 103. On October 9, 2014, the ALJ issued his recommended determination (“RD”) on remedy and bonding.

On October 14, 2014, complainant A&J filed a petition for review of (1) the ID’s interpretation of the scope of claim 10 of the '712 patent; (2) the ID’s finding that the accused Char-Broil/Fudeer Grills and the OLP/Kingsun Redesigned Grills do not satisfy the “openable [] cover means” limitations of claim 10 of the '712 patent; and (3) the ID’s finding that the Char-Broil 463724512 grill and GHP’s DGB730SNB-D grill do not satisfy the claim limitation that the first cover “includes at least one exhaust” in claims 1, 10, and 17 of the '712 patent. On the same day, respondents Brinkmann, OLP, and Academy together sought review of the following

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<sup>2</sup> GHP was terminated from this investigation on August 25, 2014 based on a settlement agreement, license, and consent order. *See* Notice of the Commission’s Determination Not to Review an Initial Determination Terminating GHP Group, Inc. Based on a Settlement Agreement, Patent License Agreement and Issuance of a Consent Orders; Issuance of a Consent Order (Aug. 25, 2014).

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determinations: (1) that the asserted claims have not been shown by clear and convincing evidence to be invalid as obvious over U.S. Patent No. 5,632,265 (“Koziol”) in view of U.S. Patent No. 4,773,319 (“Holland ’319”) and U.S. Patent No. 6,606,986 (“Holland ’986”); and (2) that the asserted claims have not been shown by clear and convincing evidence to be invalid as obvious over U.S. Patent No. 6,189,528 (“Oliver”), either alone or in view of Holland ’319. Respondent OLP separately challenged the ID’s construction of the claim term “exhaust,” and its finding that certain OLP products infringe claims 1-16 of the ’712 patent. Respondents Academy and Huige petitioned for review of the ALJ’s determination (Order No. 47) to exclude evidence and testimony concerning their redesigns, and the ALJ’s refusal to make a determination as to whether those redesigns infringe the ’712 patent. A&J, the Remaining Respondents, and the IA each filed a response to the petitions on October 22, 2014.

No party sought review of the following determinations of the ID: (1) that the Commission has subject matter, personal, and in rem jurisdiction in this investigation; (2) that certain accused products have been or have not been imported or sold for importation into the United States; (3) that Brinkmann’s 3820 grill does not infringe any asserted claim of the ’712 patent; (4) that Brinkmann’s 3821 grill infringes claims 1, 2, 4, 6-10, 13, and 15-20 of the ’712 patent; (5) that Brinkmann’s 3800 and 3802 grills infringe claims 1, 4, 6-10, 13, and 15-20 of the ’712 patent; (6) that Academy’s DLX2012, DLX2013, and CG3023 grills infringe claims 1-13, 15, and 16 of the ’712 patent; (7) that the Huige Sear & Smoke Triad grill infringes claims 1-13, 15, and 16 of the ’712 patent; (8) that GHP’s DGJ810CSB-D grill does not infringe claims 1, 4, and 6-8 of the ’712 patent; and (9) that the domestic industry requirement has been satisfied with respect to the ’712 patent.

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On December 2, 2014, the Commission determined to review the final ID in part and requested additional briefing from the parties on certain issues. Specifically, the Commission determined to review: (1) the ID's construction of the "exhaust" and "exhaust means" limitations in claims 10 and 16 of the '712 patent, and related findings regarding infringement of those claims; (2) the ID's findings regarding infringement of claims 1, 4, and 6-8 of the '712 patent by the GHP Grills; (3) the ID's findings regarding infringement of claims 1, 2, 4-8, 10, 11, and 13-15 of the '712 patent by the Char-Broil 463724512 grill; and (4) the ID's finding that the '712 patent was not shown to be invalid. *79 Fed. Reg.* 72700-02 (Dec. 8, 2014). The Commission also solicited briefing from the parties and from the public on the issues of remedy, bonding, and the public interest. On December 12, 2014, the parties filed written submissions on the issues under review, and on remedy, bonding, and the public interest. On December 19, 2014, the parties filed reply submissions.

### **B. U.S. Patent No. 8,381,712**

The '712 patent relates to a "simultaneous multiple cooking mode barbecue grill" having a first cooking mode unit and a second cooking mode unit that can be "operated simultaneously to prepare food using multiple cooking modes." JX-1 (the '712 patent) at Abstract. Claims 1-20 are asserted. The asserted independent claims each relate to cooking units having "openable [] cover[s]" that "includes at least one exhaust." *Id.* at 4:54, 6:60. The asserted independent claims and dependent claim 16 recite:

**Claim 1.** A barbecue grill having multiple cooking units, comprising:

a support structure configured to support a plurality of cooking units;

a first cooking unit configured to cook food using gas cooking fuel, the first cooking unit attached to the support structure and including at least one first grill, the first cooking unit further including an openable first cover attached to the first cooking unit that selectively covers the first grill, wherein the first cover **includes at least one exhaust**; and

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a second cooking unit configured to cook food using solid cooking fuel, the second cooking unit attached to the support structure and including at least one second grill, the second cooking unit further including an openable second cover attached to the second cooking unit that selectively covers the second grill, wherein the second cover **includes at least one exhaust**,

wherein the first cooking unit and the second cooking unit are simultaneously operable to cook food and the first grill and second grill are selectively and independently coverable.

**Claim 10.** A barbecue grill having multiple means for cooking, comprising:

a first means for cooking food using gas cooking fuel, the first means for cooking including at least one first grill and an openable first cover means for selectively covering the first grill, wherein the first cover means is attached to the first means for cooking and **includes at least one exhaust**;

a second means for cooking food using solid cooking fuel, the second means for cooking including at least one second grill and an openable second cover means for selectively covering the second grill, wherein the second cover means is attached to the second means for cooking and **includes at least one exhaust means**; and

a structure means for supporting the first means for cooking and the second means for cooking;

wherein the first means for cooking and the second means for cooking are simultaneously operable to cook food and the first grill and second grill are selectively and independently coverable.

**Claim 16.** The barbecue grill of claim 10, wherein the configuration of the at least one **exhaust means** of the first cover means includes a configuration of at least two **exhaust means**.

**Claim 17.** A barbecue grill having multiple cooking units, comprising:

a support structure configured to support a plurality of cooking units;

a first cooking unit supported by the support structure, the first cooking unit having a substantially cylindrical shape, the first cooking unit configured to cook food using gas cooking fuel, the first cooking unit including at least one first grill and an openable first cover attached to the first cooking unit that selectively covers the first grill, wherein the first cover **includes at least one exhaust**; and

a second cooking unit supported by the support structure, the second cooking unit having a substantially cylindrical shape, the second cooking unit configured to cook food using solid cooking fuel, the second cooking unit including at least one second grill and an openable second cover attached to the second cooking unit

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that selectively covers the second grill, wherein the second cover **includes at least one exhaust**,

wherein the first cooking unit and the second cooking unit are simultaneously operable to cook food and the first grill and second grill are selectively and independently coverable.

*Id.* at 4:54-5:8, 5:40-59, 6:22-47 (emphasis added).

### 1. Relevant Prosecution History

The applicant's originally filed claims sought broad coverage. *See* JX-7 at 10-14. The applicant amended the claims to distinguish the claimed invention from the prior art cited by the U.S. Patent and Trademark Office ("PTO") examiner on August 25, 2011, to add the following narrowing limitations:

- (i) that the recited cover be "openable"; and
- (ii) that the cover include "at least one exhaust."

*Id.* at 259-63. To rebut the examiner's prior art rejections, the applicant argued that the claim language added to independent claims 22, 32, and 40 (issued as claims 1, 10, and 17, respectively) regarding the exhausts included on the first and second covers formed the basis of patentability for these claims. *Id.* at 269-75. In particular, the applicant distinguished the prior art U.S. Patent No. 4,665,891 ("Nemec") and U.S. Patent No. 6,209,533 ("Ganard") references by stating:

[N]either Nemec nor Ganard teaches or suggests that the configuration of one smoke stacks [sic] on the cover of one cooking unit would be based on the type of fuel used in that cooking unit, and that the configuration of another smoke stack on the cover of another cooking unit would be based on the type of fuel used in that other cooking unit. Thus, applicant submits that Nemec and Ganard fail to teach or suggest . . . "an openable first cover. . . includ[ing] at least one exhaust" . . . and "an openable second cover attached to the second cooking unit... includ[ing] at least one exhaust."

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*Id.* at 270-71. However, even the narrowed claims were finally rejected over U.S. Patent No. 4,878,477 (“McLane”) in view of U.S. Patent No. 4,700,618 (“Cox”). *Id.* at 295. The examiner found that McLane disclosed all of the claimed limitations except for the “openable [] cover” limitations and the “[ ] cover includes at least one exhaust” limitations of claim 22. *Id.* at 295. The examiner, however, found that Cox taught these limitations of claim 22, and stated that placing the exhausts “on the first or second cover” was a mere rearrangement of parts that would not affect the functioning of the units. *Id.* at 295-99. The examiner also rejected the narrowed claims under 35 U.S.C. § 112, first paragraph, for lack of written description, and objected to the drawings as not showing every feature of the claimed invention, in part because the exhausts and the cover were not shown. *Id.* at 293-94. The examiner made similar rejections with respect to claims 32 and 40. *Id.* at 296-99.

In response to the § 112 rejection and the objection to the drawings, the applicant amended the drawings and added language to the specification defining each of the lids **111**, **121**, **211**, **221**, **311**, and **321** in FIGS. 1-3 as an “openable [] cover” and each of the smokestacks **112**, **122**, **212**, **222**, **312**, and **322** in FIGS. 1-3 as an “exhaust.” *See id.* at 342-43. The applicant made no amendment relating to the fourth cooking mode unit **324** depicted in Figure 3.

The applicant later argued in his appeal brief to the BPAI that claim 22 (issued as claim 1) was not rendered obvious over McLane in view of Cox because (1) “[i]t would not have been obvious to modify the teachings of McLane in view of the teachings of Cox because doing so would render McLane unsatisfactory for its intended purpose”; and (2) “[e]ven if McLane and Cox could be combined as suggested, the combination still does not teach or suggest ‘wherein the first cover includes at least one exhaust,’ and ‘wherein the second cover includes at least one exhaust,’ as recited in claim 22 in light of the prior art of record which teaches away from

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combining the features of claim 22.” *Id.* at 383, 387. With respect to his second argument, the applicant stated:

The Office suggests that combining the barbecue grill of McLane with the oven/smoker enclosures and chimneys described in Cox would render obvious “wherein the first cover includes at least one exhaust” and “wherein the second cover includes at least one exhaust,” as recited claim 22. Office Action, pp. 7-8. Assuming, for the sake of argument, that this combination is even possible (which it is not), **at best it would result in a barbecue grill with chimneys connected to exit ports on the fixed portions of the oven/smoker enclosures which are not openable (i.e., not covers)**. Thus, even if the references could be combined in the manner suggested in the Office Action, the combination still fails to teach “wherein the first cover includes at least one exhaust,” and “wherein the second cover includes at least one exhaust,” as recited in claim 22. In its rejection of claim 22, the Office acknowledges the fact that Cox does not disclose these features of claim 22.

*Id.* at 387 (emphasis added). As part of its second argument, the applicant also argued that the prior art of record, specifically Oliver, taught away from including exhausts on the openable covers. *Id.* at 388.

In a separate section of the appeal brief, the applicant argued for the patentability of claim 32 (issued as claim 10), stating:

Appellant respectfully submits that the combination of McLane and Cox fails to render obvious the features of claim 32 **for similar reasons to those discussed above with reference to claim 22**. Specifically, the cited references fail to render obvious the features of claim 32 at least because (1) the combination of the compact, portable barbecue grill having shallow, upwardly-open housings described in McLane with the oven/smoker enclosures and chimneys described in Cox would render McLane unsatisfactory for its intended purpose with regard to claim 32, and (2) **even if the references could be combined as suggested the combination of McLane and Cox fails to teach or suggest “wherein the first cover means...includes at least one exhaust” and “wherein the second cover means...includes at least one exhaust means,” as recited in claim 32, in light of Oliver which teaches away from combining the features of claim 32.**



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For at least the reasons presented herein, it would not have been obvious to combine the teachings of McLane with those of Cox, and the combination of McLane and Cox further does not teach or suggest all of the features of claim 32. Appellant respectfully requests that the Board reverse the rejection of claim 32.

*Id.* at 389-90 (emphasis added). Thereafter, the pending claims were allowed. In the Notice of Allowance, the examiner stated the reasons for allowance:

As regards the invention recited in independent claims 22, 32, and 40, the combination recited in the claim is novel and unobvious. Of particular interest is appellant's argument regarding the modification of McLane. Specifically, the arguments clearly establish that such modification would render McLane's invention unsatisfactory for its intended purpose. Appellant's arguments are further convincing regarding the teaching away by McLane which teaches away from the claimed invention and modifying references in providing independent covers for the grills that are required to be upwardly open and disposable. Yet another prior art reference Oliver (6,189,528 – cited on the PTO-892 form mailed 3/31/08) discloses a grill with dual chambers and independent covers, and even mentions that either gas or solid fuel may be utilized. Nevertheless, Oliver fails to disclose or make obvious multiple distinct fuels at one time among other limitations required by the claims. The prior art of record does not anticipate, nor make obvious, the claimed invention, alone or in combination therewith.

*Id.* at 413.

### **C. Products at Issue**

The accused products allegedly include multiple mode outdoor grills having at least two cooking units that are simultaneously operable to cook food using gas and solid fuels. The accused products, except for the GHP Grills, are listed in the final ID at pages 47-48.

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### II. ISSUES UNDER REVIEW

#### A. The ID's construction of "exhaust" and "exhaust means" in claims 10 and 16, and related findings on infringement of claims 10-16

##### 1. Claim Construction

Claim 10 recites "the first cover means . . . includes at least one **exhaust**" [hereinafter, "the first cover means clause"], JX-1 at 5:46-47 (emphasis added), and "the second cover means . . . includes at least one **exhaust means**" [hereinafter, "the second cover means clause"], *id.* at 5:53 (emphasis added). Claim 16 recites that "the configuration of the at least one **exhaust means** of the first cover means includes a configuration of at least two **exhaust means**." *Id.* at 6:22-24 (emphasis added).

The ID determined that the "exhaust" and "exhaust means" limitations in claims 10 and 16 should be afforded the same meaning as the "exhaust" limitations in claims 1 and 17. ID at 32-33. The ID rejected A&J's request to construe the "exhaust means" limitation of claim 10 as a means-plus-function limitation because it found that A&J failed to raise this argument in its pre-hearing brief and A&J failed to articulate any construction of "exhaust means" that was different from its proposed construction for the "exhaust" limitation. *Id.* at 32-33, n. 13. Accordingly, the ID construed all of the "exhaust" and "exhaust means" limitations in the asserted claims to mean "a passage in the cover through which smoke, waste gases and/or cooking vapors pass out of the cooking unit." *Id.* at 37.

The Commission determined to review the ID's construction of the "exhaust" and "exhaust means" limitations in claims 10 and 16 of the '712 patent, and related findings regarding infringement of those claims. Complainant A&J argued in its pre-hearing brief that "[b]ecause Claim 10 and its dependent claims are unquestionably written in means-plus-function

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format, they must be construed as provided in 35 U.S.C. § 112(f).” ComplPRHB<sup>3</sup> at 55.

Moreover, at the evidentiary hearing, A&J argued that “exhaust means” is a means-plus-function limitation, despite A&J now, before the Commission, abandoning its argument that “exhaust means” should be interpreted under § 112, ¶ 6.<sup>4</sup> Tr. at 363:15-18; ComplSub at 1-5. However, A&J failed to articulate any construction of “exhaust means” that is different than its proposed construction for the term “exhaust.” ComplPRHB at 48-49; *see* ID at 32-33 n.13 (citing ComplPHB<sup>5</sup> at 14-15, 17); Tr. at 29:1-6; ComplSub at 5.

At the outset, we recognize that all parties now argue, before the Commission, that the “exhaust” and “exhaust means” limitations in claim 10 should be construed in the same manner as the “exhaust” limitations in claims 1 and 17. ComplSub<sup>6</sup> at 4; ComplRSub<sup>7</sup> at 1-2; RespSub<sup>8</sup> at 10; *see* ID at 33. Even though the parties do not contest the ID’s construction of the “exhaust means” limitation in claims 10 and 16 to be identical to the “exhaust” limitations in claims 1 and 17, this does not relieve the Commission of its responsibility to interpret the claims as a matter of

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<sup>3</sup> Complainants A&J Manufacturing, LLC and A&J Manufacturing, Inc.’s Prehearing Statement & Brief (Jun. 20, 2014).

<sup>4</sup> Paragraph 6 of 35 U.S.C. § 112 was replaced with newly designated § 112(f) when § 4(c)(6) of the Leahy-Smith America Invents Act (“AIA”), Pub. L. No. 112-29, took effect on September 16, 2012. Because the patent application that led to the ’712 patent was filed before the effective date of the AIA, we apply the pre-AIA version of that section.

<sup>5</sup> Complainants A&J Manufacturing, LLC and A&J Manufacturing, Inc.’s Posthearing Brief (Jul. 31, 2014).

<sup>6</sup> Complainants’ Briefing on Commission Review of Final Initial Determination (Dec. 12, 2014).

<sup>7</sup> Complainants’ Reply to Respondents’ and Staff’s Briefing on Commission Review of Final Initial Determination (Dec. 19, 2014).

<sup>8</sup> Respondents’ Written Submission in Response to Commission’s Determination to Review-In-Part Final Initial Determination Finding a Violation of Section 337 (Dec. 12, 2014).

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law. *See Rodime PLC v. Seagate Tech., Inc.*, 174 F.3d 1294, 1302 (Fed. Cir. 1999) (stating that even though the appellant appeared to have conceded that the “positioning means” element invoked § 112, ¶ 6 and devoted its argument on appeal to the function and corresponding structure implicated by that limitation, that concession “does not relieve this court of its responsibility to interpret the claims as a matter of law”). To interpret the claims, the Commission must decide the subsidiary question of whether the claim term “exhaust means” invokes § 112, ¶ 6. *See id.*; *Robert Bosch, LLC v. Snap-On Inc.*, 769 F.3d 1094, 1098 (Fed. Cir. 2014) (“Determining whether certain claim language invokes § 112, ¶ 6 ‘is an exercise in claim construction and is therefore a question of law.’”).

Having considered all of the parties’ submissions and the record evidence, the Commission has determined that § 112, ¶ 6 applies to the “exhaust” and “exhaust means” limitations in claims 10 and 16 because the intrinsic evidence shows that the patentee clearly intended for them to be construed as means-plus-function limitations. We address first the “exhaust means” limitations in claims 10 and 16, before addressing the “exhaust” limitation in claim 10.

### **a. “exhaust means” in claims 10 and 16**

The use of the word “means” results in a presumption that a claim term is a means-plus-function limitation. *See Robert Bosch, LLC*, 769 F.3d at 1097. The presumption may be rebutted if the claim itself recites sufficient structure for performing the claimed function. *See Cole v. Kimberly–Clark Corp.*, 102 F.3d 524, 531 (Fed. Cir. 1996). “The question is whether the claim language names particular structures or, instead, refers only to a general category of whatever may perform specified functions.” *Robert Bosch, LLC*, 769 F.3d at 1099 (citing *Laitram Corp. v. Rexnord, Inc.*, 939 F.2d 1533, 1536 (Fed. Cir. 1991)). When a term only

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indicates what the recited means “does, not what it *is* structurally,” the claim is properly construed under § 112, ¶ 6. *Laitram Corp.*, 939 F.2d at 1536. For example, in *Biomedino, LLC v. Waters Techs. Corp.*, 490 F.3d 946 (Fed. Cir. 2007), the Court held that the term “control” in the phrase “control means for automatically operating said valving” failed to convey sufficient structure to rebut the presumption that means-plus-function claiming applied because “‘control’ is simply an adjective describing ‘means’: it is not a structure or material capable of performing the identified function.” *Id.* at 949-50.

In determining whether § 112, ¶ 6 applies and whether the presumption has been rebutted, we rely primarily on the claim language itself, but also rely on other intrinsic evidence, such as the prosecution history. *See Rodime PLC*, 174 F.3d at 1302 (citing *York Prods., Inc. v. Central Tractor*, 99 F.3d 1568, 1574 (Fed. Cir. 1996)); *Cole*, 102 F.3d at 531 (“We decide on an element-by-element basis, based upon the patent and its prosecution history, whether § 112, ¶ 6 applies.”); *Kreepy Krauly U.S.A., Inc. v. Sta-Rite Indus., Inc.*, 1998 WL 196750, at \*3 (Fed. Cir. 1998) (unpublished opinion) (concluding that “[n]othing in [the claim at issue] or the prosecution history suggests that the claim language at issue was intended to be construed in means-plus-function form”); *Greenberg v. Ethicon Endo-Surgery, Inc.*, 91 F.3d 1580, 1584 (Fed. Cir. 1996) (considering prosecution history to determine whether means-plus-function applies).

Looking first at the claim language itself, we find that the term “exhaust means” fails to convey sufficient structure to rebut the presumption that means-plus-function claiming applies because “exhaust” is simply an adjective describing “means”—it is not a structure or material capable of performing the claimed function. *See infra* at section II.A.1.c. A&J argues in its submission that, in every instance of the term “means for” in claim 10, there is explicit description of the function which the means perform. ComplSub at 3. By contrast, the “means

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for” signal is not used with the “exhaust” and “exhaust means” limitations, nor does the claim language include *further* description of a function performed. *See id.* at 4. Therefore, A&J appears to argue, and we agree, that the term “exhaust” indicates what the claim element *does*, not what it *is* structurally. *See Laitram Corp.*, 939 F.2d at 1536.

The Commission’s construction of the term “exhaust” in claims 1 and 17 does not in and of itself rebut the presumption that “exhaust means” in claims 10 and 16 invokes § 112, ¶ 6. As the Federal Circuit held in *Laitram Corp.*, a patentee cannot escape the express mandate of § 112, ¶ 6 by the presence of other claims specifically claiming the disclosed structure which underlies the means clause or an equivalent of that structure. 939 F.2d at 1538. To find otherwise would improperly conflate construction of a means-plus-function limitation under § 112, ¶ 6 with the ordinary rules of construction applicable to other limitations. The distinction is important because only means-plus-function limitations will be narrowly construed under § 112, ¶ 6 as limited to the “structure, material, or acts described in the specification and equivalents thereof.” 35 U.S.C. § 112, ¶ 6; *Al-Site Corp. v. VSI Int’l, Inc.*, 174 F.3d 1308, 1320 (Fed. Cir. 1999) (stating that in comparison to claims that do not contain means-plus-function limitations, claims subject to § 112, ¶ 6 are generally viewed to be more narrow in scope). A claim’s remaining limitations will be subject to ordinary rules of construction and the broader application of the doctrine of equivalents. *See General Elec. Co. v. Nintendo Co.*, 179 F.3d 1350, 1360 (Fed. Cir. 1999). Here, the patentee drafted one set of claims using the word “exhaust” as a noun to denote structure, as in claims 1 and 17, and another set of claims using the words “exhaust means” where “exhaust” is used as an adjective, as in claims 10 and 16. *See Tr.* (Thuma) at 342:17-343:2 (testifying that the word “exhaust” can be used as an adjective modifying a noun or as a noun implying some sort of structure). Accordingly, the Commission’s

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construction of “exhaust” in claims 1 and 17 does not imply that the presumption that the “exhaust means” limitations in claims 10 and 16 invoke § 112, ¶ 6 has been rebutted.

Any doubt as to the proper construction of “exhaust means” in claims 10 and 16 is resolved by the prosecution history, which makes clear that the patentee deliberately chose to draft the “exhaust means” as a mean-plus-function limitation, and the examiner understood it as such. Specifically, in its August 25, 2011 amendment, the patentee requested that the examiner “interpret claims 32-37 [issued as claims 10-15] in accordance with 35 U.S.C. § 112, ¶ 6,” and the examiner consistently did so. *See* JX-7 at 266-67, 299-301. The patentee argued that the specification provided examples of structure corresponding to each of the recited means in claims 10 and 16. *Id.* at 267. In particular, the patentee identified two smokestacks on the first cooking mode unit **110** in Fig. 1 and two smokestacks on the first cooking mode unit **210** in Fig. 2 as examples of structure corresponding to the recited “at least one exhaust means” of the first cover. *Id.* In addition, the patentee identified a smokestack on the second cooking mode unit **120** in Fig. 1 and a smokestack on the second cooking mode unit **220** in Fig. 2 as examples of structure corresponding to the recited “at least one exhaust means” of the second cover. *Id.*

In the face of this explicit direction provided by the intrinsic evidence, the only arguments offered to support the contention that the presumption has been rebutted rely essentially on expert testimony. In some circumstances, expert testimony may be probative of whether a claim term itself corresponds to sufficiently definite structure. *Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp.*, 498 F. App’x 986, 990 (Fed. Cir. 2013) reh’g en banc granted, opinion reinstated by *Lighting Ballast Control LLC v. Philips Electronics N. Am. Corp.*, 744 F.3d 1272 (Fed. Cir. 2014) (en banc). Here, the IA refers to Dr. Stevick’s testimony that “a person of ordinary skill in the art would find that the term “exhaust means” recites

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sufficiently definite structure – an exhaust – such that the term should not be construed as a means-plus-function limitation.” IASub<sup>9</sup> at 2 (quoting RX-190C at Q42). We find Dr. Stevick’s testimony conclusory, unhelpful, and directly in conflict with the intrinsic evidence. *See Robert Bosch, LLC*, 769 F.3d at 1101 (finding expert’s statements regarding the structural meanings of claim terms as both conclusory and unhelpful); *Lighting World, Inc. v. Birchwood Lighting, Inc.*, 382 F.3d 1354, 1358 (Fed. Cir. 2004) (explaining that even when expert evidence has been offered with respect to the issue of claim construction, a court must determine whether that evidence comports with the intrinsic evidence in the case). We, thus, give no weight to Dr. Stevick’s testimony in light of the explicit prosecution history. *See Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1584 (Fed. Cir. 1996) (“[E]ven if the judge permissibly decided to hear all the possible evidence before construing the claim, the expert testimony, which was inconsistent with the specification and file history, should have been accorded no weight.”).

Moreover, there is no evidence that “exhaust” was used synonymously with a defined class of structures at the time the application was filed, unlike the testimony considered in *Rembrandt Data Techs., LP v. AOL*, 641 F.3d 1331 (Fed. Cir. 2001). In *Rembrandt*, the Court held that the terms “fractional rate encoding means” and “trellis encoding means” were not governed by § 112, ¶ 6 because expert testimony confirmed that they were commonly used in publications to identify defined algorithms known in the art. *Id.* at 1340-41. Here, the parties’ primary dispute with respect to the “exhaust” limitations was “what structure, if any, the term requires.” *Id.* at 33. Before the ALJ and the Commission, the parties argued extensively as to the type of structures covered by the claimed “exhaust,” but did not agree on a specific defined

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<sup>9</sup> Brief of the Office of Unfair Import Investigations on the Issues Under Review and on Remedy, the Public Interest, and Bonding (Dec. 12, 2014).



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group. For example, one expert testified that a person of ordinary skill in the art would interpret “exhaust” to include “channels, ducts, vents, pipes, louvers, dampers, or smokestacks, or any other structure that defines an opening or passage to allow smoke, vapor and/or gas to escape the cooking unit.” *Id.* at 34 (citing CX-891C at Q19). However, “merely listing examples of possible structures is insufficient to avoid invocation of § 112, ¶ 6.” *Robert Bosch, LLC*, 769 F.3d at 1101. “Indeed, means-plus-function language that defines a category in functional terms will typically cover examples of structures that fall within it . . . [t]his is not a basis for distinguishing structural language from § 112, ¶ 6 language.” *Id.*

To summarize, the Commission finds that § 112, ¶ 6 presumptively applies to the “exhaust means” limitations in claims 10 and 16 because those limitations employ traditional “means” language and the prosecution history explicitly discloses that the patentee and the examiner understood “exhaust means” to be construed under § 112, ¶ 6. The record evidence does not overcome the presumption that “exhaust means” is a means-plus-function limitation since the claim language does not link the means with any further function or structure, other than “exhaust.” Accordingly, the Commission finds that the “exhaust means” limitations in claims 10 and 16 are governed by § 112, ¶ 6.<sup>10</sup>

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<sup>10</sup> Commissioner Schmidlein agrees with the determination that 35 U.S.C. § 112, ¶ 6 governs the construction of the claim limitation “exhaust means” in claims 10 and 16. She reaches this determination based on the prosecution history. She does not, however, join the Commission to the extent that it determines that § 112, ¶ 6 governs on the basis of the claim language by itself.

The use of the word “means” in a claim triggers a rebuttable presumption that § 112, ¶ 6 applies. *TecSec, Inv. v. Int’l Bus. Mach., Corp.*, 731 F.3d 1336, 1347 (Fed. Cir. 2013). The Federal Circuit has instructed that the intrinsic evidence of the patent should be considered before making a determination as to whether § 112, ¶ 6 applies. *See Inventio AG v. Thyssenkrupp Elevator Ams. Corp.*, 649 F.3d 1350, 1356 (Fed. Cir. 2011). In this case, as noted in the Commission’s opinion, the patentee unmistakably stated in the prosecution history that “exhaust means” in claims 10 and 16 should be governed by § 112, ¶ 6. Therefore, in Commissioner Schmidlein’s view, given that the prosecution history is unequivocal on this

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### b. “exhaust” in claim 10

The Commission finds that it is also appropriate to interpret the “exhaust” limitation in claim 10 under § 112, ¶ 6 because the claim language indicates that the patentee inadvertently omitted the word “means” after the word “exhaust” in the first cover means clause. Any doubt about the claim’s drafting error and the patentee’s intent is resolved by the prosecution history.

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point, the prosecution history dictates that “exhaust means” should be treated as a means-plus-function limitation. *See Springs Window Fashions LP v. Novo Indus., LP*, 323 F.3d 989, 995 (Fed. Cir. 2003) (“The public notice function of a patent and its prosecution history requires that a patentee be held to what he declares during the prosecution of his patent.”).

The Commission explains that the word “exhaust” in the limitation “exhaust means” in claims 10 and 16 is an adjective and in such a context fails to convey sufficient structure to one of ordinary skill in the art. The Commission further explains that the word “exhaust” in claims 1 and 17 denotes structure on the basis that it is used there as a noun. Commissioner Schmidtlein does not agree that simply adding “means” to the word “exhaust” changes whether sufficient structure is conveyed to one of ordinary skill in the art. On the contrary, determining whether the limitation “exhaust means” conveys sufficient structure turns on the question of whether the word “exhaust” by itself conveys sufficient structure. *See, e.g., TecSec, Inv.*, 731 F.3d at 1347 (holding that the limitation “system memory means” does not invoke § 112, ¶ 6 because the words “system memory” by themselves convey sufficient structure). In this case, the word “exhaust” has already been construed by the Commission in claims 1 and 17. *See Rexnord Corp. v. Laitram Corp.*, 274 F.3d 1336, 1342 (Fed. Cir. 2001) (“[A] claim term should be construed consistently with its appearance in other places in the same claim or in other claims of the same patent.”). When the Commission construed the word “exhaust” in claims 1 and 17, the Commission did not apply § 112, ¶ 6. In not applying § 112, ¶ 6, the Commission effectively found that the word “exhaust” conveys sufficient structure. *See Lighting World, Inc.*, 382 F.3d at 1358 (explaining that the presumption that § 112, ¶ 6 does not apply when the word “means” is not used can be overcome by showing that “the claim term fails to recite sufficiently definite structure”). There is nothing on the face of claims 10 and 16 to suggest that the word “exhaust” in the limitation “exhaust means” should be construed differently than the word “exhaust” in claims 1 and 17. It is only when the prosecution history is consulted that the patentee’s intention becomes clear. In fact, in this case, the patentee’s intention is undeniably clear. The analysis may be different in a case where the prosecution history is muddled or not so clear.

Accordingly, in finding that the presumption has not been overcome, Commissioner Schmidtlein relies on the prosecution history for construing “exhaust means” in claims 10 and 16 and not the claim language standing alone. *See TecSec, Inv.*, 731 F.3d at 1345-46 (explaining that the patentee’s statements in the prosecution history were sufficient to overcome construction suggested by the claim language).

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A court can correct a patent if “(1) the correction is not subject to reasonable debate based on consideration of the claim language and the specification *and* (2) the prosecution history does not suggest a different interpretation of the claims.” *Group One Ltd. v. Hallmark Cards, Inc.*, 407 F.3d 1297, 1303 (Fed. Cir. 2005) (quoting *Novo Indus., L.P. v. Micro Molds Corp.*, 350 F.3d 1348, 1357 (Fed. Cir. 2003)). The error in claim 10 is apparent on the face of the patent because claim 16, which depends from claim 10, recites “**exhaust means** of the first cover means.” JX-1 at 6:22-24 (emphasis added). Without this antecedent reference to the “exhaust [means]” of the first cover means of claim 10, claim 16 would be found invalid for indefiniteness. *See Hoffer v. Microsoft Corp.*, 405 F.3d 1326, 1331 (Fed. Cir. 2005) (stating that absent evidence of culpability or intent to deceive, a patent claim should not be invalidated based on an obvious clerical error). Here, even A&J concedes that “means” was inadvertently omitted during prosecution. ComplSub at 2-3.

Indeed, the prosecution history supports our finding that the patentee inadvertently struck out the word “means” from the first cover means clause in claim 10. *Id.* Specifically, in response to the May 25, 2011 office action, the patentee on August 25, 2011 amended claim 32 (issued as claim 10) to recite “the first cover means . . . includes at least one **exhaust means**” and “the second cover means . . . includes at least one **exhaust means.**” JX-7 at 260-61 (emphasis added). In the same amendment, the patentee added new claim 44 (issued as claim 16), which depends from claim 32, to recite that the “**exhaust means** of the first cover means includes a configuration of at least two **exhaust means.**” *Id.* at 263 (emphasis added). Subsequently, the patentee on January 31, 2012 mistakenly struck out the word “means” from the first cover means clause but not from the second cover means clause, as shown below.

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32. (Currently amended) A barbecue grill having multiple means for cooking, comprising:  
a first means for cooking food using gas cooking fuel, the first means for cooking including at least one first grill and an openable first cover means for selectively covering the first grill, wherein the first cover means is attached to the first means for cooking and includes at least one exhaust means having a configuration based on the type of fuel used in the first cooking means;  
a second means for cooking food using solid cooking fuel, the second means for cooking including at least one second grill and an openable second cover means for selectively covering the second grill, wherein the second cover means is attached to the second means for cooking and includes at least one exhaust means having a configuration based on the type of fuel used in the first cooking means; and  
a structure means for supporting the first means for cooking and the second means for cooking;  
wherein the first means for cooking and the second means for cooking are simultaneously operable to cook food and the first grill and second grill are selectively and independently coverable.

*Id.* at 345-46. The patentee did not amend claim 44 (issued as claim 16). *Id.* at 348. In view of the intrinsic evidence, we reject the Remaining Respondents' argument that the "exhaust means" in claim 16 should be interpreted as referring to the "exhaust" of the first cover means in claim 10. RespSub at 10-11.

The prosecution history does not suggest a different interpretation of the "exhaust" limitation in claim 10. Just as the Supreme Court found in *Essex*, the Commission finds that the omission of the word "means" from the first instance of "exhaust" in claim 10 was inadvertent and unnoticed. *See I.T.S. Rubber Co. v. Essex Rubber Co.*, 272 U.S. 429, 441-42 (1926) (affirming the district court's interpretation of the words "upper edge" to mean "[rear] upper edge" because the omission of the word "rear" was inadvertent and unnoticed in view of the intrinsic evidence). The patentee called no attention to the omission and did not differentiate "exhaust" and "exhaust means" in claim 10 in an effort to avoid prior art. *See id.* As noted above, complainant A&J agrees that the omission is a drafting error. The Commission thus finds

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that “exhaust” should be construed as the same as “exhaust means” and have the same effect as if “means” had been included. *See id.*

Furthermore, if by the omission of the word “means,” claim 10 should otherwise be regarded as having the same scope as the plain and ordinary meaning of “exhaust” in claims 1 and 17, thereby making the scope of claim 10 broader than what the patentee intended and what the examiner understood, such a construction would conflict with the patentee’s express intent to limit “exhaust [means]” of the first cover means to the corresponding structures disclosed in the ’712 patent. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1317 (Fed. Cir. 2005) (en banc) (stating that “the prosecution history can inform the meaning of claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be”).

### **c. Construction of the “exhaust means” and “exhaust” limitations in claims 10 and 16 under 35 U.S.C. § 112, ¶ 6**

Because we have concluded that both the “exhaust means” and “exhaust” limitations in claims 10 and 16 invoke § 112, ¶ 6, we now must construe those limitations by identifying the claimed function and the corresponding structure described in the specification that performs the function. *Applied Med. Res. Corp. v. U.S. Surgical Corp.*, 448 F.3d 1324, 1332 (Fed. Cir. 2006). The IA and the Remaining Respondents assert that the function is “carrying smoke outside of the [first/second] means for cooking.” RespSub at 12; IASub at 3. A&J asserts that the function should be “to permit smoke, waste gases and/or cooking vapors to pass out of each respective means for cooking food.” ComplSub at 6. As stated above, the ID construed “exhaust” in claims 1 and 17 to mean “a passage in the cover through which smoke, waste gases, and/or cooking vapors pass out of the cooking unit.” ID at 37. The Commission adopts A&J’s proposed function for “exhaust means” – “to permit smoke, waste and/or cooking vapors to pass

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out of each respective means for cooking food,” which is consistent with the ID’s construction of “exhaust” in claims 1 and 17 and the expert testimony regarding a person skilled in the art’s understanding of the function of “exhaust” in the context of the patent claims and specification. *See id.* at 34-37.

All parties agree that the corresponding structure described in the specification that performs the function “to permit smoke, waste gases and/or cooking vapors to pass out of each respective means for cooking food” is met by the smokestacks shown in Figs. 1-3 of the ’712 patent. Namely, elements **112** (Fig. 1), **212** (Fig. 2), and **312** (Fig. 3) are the structures corresponding to the “exhaust [means]” included with the first cover means in claims 10 and 16, and elements **122** (Fig. 1), **222** (Fig. 2), and **322** (Fig. 3) are the structures corresponding to the “exhaust means” included with the second cover means in claim 10. JX-1 at 2:32-34, 2:36-38, 3:4-7, 3:36-39; JX-7 at 267; RespSub at 12; IASub at 3-4; ComplSub at 6. As noted above, the patentee identified these structures as corresponding to the exhaust means in the prosecution history. JX-7 at 267.

### 2. Infringement

“Literal infringement of a § 112, ¶ 6 limitation requires that the relevant structure in the accused product perform the identical function recited in the claim and be identical or equivalent to the corresponding structure in the specification.” *Odetics, Inc. v. Storage Tech. Corp.*, 185 F.3d 1259, 1267 (Fed. Cir. 1999). Such a limitation “is literally met by structure, materials, or acts in the accused device that perform the claimed function in substantially the same way to achieve substantially the same result.” *Id.* at 1268.

As discussed above, complainant A&J argued before the ALJ that “exhaust means” should be construed under § 112, ¶ 6. *Supra* at 15-16. When claims 10 and 16 are properly

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construed, the Commission finds that the record evidence shows that Brinkmann's 3821 grill and the Academy/Huige grills satisfy the "exhaust" and "exhaust means" limitations in claims 10 and 16, and that Brinkmann's 3800 & 3802 grills, the OLP/Kingsun Redesigned Grills, the OLP/Kingsun Original Grills, and the Char-Broil/Fudeer grills do not satisfy the "exhaust" and "exhaust means" limitations in claims 10 and 16.

A&J argues that if the "exhaust" and "exhaust means" limitations in claims 10 and 16 are construed as means-plus-function limitations, record evidence supports a finding that the accused grills include structures identical or equivalent to the smokestacks disclosed in the '712 patent. *See* ComplSub at 7-11. A&J's expert, Mr. Thuma, acknowledged that "[c]laim 10 is a means-plus-function claim" and stated that he understood that claim 10 "is interpreted to cover structures shown in the patent that perform the functions stated." CX-890C at Q34. However, the evidence of infringement that A&J cites is little more than its expert's conclusory testimony that "[a]ll of these means-plus-function limitations are met by elements" of the accused products. *Id.* at Q34 (Brinkmann 3800), Q74 (OLP/Kingsun Original Grills), Q45 (Char-Broil 463724512 grill).

Based on the record evidence, the Commission finds that Brinkmann's 3800 and 3802 grills,<sup>11</sup> the OLP/Kingsun Original Grills, and the Char-Broil 463724512 grill do not satisfy the "exhaust" and "exhaust means" limitations in claims 10-16 because A&J has put forth no evidence showing that the alleged exhaust means in these accused grills are identical to or structurally equivalent to the smokestacks described in the '712 patent. Specifically, A&J cites to no evidence of record as to whether the lateral vents in Brinkmann's 3800 & 3802 grills and

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<sup>11</sup> The parties have stipulated that Brinkmann's 3802 grill is representative of Brinkmann's 3800 grill. ID at 51 (citing CX-223).

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the OLP/Kingsun Original Grills are identical to or structural equivalents of the smokestacks disclosed in the '712 patent. Nor does A&J cite to any evidence of record as to whether the channel opening and butterfly vents in the Char-Broil 463724512 grill are identical to or structural equivalents of the smokestacks disclosed in the '712 patent. Indeed, A&J's theory of infringement of claims 10-16 is solely based on the plain and ordinary meaning of "exhaust," even though 112, ¶ 6 limits means-plus-function limitations to the structures set forth in the patent specification and equivalents thereof. *See* ID at 32-33 n.13; *Applied Med. Res. Corp.*, 448 F.3d at 1332. By failing to present evidence of infringement of claims 10-16 based on a proper construction of "exhaust means" under § 112, ¶ 6, A&J has failed to meet its burden of proof of infringement with respect to these accused grills.

The parties appear to agree that construing the "exhaust" and "exhaust means" limitations in claims 10 and 16 under § 112, ¶ 6 does not change the ID's finding of infringement as to Brinkmann's 3821 grill and the Academy/Huige grills because both their gas grill covers and their charcoal grill covers include smokestacks, and all other limitations of these claims are met. *See* ComplSub at 7-8 (citing CDX-47 at 11; CX-19 at 34; CX-890C at 13; RX-208 at 2), 9-10 (citing RX-369, RX-370, RX-371, CX-110); IASub at 4-5. The Commission's construction of claims 10 and 16 also does not change the ID's finding of non-infringement as to the OLP/Kingsun Redesigned Grills and the Char-Broil 12201767, 463724514, and 14201767 grills because those grills were found to have exhausts on the fixed portions of the grills. *See* ID at 56-57, 59. Further, the Commission's construction of claims 10 and 16 does not change the ID's finding of non-infringement as to the Char-Broil 463724512 grill because that grill was found to have a gap located between the cover and the fixed portion of the gas grill, as discussed below,



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and A&J submitted no evidence that this gap is identical to or the structural equivalent of the smokestacks disclosed in the '712 patent. *Id.* at 56.

A&J argues that Brinkmann's 3820 grill should be found to infringe because it also employs smokestacks on both covers. ComplSub at 7-8. However, the ID found no violation as to this grill because A&J offered no evidence that it was imported, sold, or offered for sale at any time during the term of the '712 patent. ID at 54; IARSub at 3 n.1. As A&J fails to identify any evidence of importation or sale of these products, the Commission affirms the ID's finding.

In view of the above, the Commission affirms the ID's finding that Brinkmann's 3820 grill does not infringe claims 10-16. The Commission affirms, with modified reasoning, the ID's finding that the Char-Broil/Fudeer grills and the OLP/Kingsun Redesigned Grills do not infringe any claims of the '712 patent. The Commission also affirms, with modified reasoning, the ID's finding that Brinkmann's 3821 grill infringes claims 10, 11, 13, 15, and 16, and that the Academy/Huige grills infringe claims 10-13, 15, and 16 of the '712 patent. In addition, the Commission reverses the ID's finding that Brinkmann's 3800 and 3802 grills infringe claims 10, 13, 15, and 16, and the ID's finding that the OLP/Kingsun Original Grills infringe claims 10-16 of the '712 patent.

### **B. The ID's finding regarding infringement by the Char-Broil 463724512 grill**

All of the asserted claims of the '712 patent require that a "first cover" or "first cover means" "includes at least one exhaust" or "exhaust means." The ALJ's summary determination ("SD") construed the term "includes" to require that the "at least one exhaust" be located "on" the openable cover. *See* Order No. 33 at 9 (finding that the Char-Broil 12201767 grill does not infringe the asserted claims because it "provides exhausts on the fixed portions of the grill as opposed to the openable covers"). The SD also found that the patentee's narrowing amendments made during prosecution estopped A&J from asserting infringement under the doctrine of

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equivalents. *Id.* The Commission subsequently adopted the SD's construction of "includes." *See, e.g.,* Comm'n SD Op. at 22 ("[T]he Oklahoma Joe Longhorn Model 12201767 grill does not have exhausts on the 'openable [] covers.'"), 24 ("Each of the redesigned OLP grills do not include an exhaust or smokestack on the openable covers of at least one of the cooking units.").

The ALJ, applying the Commission's construction of "includes," analyzed all of the record evidence and weighed the credibility of the witnesses at the evidentiary hearing before determining that the evidence shows that the Char-Broil 463724512 grill does not infringe because it "does not have an exhaust on its openable cover," as the asserted claims require. ID at 56 (citing RX-2178C (Stevick RWS) at 105-107; RX-606C.0005). Specifically, the ID found Dr. Stevick's testimony that "a person of ordinary skill in the art would understand the gap or space to be located adjacent to and below . . . the openable cover and not *on* the openable cover" more credible than the testimony of A&J's expert, Mr. Thuma. *See id.* (citing CX-890C (Thuma WS) at Q41-45); RX-2178C (Stevick RWS) at Q105. The ID also found that Mr. Thuma's testimony confirmed the conclusion that the alleged exhaust is below the openable cover, and not on the openable cover. ID at 56 (citing Tr. (Thuma) at 341). On review, the Commission finds no error, much less clear error, with these findings.

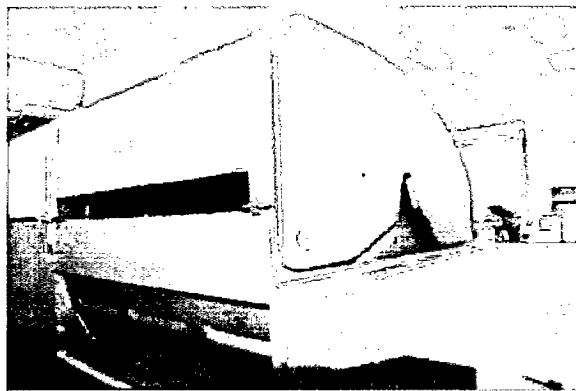
Indeed, the undisputed record evidence with respect to the Char-Broil 463724512 grill is as follows:

- The alleged exhaust on the gas grill cover is the "space there between the openable lid and the grill body." Tr. (Thuma) at 341:3-8 (emphasis added); *see also* Tr. (Stevick) at 991:23-24 ("an opening that's between the body and the lid"); RX-2178C at Q105 (testifying that "a person of ordinary skill in the art would understand the gap or space to be located adjacent to and below . . . the openable cover and not *on* the openable cover"); ID at 56, 62; Tr. (Gafford) at 797:1-5 (testifying that the space is the "gap between the firebox and the lid"); RX-587C.0019 (Gafford) (same).

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- A fold is machined into the gas grill cover to help keep rain from dripping down inside the firebox. Tr. (Gafford) at 797:21-798:4; *see also* Tr. (Thuma) at 361:13-15 (“a rain edge to keep rain out from . . . going inside the actual grill itself”).
- The bottom edge of the space is “the top of the body of the grill” and “the top edge of the body of the grill remains stationary” and “doesn’t move.” Tr. (Thuma) at 348:2-6, 358:9-18, 359:1-2, 13-14; *see also* Tr. (Stevick) at 992:4-9 (“The bottom edge of this opening is part of the enclosure or the body.”); Tr. (Gafford) at 797:6-9 (testifying that “the firebox is all the part that doesn’t move” and “[t]he lid is the part that moves”).

The photograph below shows the back side of the gas grill of the Char-Broil 463724512 grill to which this testimony refers.



(RX-606C.0005)

Based on the undisputed record evidence, we affirm the ID’s finding that the space between the lid and the grill body of the Char-Broil 463724512 grill does not satisfy the “openable [] cover... includes at least one exhaust” limitations. *See* RX-0606C; RX-2178C (Stevick RWS) at Q97-107; Tr. (Thuma) at 341:3-8; RX-0411.0023.

In response to the Commission’s question, Respondents contend that it would be procedurally improper and prejudicial for the Commission to adopt as part of the construction of “includes” the concept that an exhaust may be “on” but not “wholly within” the cover because that question was never raised before the ALJ and no party introduced evidence on this issue. RespSub at 17. As stated in the Commission’s notice, the “Commission is not changing its

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interpretation of the claim term ‘includes,’ which requires that an ‘exhaust’ be located *on* the ‘openable [] cover.’” 79 *Fed. Reg.* 72701 (Dec. 8, 2014). The Commission agrees that any alteration of its construction of “includes” (whether in claim construction or in application of the claim term) to include any fixed portion of the grill would run contrary to the law of the case and the totality of the record evidence that was before the ALJ.

We also agree with the Remaining Respondents that a construction of “includes” that allows any fixed portion of the grill to be a part of the “exhaust” or “exhaust means” conflicts with the Commission’s constructions of “openable [] cover” and “openable [] cover means.” The Commission construed “openable [] cover” in claims 1 and 17 to mean “a cover that *excludes any portion* of the grill that is not openable (*i.e.*, fixed)” after finding that the patentee during prosecution disclaimed from the scope of “openable [] cover” any fixed portion of the grill. Comm’n SD Op. at 11-12 (emphasis added). The Commission adopted the ID’s construction of “openable [] cover means” to exclude any portion of the grill enclosure that is not openable (*i.e.*, fixed). ID at 38. The undisputed evidence shows that the gas grill of the Char-Broil 463724512 grill has an opening that is surrounded on the top and sides by the openable cover and the bottom by the grill body. *See supra* at 31-32. Such an opening is not sufficient to satisfy the “includes” limitation because the undisputed evidence shows that the bottom edge of the opening is part of the fixed portion of the grill. *Id.* A contrary finding would be inconsistent with the Commission’s constructions of “openable [] cover” and “openable [] cover means” to exclude any fixed portion of the grill.

In view of the above, the Commission has determined to affirm, with modified reasoning, the ID’s finding that the Char-Broil 463724512 grill does not infringe any claims of the ’712

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patent because it does not satisfy the “includes at least one exhaust” and the “includes at least one exhaust means” limitations.<sup>12</sup>

### C. The ID’s findings regarding infringement of claims 1, 4, and 6-8 by the GHP Grills

The ID found that the GHP Grills should not be subject to an exclusion order in light of the settlement and license agreement between A&J and GHP.<sup>13</sup> ID at 62. Nevertheless, the ID

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<sup>12</sup> Commissioner Schmidlein disagrees with the determination that the Char-Broil 463724512 grill has not been shown to infringe claims 1, 2, and 4-8 of the ’712 patent.

The sole issue presented on infringement for the Char-Broil 463724512 grill is whether the grill satisfies the “includes at least one exhaust” limitation for the claimed “first cover.” The word “exhaust” in claims 1 and 17 has been construed to require “a passage *in* the cover” through which smoke, waste gases, and/or cooking vapors pass out of the cooking unit. *See* ID at 37; 79 *Fed. Reg.* 72700-02 (Dec. 8, 2014); 19 C.F.R. § 210.42(h)(2). Additionally, the Commission has previously determined in this investigation that an exhaust located *wholly within the fixed part* of the grill was not “on” the cover and therefore did not infringe. *See* Comm’n SD Op. at 22, 24. Consistent with these prior determinations, she finds that the Char-Broil 463724512 gas grill’s openable cover “includes” an exhaust.

A&J’s expert, Mr. Thuma, testified that the Char-Broil 463724512 grill has a large channel exhaust “on” the cover of the gas unit. *See* CX-0890C (Thuma WS) at Q43. Mr. Thuma further testified that the gas grill cover surrounds the exhaust passage on three sides such that the exhaust passage/structure extends a height measured at 1 3/8 units into the cover. *See* Tr. (Thuma) at 347:15-16; 358:3-8. Finally, Mr. Thuma’s testimony, which appears to be uncontested, shows that when the cover of the gas grill is opened, the exhaust structure changes position and moves along with the cover. *See* Tr. (Thuma) at 359:1-5; 370:22-371:13. To Commissioner Schmidlein, this is persuasive evidence that the openable cover “includes” an exhaust and that the exhaust is “on” as well as “in” the openable cover and not on any part of the fixed portion of the grill.

Finally, Commissioner Schmidlein’s own examination of the example of the grill introduced into evidence confirms that the exhaust structure is “on” and “in” the openable cover. *See Centricut, LLC v. Esab Group, Inc.*, 390 F.3d 1361, 1369 (Fed. Cir. 2004) (explaining that in “many patent cases expert testimony [on infringement] will not be necessary because the technology will be easily understandable without the need for expert explanatory testimony”). Indeed, in RX-606C and RPX-0023 (the physical example of the Char-Broil 463724512 grill introduced into evidence) the exhaust structure is clearly observable as “on” or “in” the openable cover of the grill.

Accordingly, in Commissioner Schmidlein’s view, the record evidence does not support the ID’s determination that the Char-Broil 463724512 grill does not infringe the ’712 patent. The expert testimony in conjunction with her observations as a fact-finder lead her to conclude that A&J satisfied its burden in showing that the Char-Broil 463724512 gas grill’s openable cover “includes” an exhaust. She would therefore find that the grill infringes claims 1, 2, and 4-8 of the ’712 patent.

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determined that both grills “do not infringe any asserted claim because they lack the claimed ‘exhaust’ or ‘exhaust means’ on their openable covers, as the claims require.” *Id.* In making this finding, the ID cited only record evidence showing that a channel opening in the DGB730SNB-D grill is below the openable cover, and not on the openable cover. *Id.* (citing RX-411.0023).

As noted above, GHP was terminated from this investigation on August 25, 2014, based on a settlement agreement, license, and consent order. *Supra* at 7, n.2. The patent license agreement grants GHP “a non-exclusive, non-transferable license, during the term of this Agreement, to make, have made by others, use, sell, distribute, offer to sell, import and have imported by others Licensed Products,” up to an annual maximum number of units each calendar year. Joint Motion to Terminate Investigation as to GHP Group, Inc. Based on Settlement Agreement and Consent Order and Motion to Stay Investigation as to GHP, Ex. H at 1. The license agreement includes the GHP Grills as Licensed Products. Accordingly, GHP is authorized “to make, have made by others, use, sell, distribute, offer to sell, import and have imported by others” the DGB730SNB-D and DGJ810CSB-D grills under the terms of the patent license.

A&J argues that respondent Keesung, the manufacturer of the DGB730SNB-D grill, was not a party to its agreement with GHP and, therefore, it has no assurance that Keesung cannot or will not begin selling the DGB730SNB-D grill for importation through another importer or distributor that is not authorized under the GHP license agreement. ComplRSUB at 21. Keesung has been found in default pursuant to section 337(g)(1) and 19 C.F.R. § 210.16. Order No. 16 (Dec. 20, 2013). Under Rule 210.16(c), the “facts alleged in the complaint will be presumed to be true with respect to the defaulting respondent.” 19 C.F.R. § 210.16(c). The complaint alleges

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<sup>13</sup> The DGB730SNB-D grill is manufactured by defaulted respondent Keesung. The DGJ810CSB-D grill is manufactured by respondent Kingsun.

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that “the units of the Dyna-Glo DGB730SNB-D manufactured by Keesung in China and sold for importation into the United States, imported into the United States and/or sold after importation in the United States, infringe claims 1, 4, 6, 7, 8, 9, 10, 13, 15, and 16 of the ’712 patent.”

Amended Complaint at 41. Accordingly, the Commission presumes the facts alleged in the complaint, as amended, to be true and vacates the ID’s finding that the DGB730SNB-D grill does not infringe the asserted claims of the ’712 patent. 19 U.S.C. § 1337(g)(1).

The Commission has also determined to reverse the ID’s finding that the DGJ810CSB-D grill does not infringe the asserted claims of the ’712 patent. The ID cited only record evidence showing that a channel opening in the DGB730SNB-D grill is below the openable cover, and not on the openable cover, as the basis for finding non-infringement with respect to the DGJ810CSB-D grill. ID at 62 (citing RX-411.0023). However, the record evidence shows that the exhausts on the DGJ810CSB-D grill are located on the openable cover. *See* CPX-5 at 11, CDX-48, CX-890C at Q65-68, RX-412, RX-414. A&J’s expert, Mr. Thuma, testified that the DGJ810CSB-D grill meets each and every limitation of claim 1. CX-890C at Q65-68. A&J also presented undisputed evidence that the DGJ810CSB-D grill satisfies the limitations in dependent claims 4 and 6-8. *See* CDX-48. Accordingly, the Commission finds that the DGJ810CSB-D grill infringes claims 1, 4, and 6-8 of the ’712 patent; however, GHP is permitted “to make, have made by others, use, sell, distribute, offer to sell, import and have imported by others” this product pursuant to the terms of its license agreement.

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### **D. The ID's finding that the '712 patent was not shown to be invalid**

#### **1. Obviousness over Koziol in view of Holland '319 and/or Holland '986**

Respondents contend that the asserted claims of the '712 patent are invalid as obvious under 35 U.S.C. § 103 over Koziol (RX-48) in view of Holland '319 (RX-28) and/or Holland '986 (RX-72).

The ID noted that Koziol was not before the examiner during prosecution of the '712 patent, but he found Koziol to be cumulative of Oliver, a reference that was considered by the examiner. ID at 71 (citing Tr. (Stevick) at 908). The ID also found that Koziol “discloses an assembly for mounting multiple barbeque grills on a common post or support,” *id.* at 69 (citing RX-48 at Abstract), but that Koziol does not teach the following:

- (1) The details of grilling devices, such as grills having openable covers, either attached to the grill body or not; RX-190C (Stevick WS) at Q196 (“Koziol does not specifically teach that the covers or lids are openable.”);
- (2) The use of an exhaust in a grill, much less placement of an exhaust in an openable cover versus exhaust below the cooking area of the grill; RX-190C at Q181, 198;
- (3) The placement or use of a cooking grate, or cooking grill; RX-190C at Q194;
- (4) Any disclosure of cooking simultaneously with two different fuels; the Koziol patent is directed to a mounting assembly, and Koziol does not disclose a device for simultaneous multi-mode cooking; CX-900C (Thuma RWS) at Q60-64.

*Id.* at 70-71. The ID further found that Respondents did not show that a person skilled in the art would have necessarily modified Koziol into the multimode grill disclosed in the '712 patent.

*Id.* at 71. The ID rejected the Respondents' obviousness argument to combine the smokestacks disclosed in either of the Holland references with the cooking apparatus taught by Koziol because the Respondents applied their proposed construction of “exhaust” instead of the ID's construction of the term. *Id.* at 72.



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The Commission has determined to affirm, with modified reasoning, the ID's finding that the asserted claims of the '712 patent have not been proven invalid as obvious over Koziol in view of the Holland references. The Commission finds that Koziol, even when combined with the teachings of the Holland references, fails to teach a first cooking unit [or means for cooking food] and a second cooking unit [or means for cooking food] that are simultaneously operable to cook food using gas and solid cooking fuels respectively, and openable covers [or openable cover means] including at least one exhaust [or exhaust means].

The asserted claims of the '712 patent require two cooking units [or means for cooking food] attached to a common support structure, one unit that uses gas cooking fuel and another unit that uses a solid cooking fuel. The ID did not explicitly find whether Koziol discloses this cooking combination. *See id.* at 69-72. A&J's expert, Mr. Thuma, testified that one could assume the combination if one had the benefit of *hindsight*. CX-900C (Thuma) at Q65. Based on the record evidence, the Commission finds that a person of ordinary skill in the art would understand that Koziol discloses a gas cooking unit and a charcoal cooking unit attached to a common support structure. FIG. 6 of Koziol discloses a gas barbecue grill unit **20** and an auxiliary gas burner unit **85**, both attached to support member **12**. RX-48 at 4:17-34. The gas grill **20** could be considered the "first cooking unit." The "second cooking unit" is the charcoal unit **81** attached to the support member **20**, as shown in FIG. 5 of Koziol. *Id.* at 4:10-13. Although the gas grill **20** is not shown on the same support structure as the charcoal grill **81**, Koziol teaches that:

While preferred embodiments have been described above, it should be readily apparent to those skilled in the art that a number of modifications and changes may be made without departing from the spirit and scope of the invention. For example, . . . while a gas grill unit has been utilized in conjunction with an auxiliary unit, it is apparent that a charcoal grill unit such as indicated at **81**, could

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likewise be employed. Barbeque grill units which utilize both gas and charcoal are also becoming popular. These also can be readily accommodated because of the gas supply lines **64** and **65**.

*Id.* at 5:27-40. In view of all that Koziol teaches, we find that a person skilled in the art would understand to combine the charcoal unit **81** with the gas grill **20** on the common support member **12**. *See* RPet. at 32-33 (citing RX-190C at Q200).

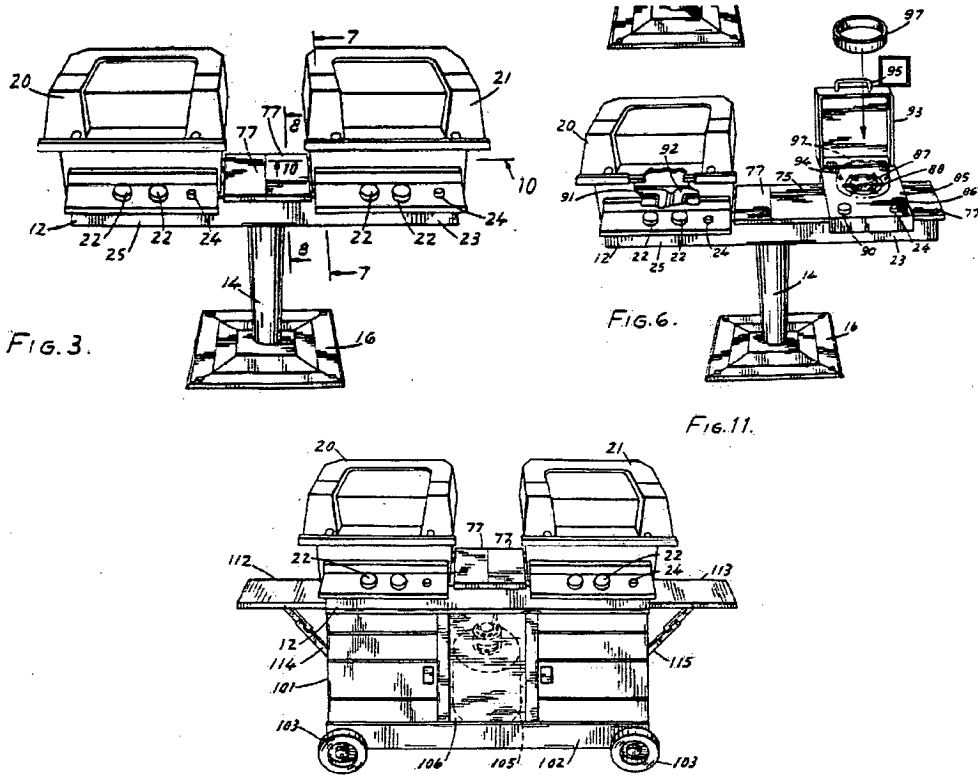
Even though Koziol discloses this cooking combination, the ID identified four limitations of the asserted claims that are absent in Koziol: (i) “openable [] cover” and “openable [] cover means”; (ii) “exhaust” and “exhaust means”; (iii) cooking simultaneously with two different fuels; and (iv) cooking grate or grill. *See* ID at 70-71. As explained below, the Commission affirms, with modified reasoning, the ID’s findings regarding the first three limitations (i)-(iii), but vacates the ID’s finding regarding the last limitation, (iv), *i.e.*, Koziol does not teach the “placement or use of a cooking grate, or cooking grill”. *Id.* at 71.

The Remaining Respondents concede that the cooking units **20/21**, and **81** do not explicitly disclose a cover that is openable and attached to a cooking unit. RPet<sup>14</sup> at 31, 32. However, the Remaining Respondents argue that “[o]ne of ordinary skill would have understood that handles on the fronts of the covers in Figs. 3-6 and 11 [highlighted in yellow in the original exhibits and reproduced below] indicate that the covers are hinged on the back side and rotate open in the standard manner as depicted in burner unit **85** on the right side in Fig. 6, where ‘a cover is also provided at **93** which is hinged by the hinges **94**.’” *Id.* at 21 (citing RX-190C (Stevick WS, Q196) (quoting RX-48 at 4:36-37)) (emphasis added).

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<sup>14</sup> Petition for Review of ALJ’s Final Initial Determination on Violation of Section 337 by Respondents the Brinkmann Corporation, Outdoor Leisure Products, Inc., and Academy, Ltd. (d/b/a Academy Sports + Outdoors) (Oct. 14, 2014)

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RX-190C at Q196 (FIGS. 3, 6, & 11 of Koziol - RX-0048.0002, 0048.0003, & 0048.0005; RDX-0005.0003)

The Remaining Respondents also claim that Mr. Thuma not only admitted that he had seen grills similar to those disclosed in Koziol that operate in this manner, but more importantly, he testified that he could not identify any grill similar to Koziol that did not operate in this manner. *Id.* (citing Tr. (Thuma) 481:15-482:1). Finally, they argue that Koziol discloses at least as much as the '712 patent with regard to “openable [] cover.” *Id.*

The Commission finds that the Remaining Respondents have not proven by clear and convincing evidence that Koziol discloses “openable [] cover” or “openable [] cover means.” We find no support for Dr. Stevick’s assumption that the parts of the units highlighted in yellow above are handles or have anything to do with covers. Contrary to the Remaining Respondents’ contention that Koziol discloses as much as the '712 patent, the '712 patent explicitly identifies elements 111, 121, 211, 221, 311, and 321 in FIGS. 1-3 as “openable cover[s].” Although FIG.

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6 of Koziol does show an openable cover (element 93), there is no indication that this cover is incorporated in any of the other units. And, even if the other units did have a cover, there is no indication that the cover would have been attached to a common support structure, as required by the claims. Tr. (Thuma) at 478:2-480:19 (testifying that Koziol says nothing about handles on grill covers and if the Koziol grill has a handle in the front, it might also have a handle in the rear of the unit such that two handles could be used to lift off the cover entirely).

In addition, the Remaining Respondents have not shown by clear and convincing evidence that Koziol discloses simultaneous operation of two cooking grills using different fuels. As the ID found, Koziol discloses an assembly for mounting multiple barbeque grills on a common support structure, but Koziol is silent as to simultaneous multimode cooking, and does not describe the use of grills or any details of the cooking units to be mounted on the support structure. ID at 70. The Remaining Respondents provide no evidence that Koziol teaches this limitation, other than arguing that “[t]here is nothing in Koziol that would prevent the grills shown and described from operating simultaneously, and as a matter of common sense there would be no reason to combine two cooking units on a single support structure unless they were independently and simultaneously operable.” RPet at 24. The Remaining Respondents cite to several statements by A&J’s expert, but none of Mr. Thuma’s cited statements support the Remaining Respondents’ argument. *Id.* at 24-25.

After analyzing Koziol, the ID acknowledged Respondents’ argument that the Holland references disclose one or two smokestack(s) on the openable cover of a grill, but rejected their argument based on the combination of Koziol and either Holland ’319 and/or Holland ’986 because “the claim term ‘exhaust’ does not require a smoke stack or chimney-type exhaust.” ID at 72. The Commission finds this legal reasoning erroneous because there is no dispute that a

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smokestack meets the ID's construction of "exhaust" and the Commission's construction of "exhaust means."

Nevertheless, the Commission finds that the Remaining Respondents have not presented clear and convincing evidence that one of ordinary skill in the art would have modified Koziol's cooking apparatus to include the smokestacks disclosed in the Holland references on its covers. Mr. Thuma admitted that Koziol necessarily includes some manner of exhausting gases. RPet at 26 (citing Tr. at 488:1-11). However, the manner of exhausting gases that is disclosed in Koziol is not on the grills themselves but, instead, "cut outs" **30**, **31**, **33**, and **35** in the support structure (as shown in FIG. 1) "provide combustion air and clearance for the gas feed lines and the usual burner venturi tubes." RX-48 at 3:48-54, 3:3-8. The Remaining Respondents concede that Koziol is silent as to any type of "exhaust" or "exhaust means" on the grills themselves (either on the alleged covers or fixed grill body). RespSub at 24 (citing RX-48.0007 at 3:52-56). We agree with A&J that Koziol does not teach exhausts or "exhaust means" and nothing in Koziol provides any teaching, suggestion, or motivation to add exhausts or "exhaust means" on the covers rather than below the surface of the cooking grill, or elsewhere in the grill body. ComplSub at 27-28.

The evidence that the Remaining Respondents rely on in support of their argument to modify Koziol incorrectly assumes that Koziol's cooking units have openable covers and that all that is at issue is simply a matter of adding smokestacks to those covers. For example, the Remaining Respondents argue that it would have been obvious to modify the openable covers of Koziol to add one or more smokestacks, as disclosed by Holland '319, because A&J's expert conceded that the smokestacks in Holland '319 perform the same function as the smokestacks in the '712 patent, and that the motivation for including the smokestacks in the '712 patent would

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have been the same motivation for including smokestacks in Holland '319. RPet at 26-27 (citing Tr. (Thuma) at 419:10-23). As another example, the Remaining Respondents contend that it is undisputed that where the entire upper half of the grill is an openable cover, “the logical and common location for exhausts is in the cover” so that the exhaust is above the cooking surface. *Id.* at 27 (citing RX-48 at Q198); *see also* Tr. at 936:24-937:8; RX-591 at Q45-53.

Even if adding smokestacks to Koziol is “the predictable use of prior art elements according to their established functions,” the Remaining Respondents present no evidence that the smokestacks would have been added on the covers instead of any fixed portion of the grills. *Id.* (quoting *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007)). They concede that the redesigned Rankam grill, for example, shows a method for exhausting a grill by including vents in the body of a grill and below the cooking surface. RespRSub<sup>15</sup> at 24. The Commission has found that other accused grills, such as the Char-Broil 12201767 grill and the OLP/Kingsun Redesigned Grills, include smokestacks on the fixed portion of the grills. Comm’n SD Op. at 21-22, 24-25.

In view of the above, the Commission affirms, with modified reasoning, the ID’s finding that the independent claims of the ’712 patent have not been proven invalid as obvious over Koziol in view of the Holland references. Additionally, the Commission adopts the ID’s finding that evidence of secondary considerations of non-obviousness weigh against a finding of obviousness. *See* ID at 78-82.

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<sup>15</sup> Respondents’ Reply to Complainants’ and Staff’s Briefing on Commission’s Determination to Review-In-Part Final Initial Determination Finding a Violation of Section 337 (Dec. 19, 2014).

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### 2. Obviousness over Oliver alone or in view of Holland '319

Respondents contend that the asserted claims are invalid as obvious over Oliver (RX-64) alone, or in view of Holland '319.

The ID noted that Oliver was before the PTO and considered by the examiner. *Id.* at 73. The ID found that the only suggestion in Oliver of simultaneous cooking with both gas and solid fuel is in the configuration of FIG. 20. However, he found that that configuration does not show two cooking units because the removal of body ends 16 allows for access for the propane burner 94 and makes the body of cooking unit 104 an open trough without any separation into a first cooking unit and a second cooking unit capable of independent operation, which the '712 patent requires. *Id.* at 76-77. The ID also found that Oliver does not specify using four body ends in the double width cooker configuration as required to form two separate cooking units. *Id.* at 75. The ID further found that a person of skill in the art would not confuse a griddle as shown in FIG. 20 with a grill and, thus, Oliver does not teach cooking on a grill over gas. *Id.* at 77 (citing CX-900C at Q41). As with Koziol, the ID rejected the Respondents' obviousness argument to combine the smokestacks disclosed in Holland '319 with the cooking apparatus taught by Oliver because the Respondents applied their proposed construction of "exhaust" instead of the ID's construction of the term. *Id.* at 77-78.

The Commission has determined to affirm, with modified reasoning, that the Remaining Respondents failed to prove by clear and convincing evidence that the asserted claims of the '712 patent are invalid as obvious over Oliver in view of Holland '319 because the prior art combination fails to teach or suggest a gas cooking unit including a grill, and openable covers [or openable cover means] including at least one exhaust [or exhaust means].

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First, we find the ID erred in interpreting the independent claims of the '712 patent to require that the first and second cooking units be “capable of independent operation.” *Id.* at 77. Independent claims 1, 10 and 17 require that the two cooking units are “simultaneously operable,” but do not require that they are independently operable. Indeed, only dependent claims 4 and 13 require independent operation of the cooking units.

Second, we agree with the Remaining Respondents that the specification and prosecution history of the '712 patent does not support the ID's conclusion that FIG. 20 of Oliver lacks two separate cooking units. RPet at 36-37. The specification describes the embodiment shown in FIG. 20 as a “double width cooker” “in which two cooking systems are configured to operate together.” RX-64 at 2:49-52, 6:17-18. With respect to the prosecution history, the examiner, in the first office action, described Oliver as disclosing “a simultaneous multiple cooking mode barbecue grill (see fig. 20), comprising a first cooking mode unit configured to prepare food in a first cooking mode (the grill on the left uses propane tank 96); a second cooking mode unit configured to prepare food in a second cooking mode (col. 2, ln. 51-55; the grill on the right uses charcoal) . . . .” JX-7 at 50. Subsequently, in the Notice of Allowance, the examiner stated that Oliver “discloses a grill with *dual chambers* and independent covers, and even mentions that either gas or solid fuel may be utilized.” *Id.* at 413 (emphasis added). Indeed, the patentee characterized FIGS. 19 and 20 of Oliver as “*dual unit* embodiment,” and described FIG. 20 as having two units. *Id.* at 70 (emphasis added).

The Commission finds that the ID incorrectly adopted A&J's argument that the configuration in FIG. 20 does not show two cooking units because there is a trough at the bottom. ID at 77. While it is true that the specification describes that the body ends on the gas cooking unit side of the double width cooker (FIG. 20) may be omitted, there is no evidence that



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the same is true of the body ends on the charcoal cooking unit side. We agree with the ID's finding that "[i]n every case in which Oliver describes a configuration that can use gas fuel to cook, the body ends **16** are omitted." ID at 76 (citing Fig 15, RX-64 at 5:62-64). On the flip side, in every case in which Oliver describes a configuration that uses charcoal to cook, the body ends **16** are included. *See, e.g.*, RX-64 at 3:12-13 ("A body end **16** at each end of reflector **12** closes the ends of the body portion of the cooker."). The same is true for the double width cookers described in Oliver. *See id.* at 6:28-33 ("Cooker **102** may be assembled **with body ends 16** for use with one or two grates **48** to support fuel such as charcoal or wood. Cooker **104** may be assembled . . . **without body ends 16** to provide propane heat for cooking.") (emphasis added). One of ordinary skill in the art would recognize that the body ends are necessary to confine the charcoal inside the grill to prevent the "start [of] grass fires" and for "draft control," which were two of Oliver's central concerns. RPet at 37 (citing RX-64 at 1:23 and 1:36; Tr. (Stevick) at 876:23-877:21 and 882:3-889:3). Because Oliver discloses the use of body ends **16** in every embodiment that includes a cooker using charcoal, the charcoal cooking unit that is combined with the gas cooking unit in FIG. 20 would also include body ends, thereby separating itself from the gas cooking unit in FIG. 20. *See id.* at 36-37 (citing Tr. (Stevick) at 876:23-889:3). Accordingly, the Commission finds that the charcoal cooking unit and the gas cooking unit shown in FIG. 20 each constitute a "cooking unit" within the meaning of the '712 patent. *Id.* at 38 (citing Tr. at 876:18-877:21).

Third, the ID's conclusion that Oliver lacks disclosure of dual-mode cooking simultaneously with gas and charcoal contradicts the teachings of Oliver. The examiner who issued the first office action found that Oliver disclosed a barbeque grill that included a gas cooking unit and a charcoal cooking unit that "operated simultaneously to prepare food using

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multiple cooking modes.” JX-7 at 50 (citing RX-64 at 6:25-26). Subsequently, a different examiner allowed the claims in part because “Oliver fails to disclose or make obvious *multiple distinct fuels at one time* among other limitations required by the claims.” *Id.* at 413 (emphasis added). We agree with the first examiner’s interpretation of Oliver and believe that the subsequent examiner incorrectly interpreted Oliver. In the summary of the invention, Oliver describes that the disclosed system “includes a number of different cooking modes” and “[s]ome of these modes may be carried out simultaneously.” RX-64 at 1:46-50. Oliver teaches that FIG. 20 shows dual gas and charcoal capability, and that they can be operated simultaneously. *Id.* at 2:52-55 (FIG. 20 shows that “a container of fuel is positioned along one end thereof for cooking on a griddle on one side of the cooking system, and a charcoal grill is used on the other side.”); 6:25-26 (“In this embodiment [of FIG. 20], one can griddle and grill simultaneously.”). Accordingly, the Commission finds that Oliver discloses dual-mode cooking simultaneously with gas and charcoal.

Nevertheless, the Commission finds that the asserted claims are not obvious over Oliver in view of Holland ’319 because the asserted claims require that the gas cooking unit includes a grill, but Fig. 20 shows a griddle on a gas cooking unit. We agree with the ID’s finding that “Oliver does not teach cooking on a grill over gas.” ID at 77 (citing CX-900C at Q41). The record evidence shows that Oliver teaches away from using a grill with gas. CX-900C at Q41. Specifically, A&J’s expert, Mr. Thuma, testified that “Oliver’s teachings about holding in radiant heat would discourage the skilled artisan from trying to use the Oliver gas burner with a grill, because the body ends 16 must be omitted.” *Id.* at Q39.

After analyzing Oliver, the ID acknowledged Respondents’ argument that Holland ’319 discloses smokestacks on the openable cover of a grill, but rejected Respondents’ argument

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based on the combination of Oliver and Holland '319 because “the claim term ‘exhaust’ does not require a smoke stack or chimney-type exhaust.” ID at 77-78. The Commission finds that the ID’s rationale for rejecting Respondents’ obviousness argument is incorrect, although we ultimately agree that the Remaining Respondents have failed to present clear and convincing evidence that one of ordinary skill in the art would have modified Oliver’s cooking apparatus to include the smokestacks disclosed in Holland '319.

There is no dispute that a smokestack meets the ID’s construction of “exhaust” and the Commission’s construction of “exhaust means.” However, we agree with A&J that a person of ordinary skill in the art would not be motivated to place smokestacks as taught by Holland '319 on the covers (or lid reflectors) disclosed in Oliver because that would defeat one of the objectives of Oliver, a cooking system that can be broken down, stored flat, and easily transported, and would conflict with Oliver’s purposes of reflecting and holding in radiant heat. AJResp<sup>16</sup> at 19-20. Oliver describes a “portable grill easily carried as components, which may be stacked as generally flat parts, to be carried in a compact container, and may be easily assembled without tools and used in various modes.” RX-64 at Abstract. Oliver criticized that the prior art systems’ open lid designs “lose heat, [and] do not reflect heat to food being cooked.” *Id.* at 1:27-28. Oliver describes that the function of its lid reflectors are to “reduce the loss of heat” within the cookers. *Id.* at 6:61-63. Therefore, the Commission finds that Oliver explicitly teaches away from including exhausts on its lid reflectors. We note that the patentee made these same arguments in its appeal brief before the BPAI. *See* JX-7 at 388.

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<sup>16</sup> Complainants’ Combined Response in Opposition to Respondents’ Petitions for Review of Final Initial Determination of Non-Infringement of U.S. Patent No. 8,381,712 (Oct. 22, 2014).

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Finally, the Remaining Respondents have not shown by clear and convincing evidence that Oliver alone satisfies the “exhaust” or “exhaust means” limitations in the asserted claims. Oliver discloses that prior art systems are inefficient by design because of “[i]nadequate draft control” and “[n]o combustion air control,” RX-64 at 1:21-26, and that the purpose of the invention is to improve “draft control,” making it possible to start a “charcoal fire, even in rain, by positioning body and lid ends to control draft,” *id.* at 1:53-55. Oliver teaches that “lid ends **18** may be slid along rods **28** and **30** to vary the distance from lid **14** to vary flow of draft air for the fire.” *Id.* at 4:67-5:2. Additionally, Claim 18 of Oliver recites “wherein at least one of the lid ends may be spaced apart from the lid reflector to provide combustion air for the cooker.” *Id.* at 10:35-37. Therefore, Oliver teaches that the purpose of the opening created by the space between the lid end and the lid reflector is for “vary[ing] flow of draft air for the fire,” *id.* at 4:67-5:2, and “to provide combustion air for the cooker,” *id.* at 10:35-37. *See also id.* at 6:41-43 (“controlling draft with lid ends **19**”). However, Oliver is silent as to whether smoke, waste gases and/or cooking vapors pass out of the opening between the lid and the lid reflector, and the Remaining Respondents have not presented clear and convincing evidence that it does so. Therefore, the Commission finds that the opening created by the space between the lid end and the lid reflector does not satisfy the ID’s construction of “exhaust,” *i.e.*, “a passage in the cover through which smoke, waste gases and/or cooking vapors pass out of the cooking unit.” Nor does the Commission find that the opening created by the space between the lid and the lid reflector satisfies the Commission’s construction of “exhaust means” because it has not been shown that the opening performs the function “to permit smoke, waste gases and/or cooking vapors to pass out of each respective means for cooking food” and there is no evidence showing that such an opening is a structural equivalent of the smokestacks disclosed in the ’712 patent.

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Moreover, Oliver teaches that the opening between the lid end and the lid reflector can be created in single cooker **10** (FIGS. 1-3 & 10) (*id.* at 4:67-5:2) and the double width cooker shown in FIG. 21 (*id.* at 6:41-43), but Oliver is silent as to whether the opening can be created in the double width cooker **104** of FIG. 20. The opening may not be possible in cooker **104** if one of the cooking units uses a propane tank because the brackets **76** that hold the propane tank **96** would prevent the lid end from sliding along rods **128** and **130**. *See id.* at 6:30-39. For this reason, the Commission finds that an opening between the lid end and the lid reflector cannot be created in a double width cooker that uses propane fuel for cooking.

A&J argues that Oliver's disclosure of sliding a lid along rods to create an opening does not teach an "exhaust" because the opening is not a permanent feature of a cover. *See* AJResp at 17-18. We reject this argument because the asserted claims do not require any sort of permanency with respect to the "exhaust" or "exhaust means" limitations.

In view of the above, the Commission has determined to affirm, with modified reasoning, the ID's finding that the independent claims of the '712 patent have not been proven invalid as obvious over Oliver in view of Holland '319. Additionally, the Commission adopts the ID's finding that evidence of secondary considerations of non-obviousness weigh against a finding of obviousness. ID at 78-82.

### **3. Dependent claims**

The Commission has determined to affirm, with modified reasoning, the ID's finding that the dependent claims of the '712 patent have not been proven invalid for the reasons discussed above with respect to the independent claims.

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

**1. Remedy**

The Commission is authorized to issue a limited exclusion order (“LEO”) excluding the articles of the person(s) found in violation. 19 U.S.C. §1337 (d)(1), (g)(1). If certain criteria are met, the Commission may issue a general exclusion order (“GEO”) excluding all infringing goods regardless of the source. 19 U.S.C. §1337 (d)(2), (g)(2). The Commission may also issue a cease and desist order (“CDO”) directed to any entity violating section 337, ordering it to cease and desist from engaging in the unfair methods or acts involved. 19 U.S.C. §1337 (f)(1), (g)(1). In general, the Commission issues CDOs to persons or business entities that have a “commercially significant” domestic inventory of subject articles that have already been imported, in order to prevent continued unfair acts with respect to violating articles. *See, e.g., Certain Integrated Repeaters*, Inv. No. 337-TA-435, Comm’n Op. at 27 (Aug. 2002).

**a. General Exclusion Order**

A&J argues that a GEO is necessary to prevent circumvention of a LEO and to address the widespread pattern of violation of section 337 in this investigation. According to A&J, a GEO is necessary to prevent circumvention of a LEO because (1) the demand for multiple mode grills in the U.S. market is established and growing as shown by A&J’s and Respondents’ sales volumes and profitability; (2) multiple mode grills are sold through well-established marketing and distribution networks, which include brick-and-mortar retail establishments and the online market; and (3) there are a large number of non-respondent Chinese manufacturers that produce multiple mode grills and there is no significant barrier to the expansion of their foreign production. ComplRmdySub<sup>17</sup> at 5-9. A&J asserts that there is a widespread pattern of violation

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<sup>17</sup> Complainants’ Submission on Remedy, Public Interest, and Bonding (Dec. 12, 2014).

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as demonstrated by the significant volume of imports of Respondents' accused grills, and the substantial number of entities worldwide that either manufacture or are capable of manufacturing infringing grills for importation into the United States. *Id.* at 10. Finally, A&J asserts that a GEO is appropriate because it is difficult to identify the source of infringing products when grills are not typically branded with the manufacturer's name. *Id.* at 11-12.

The ALJ declined to recommend a GEO because (1) A&J failed to name the importer Blue Rhino during the course of the investigation; (2) none of the Respondents are likely to circumvent an LEO; and (3) the Commission has already determined that certain design-around products do not infringe. RD at 3-4. A&J argues that the fact that it did not name Blue Rhino, a newly discovered importer of infringing grills, is not a sufficient basis for denying the issuance of a GEO. ComplRmdySub at 12 n. 1 (citing *e.g.*, *Certain Ground Fault Circuit Interrupters & Prods. Containing Same* ("Certain GFCP"), Inv. No. 337-TA-739, Comm'n Op. at 87-92 (June 8, 2012) (rejecting argument that a complainant must name all known respondents and refusing to carve a non-named party from the GEO)). A&J also argues that there is no evidence that creating a non-infringing redesigned grill would be easy or that new entrants would even want to introduce redesigns that have not been commercially tested. *Id.* at 13-14.

The Remaining Respondents argue that there is no widespread violation because A&J presented no evidence that any of the non-respondent manufacturers identified during the hearing had actually imported a multiple mode grill. RespRmdySub<sup>18</sup> at 3-4. The Remaining Respondents also argue that it is not difficult to identify the source of the infringing products as shown by the ease with which A&J's economic expert, Dr. Button, was able to identify manufacturers of potentially infringing grills. *Id.* at 4. The Remaining Respondents further

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<sup>18</sup> Respondents' Written Submission on the Issues of Remedy, the Public Interest, and Bonding (Dec. 12, 2014).

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argue that a GEO is unnecessary given the time needed by new entrants to bring multiple mode grills to market and the barriers to entry to such market. *Id.* at 5.

The IA believes that A&J has neither shown a likelihood of circumvention, nor a widespread pattern of violation and difficulty in ascertaining the source of infringing goods. IASub at 16-18. To the contrary, the IA argues that the evidence shows that circumvention is unlikely. *Id.* at 18 (citing Tr. at 507:9-508:1).

The Commission has “broad discretion in selecting the form, scope and extent of the remedy.” *Viscofan, S.A. v. Int’l Trade Comm’n*, 787 F.2d 544, 548 (Fed. Cir. 1986). The Commission may issue a GEO under section 337(d)(2) only when at least one of two conditions are met:

(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*.

19 U.S.C. § 1337(d)(2) (emphasis added).

The record evidence cited by A&J does not support a conclusion that a GEO is necessary to prevent circumvention of a LEO or to address a pattern of violation and that it is difficult to identify the source of infringing products. A&J’s evidence consists of unsupported attorney arguments and speculative assumptions that potential non-respondent manufacturers and importers may circumvent an LEO. ComplRmdySub at 13-14. A&J concedes that there is no evidence that any of the Respondents found in violation of section 337 are likely to circumvent a LEO. *See id.* at 5; IASub at 16-17 (citing Tr. at 507:9-508:1). By contrast, in *Certain GFCI*, the Commission found that two of the respondents in the investigation may have been attempting to circumvent the LEO issued in an earlier investigation, and evidence further showed that some



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respondents and other potential manufacturers have a propensity and ability to change names and corporate forms. *Certain GFCl*, Comm'n Op. at 88-89. More recently, the Commission issued a GEO under sections 337(d)(2)(A) and (B) because the evidence showed that the defaulting respondents have, or are capable of, changing names, facilities, or corporate structure to avoid detection. *Certain Cases for Portable Electronic Devices*, Inv. Nos. 337-TA-861/867, Comm'n Op. at 9-10 (June 20, 2014). In that same investigation, the Commission also found that evidence of pervasive internet auctions selling counterfeit products covered by the asserted patent demonstrated that the respondents can easily circumvent a LEO. *Id.* at 9.

Moreover, the Commission has already determined that certain design-around multiple mode grills, as well as some of the accused products, do not infringe the '712 patent. We agree with the IA that "it is more likely that manufacturers would design around the asserted patent, instead of circumventing any remedial order." IASub at 17. We find unpersuasive A&J's unsupported assertion that reliance on the redesigns requires new market entrants to risk rejection by the marketplace. ComplRRmdySub<sup>19</sup> at 2. Accordingly, the Commission finds that the factual requirements for the issuance of a GEO under section 337(d)(2)(A) or (B) have not been met. 19 U.S.C. § 1337(d)(2).

**b. Limited Exclusion Orders**

The Commission finds that a limited exclusion order preventing entry of the infringing products of Brinkmann, OLP, Kingsun, Academy, and Huige is appropriate. RD at 7. In addition, as requested by A&J, the LEO should also be issued against the accused products of defaulted party Keesung. Specifically, as to Keesung, A&J requests that any LEO issued by the Commission should include this defaulted respondent, but reflect the fact that the DGB730SNB-

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<sup>19</sup> Complainants' Reply Submission on Remedy, Public Interest, and Bonding (Dec. 19, 2014).

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D grill may be sold to GHP under license. ComplRSub. at 21. The IA believes that no remedy should issue in this investigation as to Keesung because A&J's allegations as to Keesung appear limited to the GHP DGB730SNB-D grill, and that grill was the subject of a settlement agreement between A&J and GHP. IARSub at 9. A&J argues that Keesung was not a party to its agreement with GHP and, therefore, it has no assurance that Keesung cannot or will not begin selling the DGB730SNB-D grill for importation through another importer or distributor. ComplRSub. at 21. Here, Keesung was found in default under section 337(g)(1), which states that the Commission "shall, upon request, issue an exclusion from entry" directed to a respondent found in default. 19 U.S.C. § 1337(g)(1); Order No. 16 (Dec. 20, 2013). The Commission has determined to grant A&J's request and the LEO will include Keesung (except as authorized by the patent license agreement between GHP and A&J or other such license).

The Remaining Respondents request that any remedial order be narrowly tailored to identify the model numbers of the grills that are found not to infringe any claims of the '712 patent, to include a certification provision, and to include an exception for continued sales of service and repair parts for grills that were sold before issuance of the order. RespRmdySub at 8-12. We address each of these requests below.

The Remaining Respondents request that any remedial order identify with specificity what grills are not infringing. The Commission has previously stated that because A&J admits that three redesigned products do not infringe, those redesigned products will be exempted from any remedy that might issue in this investigation. Comm'n SD Op. at 16. Those three redesigned products are (1) Rankam Model No. GR2034205-SC (Ver 2); (2) Rankam Model No. GR2071001-MM (Ver 2); and (3) Chant Red Stone Model 1046761. *Id.* The remedial orders issued in this investigation also exempt all other products that have been found not to infringe,

## PUBLIC VERSION

*i.e.*, the OLP/Kingsun Redesigned Grills and the Char-Broil/Fudeer grills, and identify the pages in the Commission's Opinions that discuss these non-infringing products. *See Certain Electronic Digital Media Devices and Components Thereof*, Inv. No. 337-TA-796, Comm'n Op. at 107 (Aug. 9, 2013).

The Remaining Respondents also request that any remedy "cover only those grills found to infringe." RespRmdySub at 12. To the extent they are suggesting that our orders should explicitly identify the specific models of grills found to infringe, we reject this suggestion.

The RD adopted Respondents' request that any LEO include a provision that would allow them to certify that the products being imported are not excluded from entry under the LEO. RD at 6. A&J argues that a certification provision is unnecessary because the asserted claims are neither product-by-process claims nor claims that cover products requiring complicated and costly reverse engineering procedures to determine infringement. ComplRRmdySub at 2-3 (citing *Certain Ink Jet Print Cartridges and Components Thereof*, Inv. No. 337-TA-446, USITC Pub. 3549, Comm'n Op. at 10-11 (Oct. 2002)). However, it has been Commission practice for the past several years to include certification provisions in all exclusion orders to aid Customs and Border Protection ("CBP") in enforcing the Commission's remedial orders. IARSub at 12; *Certain Mobile Devices, Associated Software, and Components Thereof*, Inv. No. 337-TA-744, Comm'n Op., 2012 WL 3715788 at \*13 (June 5, 2012). Therefore, the LEO includes a certification provision.

The RD rejected the Respondents' request that any LEO should exempt from its scope all activities related to, and component parts utilized in, the servicing or repair of previously sold accused products and any merchandise delivered pursuant to preexisting contracts because Respondents did not show how and to what extent their customers or others would be harmed

## PUBLIC VERSION

absent this exemption. RD at 6. The IA and A&J agree with the RD's recommendation. *See* ComplRmdySub at 15-16; IASub at 18-19; IARSub at 12. The Remaining Respondents contend that consumers who legally purchased accused grills should be permitted to continue to purchase parts to maintain those grills in a safe and working manner. RespRmdySub at 11. They also contend that some of the grills were imported and sold before the '712 patent issued in 2013. *Id.* Additionally, they argue that A&J did not present any evidence establishing which parts are unique to the accused grills and which are standard parts also used in non-accused single-mode grills. *Id.* The Remaining Respondents assert that it would be unfair to exclude parts that are also used to repair non-accused single-mode grills. *Id.* at 11-12. Moreover, even if alternative products are available, the Remaining Respondents submit that the Commission has found that the public interest is served by an exemption from any exclusion order for the importation of parts and components used in the maintenance, service, repair, or replacement of accused products previously sold in the United States. *Id.*; *Certain Liquid Crystal Display Devices & Products Containing the Same*, Inv. No. 337-TA-631, Comm'n Op. at 27 (July 14, 2009) ("the public interest weighs in favor of an exemption to allow importation of service and replacement parts"); *Certain Integrated Circuits, Chipsets, & Products Containing Same*, Inv. No. 337-TA-786, Final Initial Determination, 2012 WL 3610787 at \*88 (July 12, 2012). The Commission most recently included such an exemption in the remedial orders issued in *Certain Sleep-Disordered Breathing Treatment Systems and Components Thereof*, Inv. No. 337-TA-890, Comm'n Op. at 47 (Dec. 23, 2014), which involved medical devices used to treat certain health conditions. In this investigation, Respondents cite the need for customers to be able to purchase replacement parts to keep their grills in safe operable condition. RespRmdySub at 11. Accordingly, the remedial orders here provide for an exemption for the importation of parts for

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use in the service, repair and maintenance of accused products previously sold in the United States.

### c. Cease and Desist Orders

The RD also recommended that CDOs issue as to Respondents Brinkmann, OLP, Academy, and Char-Broil if a violation is found as to those Respondents. RD at 10. The RD found that those Respondents maintain commercially significant inventories in the United States. *Id.* at 8.

Brinkmann and Academy do not challenge the RD's findings that they maintain commercially significant inventories of infringing grills in the United States. RD at 7-8. The record evidence supports the ID's findings. *See* CX-0171C.0029; JX-0017C at 109; CX-0163C at 29-30; *see also* CDX-42C. Thus, cease and desist orders against Brinkmann and Academy are warranted. Char-Broil has not been found in violation of section 337.

As to whether a CDO is proper against OLP, A&J asserts that as of March 27, 2014, OLP held [ ] units of an assortment of three of its original grill models in its Neosho, Missouri facility, and an additional [ ] grills at Kingsun's warehouse in China. ComplSub at 45. A&J contends that these numbers constitute commercially significant inventory. ComplRSub at 20.

The IA believes that evidence of the [ ] original grills maintained at OLP's warehouse in Neosho, Missouri supports the ID's finding that OLP maintains a commercially significant inventory of the OLP grills that have been found to infringe the '712 patent. IARSub at 8 (citing CX-889C at Q536-41, 553, 554).

The Remaining Respondents argue that A&J bears the burden of proving that a respondent has a commercially significant inventory in the United States. RespSub at 49. They contend that the RD's finding of commercially significant inventory was based on evidence of

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over [ ] grills, not the [ ] grills that the Commission found infringing, and Dr. Button's testimony that a commercially significant inventory would be based on a finding that both the original and the redesigned grills infringe. *Id.* at 51.

The sole issue presented by the parties is whether the record evidence supports a finding that the [ ] units stored in OLP's Neosho facility constitute a commercially significant inventory. The [ ] units stored in OLP's Neosho facility consist of the 1200SH, SH5000, and SH7000 model grills. CX-709C. A&J has shown with record evidence that, because these grills are relatively expensive products, sale of this inventory by OLP would adversely impact A&J. *See* CX-329C at 1 (1200SH model sold for [ ] by Orchard Supply Company LLC in 2013); 14 (SH5000 model sold for [ ] at Farm King in 2013); 15 (SH7000 model sold for [ ] at ACE Hardware Corp. in 2013). Accordingly, the Commission finds that the [ ] units constitute a commercially significant inventory.

As discussed above with respect to the LEO, the remedial orders exclude the distribution and sale of parts for use in the maintenance, service, or repair of covered products previously sold in the United States.

### **2. Public Interest**

The Commission must weigh the effect that remedial orders will have on four public interest factors when determining whether the issuance of such orders is appropriate: (1) the public health and welfare; (2) competitive conditions in the U.S. economy; (3) the production of like or competitive articles in the U.S.; and (4) U.S. consumers. 19 U.S.C. §§ 1337(d), (f), (g). The Commission considers these public interest factors in determining the appropriate remedy in each investigation.

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A&J argues that a remedial order would not have an adverse effect on the public interest. ComplRmdySub at 19. First, A&J contends that the public interest favors the protection of U.S. intellectual property rights. *Id.* Second, A&J asserts that competitive conditions in the U.S. economy and production of like or directly competitive articles will not be negatively impacted by a remedial order. *Id.* at 20. Third, A&J argues that multiple mode grills are not the type of products that should raise public interest concerns in a section 337 investigation. *Id.*

The IA's submissions did not discuss public interest.

The Remaining Respondents do not argue that the public interest counsels against issuing a remedy in this investigation, but, rather, they argue that any remedy should be narrowly tailored to cover only those grills found to infringe. RespRmdySub at 8-12. The request to tailor the remedial orders to cover specific models of grills has been addressed above. *Supra* at 55-56.

In view of the evidence of record here, the Commission finds that the remedial orders discussed above would not have an adverse impact on the public health and welfare, competitive conditions in the U.S. economy, the production of like or competitive articles in the United States, or U.S. consumers. Accordingly, the Commission has determined that the public interest factors enumerated in section 337(d), (f), and (g) (19 U.S.C. §§ 1337(d), (f), and (g)) do not preclude issuance of its remedial orders.

### **3. Bonding**

During the 60-day period of Presidential review, imported articles otherwise subject to remedial orders are entitled to conditional entry under bond. 19 U.S.C. § 1337(j)(3). The amount of the bond specified by the Commission must be an amount sufficient to protect the complainant from any injury. *Id.*; 19 C.F.R. § 210.50(a)(3). The Commission frequently sets the bond by attempting to eliminate the difference in sales prices between the patented domestic

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product and the infringing product or basing the bond upon a reasonable royalty rate based on the evidence of record. *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 24, USITC Pub. No. 2949 (Jan. 1996). Complainant bears the burden of establishing the need for a bond amount in the first place. *Certain Rubber Antidegradants, Components Thereof and Products Containing Same*, Inv. No. 337-TA-533, Comm'n Op. at 39-40 (July 21, 2006).

A&J argues that the bond rate should be set at [ ] per grill based on its lost profits. *See* RD at 12. The RD rejected A&J's lost profits calculation because its analysis did not account for non-infringing alternatives and it did not address whether A&J would have the manufacturing and marketing capability to exploit excess demand in the absence of excluded products. *Id.* Moreover, the RD noted that the Commission has previously declined to use lost profits as a basis for establishing the appropriate bond rate. *Id.* (citing *Certain Hardware Logic Emulation Systems & Components Thereof*, Inv. No. 337-TA-383, Comm'n Op. at 41 (Apr. 1, 1998)).

The RD also rejected A&J's belated argument that the bond should be set at 100% of the entered value of Respondents' products on the basis that a bond rate cannot be set based on pricing differentials or a reasonable royalty. *Id.* at 13. The RD noted that A&J failed to make this argument in its prehearing brief. Moreover, it found that an appropriate bond rate cannot be set based on a reasonable royalty because A&J withheld from respondents the terms of its licensing agreements that may bear on this issue. *Id.* As such, the RD recommended that no bond be imposed during the period of Presidential review.

All of the parties agree that price differential and royalty rates are not appropriate for determining bond in this investigation. *Id.* at 11. As to A&J's lost profits analysis, regardless of whether the Commission applies such an analysis in determining bond rates, A&J's evidence is



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flawed because it does not account for non-infringing alternatives. Moreover, the analysis does not address whether A&J would have the manufacturing and marketing capability to exploit excess demand in the absence of excluded grills. *Id.* at 12. In addition, A&J does not assert, nor does the evidence show, that a bond amount can be set based on the price differential between the imported products and A&J's domestic industry products. Further, because A&J has not disclosed the terms of its licenses for the '712 patent to respondents, there is insufficient evidence to establish an appropriate bond amount based on reasonable royalty. Therefore, the Commission has determined to set a bond in the amount of zero percent during the period of Presidential review for all covered products imported by or manufactured by, for, or on behalf of Brinkmann, OLP, Kingsun, Academy, and Huige. *See Certain Liquid Crystal Display Devices*, Inv. No. 337-TA-631, Comm'n Op. at 28 (July 10, 2009).

With respect to the defaulted respondent Keesung, the Commission has determined to impose a bond of 100 percent of the entered value of the imported infringing products. *See Certain Digital Photo Frames and Image Display Devices and Components Thereof*, Inv. No. 337-TA-807, Comm'n Op. at 12-18 (Mar. 12, 2013).

By order of the Commission.



Lisa R. Barton  
Secretary to the Commission

Issued: February 20, 2015

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, R. Whitney Winston, Esq., and the following parties as indicated, on **February 20, 2015**.



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
500 E Street, SW, Room 112  
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**CERTAIN MULTIPLE MODE OUTDOOR GRILLS AND  
PARTS THEREOF**

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

Certificate of Service – Page 2

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

**In the Matter of**

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

**Investigation No. 337-TA-895**

**NOTICE OF THE COMMISSION'S DETERMINATION TO REVIEW AN INITIAL  
DETERMINATION GRANTING IN PART A MOTION FOR SUMMARY  
DETERMINATION OF NON-INFRINGEMENT; REQUEST FOR BRIEFING**

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

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to review the presiding administrative law judge's ("ALJ") initial determination ("ID") (Order No. 33) finding non-infringement of certain products.

**FOR FURTHER INFORMATION CONTACT:** Amanda Pitcher Fisherow, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2737. 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 this investigation on September 26, 2013, based on a complaint filed on behalf of A&J Manufacturing, LLC of St. Simons, Georgia and A&J Manufacturing, Inc. of Green Cove Springs, Florida (collectively "Complainants"). 78 *Fed. Reg.* 59373 (Sept. 26, 2013). The complaint alleged violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the sale for importation, importation, or sale within the United States after importation of certain multiple mode outdoor grills and parts thereof by reason of infringement of certain claims of U.S. Patent No. 8,381,712 ("the '712 patent"), U.S. Patent No. D660,646, and U.S. Patent No. D662,773 patent. The

Commission's notice of investigation, as amended, named several respondents, including Char-Broil, LLC; Zhejiang Fudeer Electric Appliance Co., Ltd; Rankam Metal Products Manufactory Limited, USA; Outdoor Leisure Products, Inc.; Dongguan Kingsun Enterprises Co., Ltd.; Tractor Supply Co.; and Chant Kitchen Equipment (HK) Ltd. (collectively "Respondents").

On March 5, 2014, the Respondents filed a motion for summary determination of non-infringement of the asserted claims of the '712 patent. On March 24, 2014, Complainants opposed the motion. Also on March 23, 2014, the Office of Unfair Import Investigations (OUII) filed a response in partial support of the motion. After considering the motion and responses, on April 8, 2014, the ALJ requested additional briefing from the parties. Order No. 28. The parties filed responses to Order No. 28 on April 11, 2014 and April 14, 2014.

On April 17, 2014, the ALJ granted the Respondents' motion in part. The ALJ found that that certain products do not infringe claims 1-20 of the '712 patent and that a genuine issue of material fact exists with respect to an additional product.

On April 25, 2014, Complainants timely petitioned for review. On May 2, 2014, OUII filed a response. On May 2, 2014, respondents Char-Broil, LLC; Zhejiang Fudeer Electric Appliance Co., Ltd; Rankam Metal Products Manufactory Limited, USA; Outdoor Leisure Products, Inc.; Dongguan Kingsun Enterprises Co., Ltd. filed a joint response. Also on May 2, 2014 respondents Tractor Supply Co.; and Chant Kitchen Equipment (HK) Ltd. filed a joint response.

The Commission has determined to review the subject ID in the entirety. The parties are requested to brief their positions on the issues under 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. Discuss whether claim 10 should be treated as a mean-plus-function claim, and more specifically the "openable [] cover means" limitations. In discussing whether the "openable [] cover means" limitations of claim 10 should or should not be treated as means-plus-function limitations, please discuss whether the presumption that these limitations are means-plus-function limitation has been rebutted.
2. If the "openable [] cover means" limitations are determined to be means-plus-function limitations, what impact do the statements and/or amendments made during prosecution have on the construction of the limitations and whether they limit the range of equivalents that would fall within the "openable [] cover limitations."
3. Did the '712 patent applicant clearly and unambiguously, via prosecution disclaimer, disclaim claim scope for the "openable [] cover" limitations of the asserted independent claims? Please

address the applicant's arguments in the September 4, 2012 Appeal Brief.

4. If the "openable [] cover means" limitations are interpreted as means-plus-function limitations, (a) please identify the functions claimed in the "openable [] cover means" limitations of claim 10, as well as what structure in the specification performs the claimed functions of the "openable [] cover means" limitations, and (b) discuss whether the "openable [] cover means" limitations of claim 10 are met by the products at issue in the ID.
5. Discuss what discovery has occurred with respect to the redesigned products (*e.g.*, were the redesigned products part of expert discovery, document productions, contention interrogatories, lists identifying the products at issue, admissions, etc.)? Please include the dates corresponding to the discovery and, if appropriate, the associated EDIS ID numbers. Include in your answer when Complainants were first made aware of each of the redesigned products. Please discuss whether Complainants requested a continuance under Rule 210.18(d) to conduct further discovery.
6. Discuss whether the design of each of the redesigned grills is fixed. Please discuss whether the redesigned grills meet the "openable [] cover" limitations of the asserted independent claims. Please cite to evidence to support your position.

**WRITTEN SUBMISSIONS:** The parties to the investigation are requested to file written submissions on the issues identified in this notice. The written submissions must be filed no later than close of business on Wednesday, May 28, 2014. Reply submissions must be filed no later than the close of business on Monday, June 2, 2014. No further submissions on these issues will be permitted unless otherwise ordered by the Commission. The page limit for the parties' initial submissions on the questions posed by the Commission is 25 pages. The parties' reply submissions, if any, are limited to 15 pages.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 C.F.R. 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-895") in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures*, [http://www.usitc.gov/secretary/fed\\_reg\\_notices/rules/handbook\\_on\\_electronic\\_filing.pdf](http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf)). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to 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 properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with the any confidential filing. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

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 Part 210 of the Commission's Rules of Practice and Procedure (19 C.F.R. Part 210).

By order of the Commission.

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

Lisa R. Barton  
Secretary to the Commission

Issued: May 20, 2014

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, R. Whitney Winston, Esq., and the following parties as indicated, on **May 21, 2014**.



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

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

Certificate of Service – Page 2

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**PUBLIC VERSION**

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

**In the Matter of**

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

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

**Order No. 33: Initial Determination**

Pursuant to Commission Rule 210.18, respondents Char-Broil, LLC; Zhejiang Fudeer Electric Appliance Co., Ltd; Rankam Metal Products Manufactory Limited, USA; Outdoor Leisure Products, Inc.; Dongguan Kingsun Enterprises Co., Ltd.; Tractor Supply Co.; and Chant Kitchen Equipment (HK) Ltd. (collectively, “the moving respondents”) filed a motion for summary determination that they do not infringe any of the asserted claims of U.S. Patent No. 8,381,712 (“the ‘712 patent”). Motion Docket No. 895-19.

Complainants A&J Manufacturing, LLC, and A&J Manufacturing, Inc. (collectively, “complainants” or “A&J”) oppose the pending motion. The Commission investigative staff (“Staff”) filed a response supporting the motion in part. No other response was filed. The parties filed supplemental briefs as required by the administrative law judge. *See* Order No. 28 (Apr. 8, 2014).<sup>1</sup>

Commission Rules provide that “[a]ny party may move with any necessary supporting affidavits for a summary determination in its favor upon all or part of the issues to be determined in the investigation.” 19 C.F.R. § 210.18(a). Summary determination “shall be rendered if

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<sup>1</sup> The moving respondents filed a motion for leave to file a reply. Motion Docket No. 895-30. Complainants filed an opposition. The motion for leave is granted.

pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.” 19 C.F.R. § 210.18(b).

### **BACKGROUND**

Complainants assert claims 1-20 of U.S. Patent No. 8,381,712. Am. Compl. at ¶¶ 91-131.

The ‘712 patent generally relates to dual-mode grills having cooking units for both solid fuels (such as charcoal) and gas fuels (such as propane) that can be operated simultaneously. Mem. Ex. 1, ‘712 patent, Abstract. As reflected in the asserted claims, the cooking units of the claimed invention include openable cover having at least one exhaust. *See id.* at col. 4, ln. 54, col. 6, ln. 60. The following independent claims are asserted:

**Claim 1.** A barbecue grill having multiple cooking units, comprising:

a support structure configured to support a plurality of cooking units;

a first cooking unit configured to cook food using gas cooking fuel, the first cooking unit attached to the support structure and including at least one first grill, the first cooking unit further including an openable first cover attached to the first cooking unit that selectively covers the first grill, wherein the first cover includes at least one exhaust; and

a second cooking unit configured to cook food using solid cooking fuel, the second cooking unit attached to the support structure and including at least one second grill, the second cooking unit further including an openable second cover attached to the second cooking unit that selectively covers the second grill, wherein the second cover includes at least one exhaust,

wherein the first cooking unit and the second cooking unit are simultaneously operable to cook food and the first grill and second grill are selectively and independently coverable.

**Claim 10.** A barbecue grill having multiple means for cooking, comprising:

a first means for cooking food using gas cooking fuel, the first means for cooking including at least one first grill and an openable first cover means for selectively covering the first grill, wherein the first cover means is attached to the first means for cooking and

includes at least one exhaust;

a second means for cooking food using solid cooking fuel, the second means for cooking including at least one second grill and an openable second cover means for selectively covering the second grill, wherein the second cover means is attached to the second means for cooking and includes at least one exhaust means; and

a structure means for supporting the first means for cooking and the second means for cooking;

wherein the first means for cooking and the second means for cooking are simultaneously operable to cook food and the first grill and second grill are selectively and independently coverable.

**Claim 17.** A barbecue grill having multiple cooking units, comprising:

a support structure configured to support a plurality of cooking units;

a first cooking unit supported by the support structure, the first cooking unit having a substantially cylindrical shape, the first cooking unit configured to cook food using gas cooking fuel, the first cooking unit including at least one first grill and an openable first cover attached to the first cooking unit that selectively covers the first grill, wherein the first cover includes at least one exhaust; and

a second cooking unit supported by the support structure, the second cooking unit having a substantially cylindrical shape, the second cooking unit configured to cook food using solid cooking fuel, the second cooking unit including at least one second grill and an openable second cover attached to the second cooking unit that selectively covers the second grill, wherein the second cover includes at least one exhaust,

wherein the first cooking unit and the second cooking unit are simultaneously operable to cook food and the first grill and second grill are selectively and independently coverable.

Mem. Ex. 1, '712 patent, at col. 4, ln. 54 – col. 5, ln. 8, col. 5, lns. 40-59, col. 6, lns. 25-47

(emphasis added).

## **DISCUSSION**

The parties' dispute principally concerns whether the claimed cover can include both fixed and openable portions. The moving respondents and the Staff argue that the plain meaning of "openable cover" does not include fixed portions of the grill. Mem. at 14; Staff at 6. The

moving respondents and the Staff argue that during prosecution A&J explicitly disclaimed grills having exhausts attached to fixed portions. Mem. at 16; Staff at 6-9. For the reasons set forth below, the administrative law judge agrees with the moving respondents and the Staff that the disputed claim term “openable [ ] cover” should be construed to mean a cover that excludes any portion of the grill enclosure that is not openable (*i.e.*, fixed).

The plain language of the disputed claim term “openable [ ] cover” requires that the cover be openable. In view of the plain meaning of the claim language and the prosecution history of the ‘712 patent, the “openable cover” limitations cannot be met by grills having exhausts on fixed portions. During prosecution, the Examiner rejected the applicant’s claimed invention over prior art grills having exhausts on the fixed portions of the grills as opposed to their openable covers, including: U.S. Patent No. 4,665,891 (“Nemec”); U.S. Patent No. 6,209,533 (“Ganard”), and U.S. Patent No. 4,700,618 (“Cox”). See Mem. Ex. 2 at A&J000157, A&J000215-24, A&J000295-99. Nemec discloses a grill having an exhaust on top of the fixed portion of the grill:

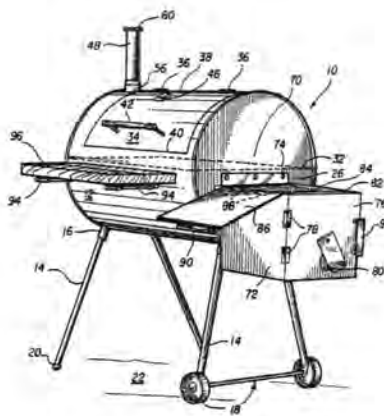


FIG. 1

Mem. Ex. 5, Fig. 1. Ganard discloses a grill having an exhaust on the side of the fixed portion of the grill:

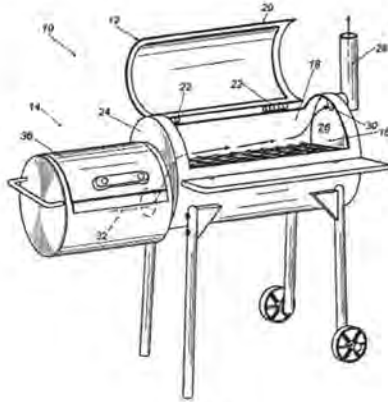
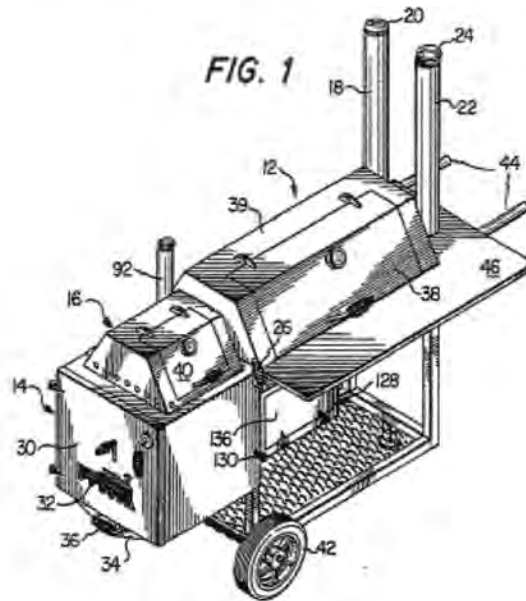


Fig. 1

Mem. Ex. 6, Fig. 1. When applying the broadest reasonable construction, the Examiner understood that Ganard (shown above) does not teach the placement of an exhaust on the openable cover. Mem. Ex. 2 at A&J000224. Finally, Cox discloses a grill having three exhausts (18, 22, and 92) placed on fixed portions of the grill:



Mem. Ex. 7, Fig. 1. As shown in Figure 2, chimney 18 exhausts the upper portion of the grill through hole 54. *Id.* at col. 3, lns. 23-25, Fig. 2.

Initially, complainants sought broad claim coverage. *See* Mem. Ex. 2 at A&J0000010-14. However, they were unable to secure allowance of those claims without amending them to



distinguish their claimed invention from the prior art of record. In this regard, A&J amended its claims on August 25, 2011 to add the following narrowing limitations: (i) that the recited cover be “openable”; and (ii) that the cover include “at least one exhaust.” *Id.* at A&J000259-63. However, even their narrowed claims were finally rejected over U.S. Patent No. 4,787,477 (“McLane”) in view of Cox. *Id.* at A&J000295. A&J then appealed the Examiner’s final rejection. *Id.* at A&J000372-402. In its appeal brief, A&J argued that the claimed invention was not rendered obvious over McLane in view of Cox:

The Office suggests that combining the barbecue grill of McLane with the oven/smoker enclosures and chimneys described in Cox would render obvious “wherein the first cover includes at least one exhaust,” and “wherein the second cover includes at least one exhaust,” as recited in claim 22. Office Action, pp. 7-8. Assuming, for the sake of argument, that this combination is even possible (which it is not), **at best it would result in a barbecue grill with chimneys connected to exit ports on the fixed portions of the oven/smoker enclosures which are not openable (i.e., not covers).** Thus, even if the references could be combined in the manner suggested in the Office Action, the combination still fails to teach “wherein the first cover includes at least one exhaust,” and “wherein the second cover includes at least one exhaust,” as recited in claim 22.

*Id.* at A&J000387. This argument concerning Cox shows that the applicant did not regard the fixed portion of the grill enclosure 39 as “openable.” The “openable cover” of Cox is the door 38 that can be opened to provide access to the inside of the grill enclosure. This is consistent with the plain meaning of the term “openable cover.”

In its opposition, A&J argues: “In the Appeal Brief, Applicant’s counsel stated that the combination of McLane and Cox would be impossible, CRSUMF ¶151, but counsel went on to show the unworkability of the Examiner’s position by assuming for the sake of argument that if this combination was possible the result would be a grill ‘with chimneys connected to exit ports on the fixed portions of the oven/smoker enclosures which are not openable (i.e., not covers).’” Importantly, note that none of this argument related to Applicant’s own proposed grill structure, rather it was to show the absurdity of suggesting that a person of skill would combine McLane

and Cox.” Compls. Opp’n at 32-33.

A&J is incorrect. As noted above, the prosecution history shows that the applicant did not regard the fixed portion of the grill enclosure as “openable.” *See also* Resps. Supp. Br. at 9-14; Resps. Supp. Reply Br. at 5-7; Staff Supp. Br. at 2-4; Staff Supp. Reply Br. at 5-7.

The prosecution history “provides evidence of how the PTO and the inventor understood the patent.” *Phillips*, 415 F.3d at 1317. As such, “it may inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be.” *Id.*; *Vitronics*, 90 F.3d at 1582-83; *see also Chimie v. PPG Indus., Inc.*, 402 F.3d 1371, 1384 (Fed. Cir. 2005) (“The purpose of consulting the prosecution history in construing a claim is to exclude any interpretation that was disclaimed during prosecution.”). Here, the claimed “openable cover” does not include fixed portions of a grill enclosure. The recited exhausts must be located on the “openable” portion of the grill.

In its opposition, A&J argues that the “purported disclaimer arises out of prosecution argument, not out of a claim amendment” and that “claim amendment-based estoppel (under *Festo*) invokes a wholly different standard than prosecution argument-based estoppel.” Compls. Opp’n at 31.

A&J is incorrect. A&J’s narrowing amendment made on August 25, 2011 gives rise to “claim amendment-based estoppel.” Here, A&J amended its claims for the purpose of overcoming a prior art rejection over U.S. Patent No. 4,878,477 (“McLean”) in view of U.S. Patent No. 4,665,891 (“Nemec”), adding the following narrowing limitations: (i) that the recited cover be “openable”; and (ii) that the cover includes “at least one exhaust.” *See* Mem. Ex. 2 at A&J000259-63, 77. By narrowing the “cover” claim limitation to overcome the prior art, A&J

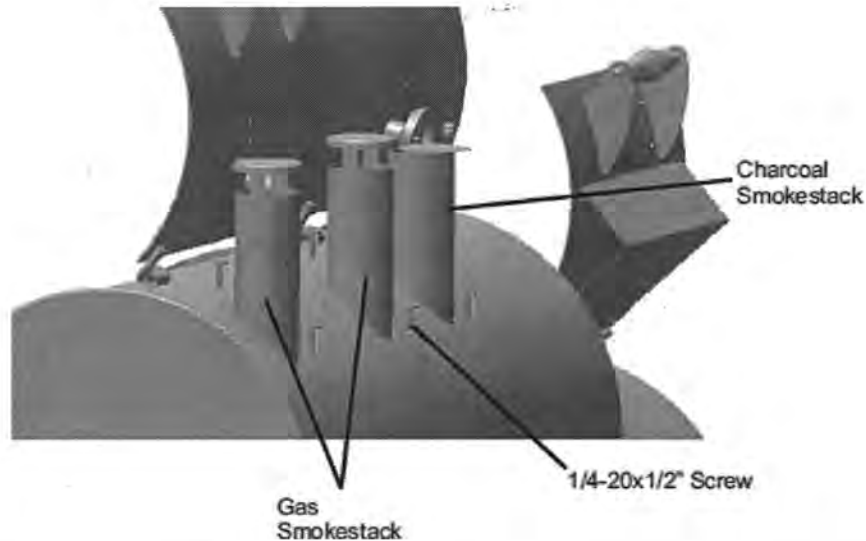


surrendered equivalents to that claim limitation. *See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 727 (2002) (“When the patentee responds to the rejection by narrowing his claims, this prosecution history estops him from later arguing that the subject matter covered by the original, broader claim was nothing more than an equivalent.”). This amendment gives rise to claim amendment-based estoppel, thus precluding A&J from arguing that the accused products satisfy the “openable [ ] cover” limitations of the asserted claims under the doctrine of equivalents. *See id.*

As noted above, the administrative law judge has determined that the disputed claim term “openable [ ] cover” should be construed to mean a cover that excludes any portion of the grill enclosure that is not openable (*i.e.*, fixed). Based on this construction, accused products that provide exhausts only on the fixed portions of the grill do not infringe the asserted claims of the ‘712 patent. The products at issue include the following: (i) Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill Model Number 12210767; (ii) Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill Model Number 14201767; (iii) Char-Broil Model 463724512 Charcoal/Gas Grill Combination; (iv) Char-Broil Charcoal/Gas Combo 1010 Deluxe, Model No. 463724514; (v) Rankam Model No. GR2034205-SC (Ver 2); (vi) Rankam GR2071001-MM (Ver 2); (vii) Outdoor Leisure Products Smoke Hollow Model Numbers PS9500, 8000, 8500, 3500, 3300, and 6500; and (viii) Chant Red Stone Model 1046761. Mem. at 1, n. 2; Mem. at 20-43; Staff Supp. Reply Br. at 5 n.2.

With one exception, the summary determination of noninfringement of the asserted claims of the ‘712 patent is proper. The pending motion shows that the products at issue (with the exception of the Char-Broil Model 463724512 combination charcoal/gas grill) do not include openable covers having exhausts as the asserted claims require. *See* Mem. at 21-43. For

example, the Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill Model Number 12210767 provides exhausts on the fixed portions of the grill as opposed to the openable covers as shown below:



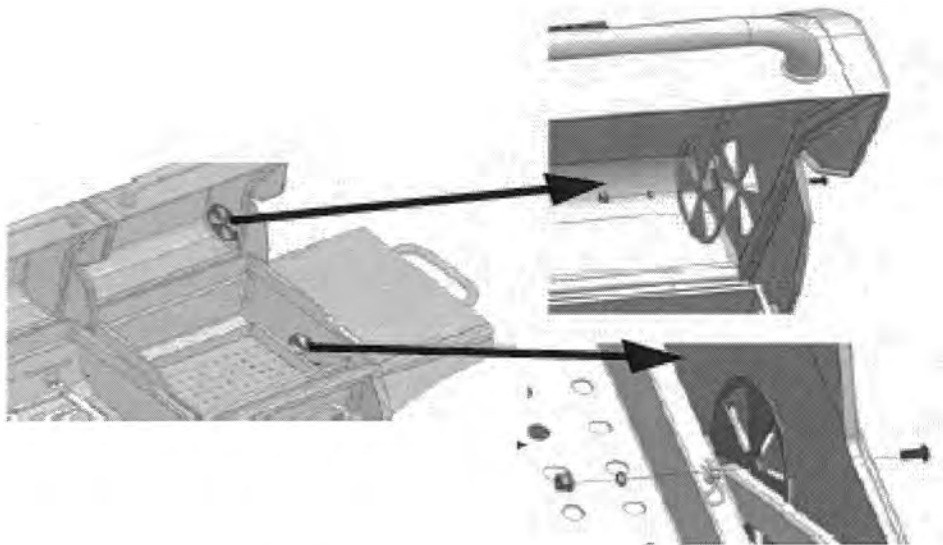
Mem. Ex. 11, Gafford Decl., Ex. B at 24. Thus, there is no genuine issue of material fact that those products fail to satisfy each limitation of the claimed invention, and therefore do not literally infringe any asserted claim. Additionally, because of A&J's narrowing amendments made during prosecution, adding limitations that the cover be "openable" and include "at least one exhaust," A&J is estopped from asserting infringement under the doctrine of equivalents. Thus, those products do not infringe any asserted claims of the '712 patent.

However, a factual dispute remains with respect to the Char-Broil Model 463724512 grill. This grill includes a gas cooking unit having a vent located at the back edge of an openable cover of the grill as shown below:



(Mem. Ex. 11, Gafford Decl., Ex. C at 5). Thus, a factual dispute remains as to whether the “openable cover” of the grill shown above includes an exhaust as the claims require.

Furthermore, the Char-Broil Model 463724512 combination charcoal/gas grill includes a butterfly vent located on the openable cover of its charcoal grill as shown below:



Mem. Ex. 11, Gafford Decl., Ex. D at 41. Thus, a factual dispute remains as to whether this butterfly vent in the “openable cover” satisfies the limitations of the asserted claims. The


pending motion is denied with respect to the Char-Broil Model 463724512 combination charcoal/gas grill.

**CONCLUSION**

For the reasons set forth above, the pending motion seeking summary determination of non-infringement of claims 1-20 of the '712 patent is granted with respect to the following products: (i) Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill Model Number 12210767; (ii) Char-Broil Oklahoma Joe Combination Charcoal/Gas Longhorn Grill Model Number 14201767; (iii) Char-Broil Charcoal/Gas Combo 1010 Deluxe, Model No. 463724514; (iv) Rankam Model No. GR2034205-SC (Ver 2); (v) Rankam GR2071001-MM (Ver 2); (vi) Outdoor Leisure Products Smoke Hollow Model Numbers PS9500, 8000, 8500, 3500, 3300, and 6500; and (vii) Chant Red Stone Model 1046761. *See* Staff Supp. Reply Br. at 5 n.2. However, the motion is denied with respect to the Char-Broil Model 463724512 combination charcoal/gas grill.

Accordingly, it is the INITIAL DETERMINATION of the undersigned that Motion No. 895-19 is granted in part.

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.

  
\_\_\_\_\_  
David P. Shaw  
Administrative Law Judge

Issued: April 17, 2014

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **ORDER NO. 33 (INITIAL DETERMINATION)** has been served by hand upon the Commission Investigative Attorney, **R. Whitney Winston, Esq.**, and the following parties as indicated, on April 29, 2014.



Lisa R. Barton, Acting Secretary  
 U.S. International Trade Commission  
 500 E Street SW, Room 112A  
 Washington, DC 20436

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<b>FOR RESPONDENTS CHAR-BROIL LLC; RANKAM METAL PRODUCTS MANUFACTORY LIMITED, USA; AND ZHEJIANG FUDEER ELECTRIC APPLIANCE CO., LTD.:</b>	
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**CERTAIN MULTIPLE MODE OUTDOOR  
GRILLS AND PARTS THEREOF**

Inv. No. 337-TA-895

<b>FOR RESPONDENTS ACADEMY LTD. d/b/a ACADEMY SPORTS &amp; OUTDOORS; AND NINGBO HUIGE OUTDOOR PRODUCTS, CO., LTD:</b>	
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<b>FOR RESPONDENTS DONGGUAN KINGSUN ENTERPRISES, CO., LTD.; AND OUTDOOR LEISURE PRODUCTS, INC.:</b>	
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<b>FOR RESPONDENTS PREMIER SPECIALTY BRANDS; AND WUXI JOYRAY INTERNATIONAL CORPORATION:</b>	
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<b>FOR RESPONDENT GHP GROUP, INC:</b>	
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