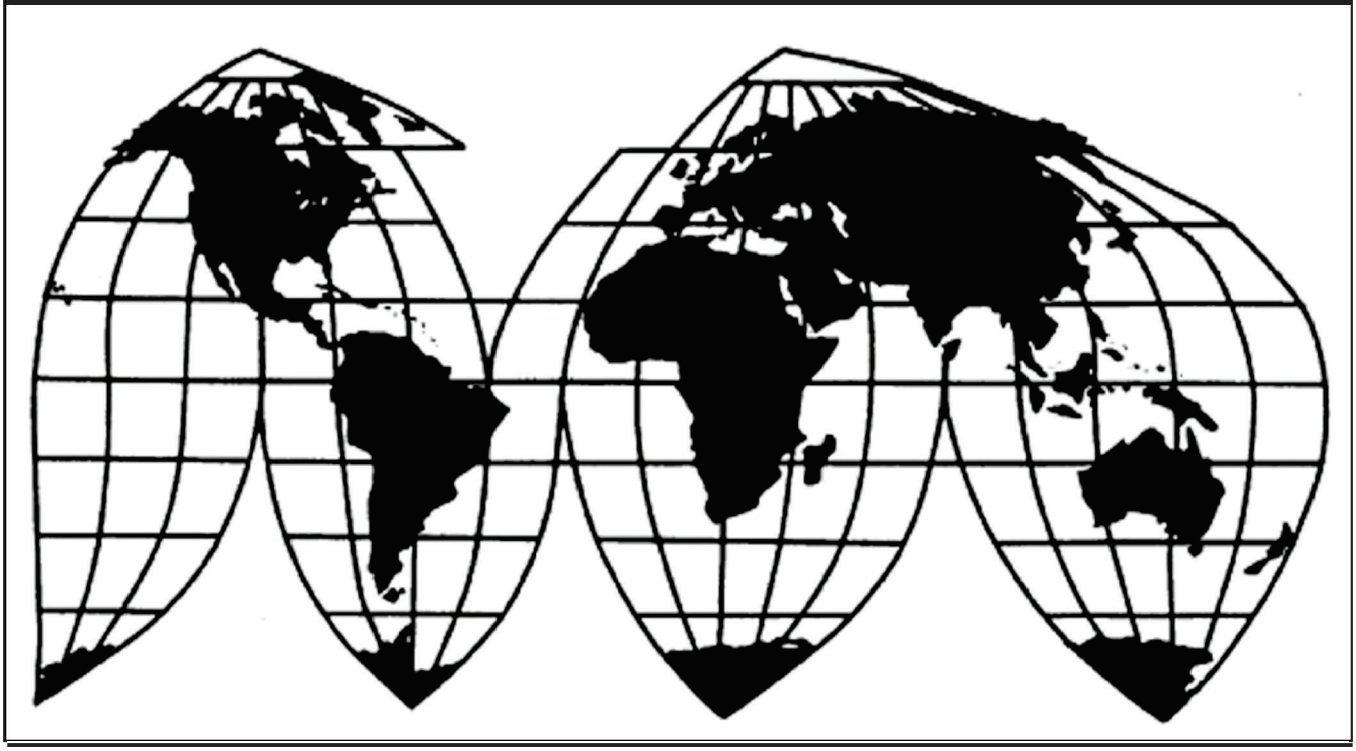
In the Matter of

CERTAIN LOOM KITS FOR CREATING LINKED ARTICLES

337-TA-923

Publication 4871 **February 2019**

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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Washington, DC 20436
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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC

In the Matter of **CERTAIN LOOM KITS FOR CREATING LINKED ARTICLES**	**Inv. No. 337-TA-923**

NOTICE OF FINAL COMMISSION DETERMINATION TO AMEND THE NOTICE OF INVESTIGATION, TERMINATE PATENT CLAIMS, AND ISSUE A GENERAL EXCLUSION ORDER; TERMINATION OF INVESTIGATION

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to amend the notice of investigation to reflect a change in corporate form by the complainant, to terminate the investigation with respect to claims 2 and 3 of U.S. Patent No. 8,485,565 ("the '565 patent"), and to enter a general exclusion order barring entry of loom kits that infringe claim 4 of the '565 patent. The Commission's determination is final and the investigation is terminated in its entirety.

FOR FURTHER INFORMATION CONTACT: Clark S. Cheney, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2661. 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 (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 August 6, 2014, based on a complaint filed by Choon's Design, Inc., of Wixom, Michigan, now Choon's Design LLC ("Choon's"). *See* 79 *Fed. Reg.* 45844-45 (August 6, 2014). The complaint alleged violations of section 337 by reason of the importation into the United States, the sale for importation, and the sale within the United States after importation of certain loom kits that infringe the '565 patent. The notice of investigation named thirteen respondents, all of which either have been found in default or have been terminated from this investigation. *See* Notice of Commission Determination Not to Review an Initial Determination Terminating the

Investigation as to Respondent Creative Kidstuff, LLC (September 26, 2014); Notice of Commission Determination Not to Review Two Initial Determinations Finding Certain Respondents in Default and Terminating the Investigation with Respect to Another Respondent (January 9, 2015); Notice of Commission Determination Not to Review an Initial Determination Terminating the Investigation as to Respondent Altatac, Inc. (January 13, 2015). The respondents in default are Island in the Sun LLC; Quality Innovations Inc.; Yiwu Mengwang Craft & Art Factory; Shenzhen Xuncent Technology Co., Ltd.; My Imports USA LLC; Jayfinn LLC; Hongkong Haoguan Plastic Hardware Co., Ltd.; Blinkee.com, LLC; Eyyup Arga; and Itcoolnomore (collectively, "defaulting respondents").

On February 3, 2015, the presiding administrative law judge ("ALJ") issued an ID finding a violation of section 337 and recommending the issuance of a general exclusion order. *See* Order No. 13. On February 13, 2015, the IA submitted a petition for review of the ID in part. On March 20, 2015, the Commission determined to review only the domestic industry economic prong determination in the ID. Upon review, the Commission determined to affirm the ALJ's finding that Choon's has shown a substantial investment in the exploitation of the '565 patent through engineering and research and development of articles protected by the '565 patent, but the Commission determined to modify certain portions of the ID regarding the expenditures comprising the domestic industry investments. The Commission stated that its modifications would be specified in a later Commission opinion. Having affirmed a violation of section 337, the Commission requested briefing concerning remedy, the public interest, and bonding. *See* 80 *Fed. Reg.* 16023-25 (March 26, 2015).

In response to the Commission's notice, Choon's informed the Commission that it changed its corporate form during the course of the investigation from Choon's Design, Inc., to Choon's Design LLC. Choon's also requested that claims 2 and 3 of the '565 patent be withdrawn from the investigation. No contrary submissions were received on those points. Accordingly, the Commission has determined to amend the notice of investigation to reflect that the complainant is Choon's Design LLC. The Commission has further determined to terminate the investigation with respect to claims 2 and 3.

Upon review of all submissions in response to the Commission's notice, and the entire record of the investigation, the Commission has determined that the appropriate form of relief for the determined violation of section 337 is a general exclusion order barring entry of loom kits that infringe claim 4 of the '565 patent. The Commission has further determined that the public interest factors enumerated in section 337(d)(1) (19 U.S.C. § 1337(d)(1)) do not preclude issuance of the general exclusion order. Additionally, the Commission has determined that a bond in the amount of one hundred (100) percent of the entered value of subject articles is required to permit temporary importation of the articles in question during the period of Presidential review (19 U.S.C. § 1337(j)). The Commission has also issued an opinion explaining its modification of the ALJ's domestic industry economic prong analysis and explaining the basis for the remedy. The Commission's determination is final and the investigation is terminated in its entirety.

The Commission's orders and the record upon which it based its determination were delivered to the President and to the United States Trade Representative on the day of their issuance. The Commission has also notified the Secretary of the Treasury of the orders.

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.

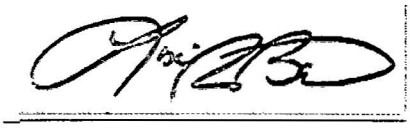
Lisa R. Barton
Secretary to the Commission

Issued: May 21, 2015

CERTAIN LOOM KITS FOR CREATING LINKED ARTICLES **Inv. No. 337-TA-923**

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, John K. Shin Esq., and the following parties as indicated, on **May 21, 2015.**



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

On Behalf of Complainant Choon's Design Inc.:

Timothy J. Murphy, Esq.
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Respondents:

Island In The Sun LLC
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Quality Innovations Inc.
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Hongkong Haoguan Plastic Hardware Co., Limited
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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN LOOM KITS FOR CREATING LINKED ARTICLES**	**Investigation No. 337-TA-923**

GENERAL EXCLUSION ORDER

The Commission has determined 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 and sale of certain loom kits for creating linked articles covered by claim 4 of U.S. Patent No. 8,485,565 ("the '565 patent") asserted in this investigation.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has made its determinations on the issues of remedy, the public interest, and bonding. The Commission has determined that a general exclusion from entry for consumption is necessary to prevent circumvention of an exclusion order limited to products of named persons and because there is a pattern of violation of section 337 and it is difficult to identify the source of infringing products. Accordingly, the Commission has determined to issue a general exclusion order prohibiting the unlicensed importation of infringing loom kits for creating linked articles ("covered products").

The Commission has also determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) do not preclude the issuance of the general exclusion order, and that the bond during the Presidential review period shall be in the amount of 100 percent of the entered value for all covered products in question.

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

1. Loom kits for creating linked articles covered by claim 4 of the '565 patent are excluded from entry into the United States for consumption, 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.

2. Notwithstanding paragraph 1 of this Order, the aforesaid loom kits for creating linked articles 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 one hundred (100) percent of the entered value of the products, 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.

3. At the discretion of U.S. Customs and Border Protection ("CBP") and pursuant to procedures that it establishes, persons seeking to import loom kits for creating linked articles 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 paragraph 1

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.

4. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to loom kits for creating linked articles 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.

5. 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).

6. The Commission Secretary shall serve copies of this Order upon each party of record in this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and U.S. Customs and Border Protection.

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

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: May 21, 2015

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION ORDER** has been served by hand upon the Commission Investigative Attorney, John K. Shin Esq., and the following parties as indicated, on **May 21, 2015.**

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

On Behalf of Complainant Choon's Design Inc.:

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Shuitian Community, Shiyan Street, Baoan Dist.
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Industry Part of Gong Chuang Ying, No. 8 of
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PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN LOOM KITS FOR CREATING LINKED ARTICLES**	**Investigation No. 337-TA-923**

COMMISSION OPINION

The Commission instituted this investigation on August 6, 2014, based on a complaint filed by Choon's Design, Inc. (now Choon's Design LLC or "Choon's").[1] 79 Fed. Reg. 45844-45 (August 6, 2014). The complaint alleged a violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337 or "section 337") based on, *inter alia*, the importation of loom kits that infringe U.S. Patent No. 8,485,565 ("the '565 patent"). The '565 patent describes a loom-like device for linking small rubber bands to form larger items like bracelets. The patent identifies Mr. Cheong Choon Ng ("Mr. Ng") as the sole inventor. Mr. Ng founded Choon's.

The notice of investigation named thirteen respondents. The Commission's Office of Unfair Import Investigations was also named as a party. Respondent Altatac Inc. made an appearance to contest the allegations in the complaint, but later settled with Choon's and was terminated from the investigation. During the course of the investigation Choon's withdrew its allegations against respondent Creative Kidstuff, LLC, which did not formally appear, and

[1] Although the complaint was filed by Choon's Design, Inc., during the course of the investigation the complainant changed its corporate form to Choon's Design LLC. *See* Complainant's Submission on Remedy, Public Interest, and Bonding, 1 (March 31, 2015) ("Choon's Sub."). The Commission has amended the notice of investigation to reflect this change.

against respondent Wangying, which had never been successfully served. The remaining respondents elected default or were found to be in default.

On February 3, 2015, the presiding administrative law judge ("ALJ"), issued an initial determination ("ID") granting a summary determination finding a violation of section 337 by the defaulting respondents and a recommended determination on remedy and bonding. *See* Order No. 13.[2] On February 13, 2015, the Commission investigative attorney ("IA") submitted a petition for review of the analysis in the ID concerning the economic prong of the domestic industry requirement.

On March 20, 2015, the Commission determined to review only the portion of the ID relating to the domestic industry economic prong. 80 Fed. Reg. 16023-25 (March 26, 2015). Upon review, the Commission determined to affirm the ID's finding that Choon's has shown a substantial investment in the exploitation of the '565 patent through engineering and research and development of articles protected by the '565 patent, but the Commission determined to modify certain portions of the ID regarding the expenditures comprising the domestic industry investments. *Id.*

This opinion explains the Commission's modifications to the ID's economic prong analysis. This opinion also addresses the appropriate remedy for the violation previously affirmed by the Commission, the statutory public interest factors, and the appropriate bond during the period of Presidential review.

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[2] The ID also addressed Choon's argument that a general exclusion order would not adversely affect the public interest. ID at 49. We note, however, that fact finding relating to the public interest was not delegated to the ALJ in this investigation. *See* 19 C.F.R. §§ 210.42(a)(1)(ii), 210.50(b)(1).

I. Domestic Industry

Under paragraph (a)(2) of section 337, a complainant must show that an industry "relating to the articles protected by the patent . . . exists or is in the process of being established" in the United States. 19 U.S.C. § 1337(a)(2). Paragraph (a)(3) expands upon paragraph (a)(2) as follows:

> (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).

The requirement of "articles protected by the patent" in section 337(a)(2) and (a)(3) has been termed the "technical prong" of the domestic industry requirement. *Alloc v. Int'l Trade Comm'n*, 342 F.3d 1361, 1375 (Fed. Cir. 2003). The test for determining whether the technical prong is met through the practice of the patent "is essentially the same as that for infringement, i.e., a comparison of domestic products to the asserted claims." *Id.* The Commission previously affirmed that Choon's has satisfied the technical prong of the domestic industry requirement. 80 Fed. Reg. 16023-25 (March 26, 2015).

The "economic prong" of the domestic industry requirement is satisfied when it is determined that significant or substantial economic activities and investments set forth in subparagraphs (A), (B), and/or (C) of section 337(a)(3) have taken place or are taking place in the United States. *Certain Variable Speed Wind Turbines & Components Thereof*, Inv. No. 337-TA-376, USITC Pub. No. 3003, Comm'n Op. at 21 (Nov. 1996).

Before the ALJ, Choon's moved for summary determination of the domestic industry economic prong under all three subparagraphs of section 337(a)(3). Complainant's Motion for Summary Determination with Respect to Domestic Industry and Violation of Section 337, and Request for General Exclusion Order (public version Dec. 8, 2014) ("SD Mot."). The IA supported only summary determination under subparagraph (C) based on Choon's substantial investments in engineering, research, and development. The IA disputed certain facts relating to investments under subparagraphs (A) and (B).

The ID found disputed issues of material fact as to whether Choon's had proven the existence of a domestic industry under subparagraphs (A) and (B). ID at 34 n.9. The ALJ found no dispute that a domestic industry exists based on investments identified in section 337(a)(3)(C). *Id.* at 42-43. The ID's analysis under subparagraph (C) described a variety of Choon's expenditures in developing its patented loom kit. Among the recited expenditures were "paying a patent attorney to prosecute U.S. and international patent applications" and "visiting a Chinese factory for a week to investigate manufacturing the Rainbow Loom® kits." *See* ID at 40. The ID also listed expenditures that Choon's paid to manufacturers in China for production of its patented looms kits. ID at 35-36. Additionally, the ID acknowledged Choon's argument that Mr. Ng "lost" or "gave up" salary from his regular employment at Nissan to build Choon's loom kit business. ID at 36-37.

On February 13, 2015, as noted *supra*, the IA submitted a petition for review of the ID in part. The IA argued that the ID erred by crediting certain expenditures as domestic industry investments. In particular, the IA objected to reliance on patent prosecution fees, money paid to manufacturers in China, and the cost of travel to visit Chinese manufacturers. With respect to patent prosecution costs, the IA cited *Certain Video Game Systems and Controllers*, Inv. No.

337-TA-743, USITC Pub. 4377, Comm'n Op. at p. 5 (Feb. 2013), to argue that the Commission should decline to credit patent prosecution costs toward a domestic industry investment. With regard to foreign travel and foreign manufacturing expenditures, the IA cited *Certain Optoelectronic Devices for Fiber Optic Communications, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-860, Comm'n Op. at pp. 16-18 (public version May 9, 2014), to argue that such expenditures are not domestic investments.

The IA further argued that the ID erred by failing to credit certain domestic investments, including $[ ] in Mr. Ng's time and effort to develop loom prototypes, a $[ ] investment in modeling clay for the prototypes, and a $[ ] investment to domestically manufacture prototypes. The IA argued that when Choon's expenditures are properly categorized, Choon's has satisfied the economic prong of the domestic industry requirement.

On February 18, 2015, Choon's filed a response to the IA's petition. Choon's took no position as to whether patent prosecution costs or costs to visit Chinese manufacturers count as domestic industry investments. Choon's agreed with the IA that Mr. Ng's time developing prototypes and expenditures for materials and manufacturing of those prototypes should have been included in the ID's domestic investment total. Choon's agreed with the IA that the economic prong of the domestic industry requirement has been met.

We have determined the ALJ's ultimate determination on domestic industry is correct: a domestic industry exists under section 337(a)(3)(C). However, we modify certain subsidiary findings in the ID as described below.

The ID found that Mr. Ng invested over $[ ] to exploit the '565 patent through engineering and research and development. *See, e.g.*, ID at 40-41. To arrive at that total, it appears that the ID credited Choon's expenditures listed in a chart spanning pages 35 and 36 of

the ID. For example, one item in the chart is Mr. Ng's "[t]rip to visit [a] Chinese factory" and another item is "[l]ost salary from weeklong trip to China." *Id.* at 35-36. The ID's analysis characterized Mr. Ng's trip to China as a domestic industry investment. *Id.* at 40. To the extent that the ID relied on expenditures in the chart on pages 35 and 36 to conclude a domestic industry exists, we set aside such reliance. The only exception is the expenditure for the domestically produced instruction manual, listed in the chart on page 36. We affirm that Choon's expenditure in the United States to produce its loom kit instruction manual is appropriately considered a domestic industry investment.

We clarify that Mr. Ng's development work, the purchase of prototype materials, and expenditures to domestically manufacture prototypes, as described in the text on page 35 of the ID, are properly considered domestic industry investments.

We set aside the statements on page 40 of the ID crediting expenditures for "paying a patent attorney to prosecute U.S. and international patent applications."

The foregoing modifications to the ID result in our reliance on the following investments to conclude that Choon's has satisfied the domestic industry requirement of section 337(a)(3)(C):

Activity	ID Citation	Amount[3]
Instruction manuals for kits, paid to a U.S. company	Chart p. 36	$[ ]
Assembly/quality control time (May 2011-Aug. 2012)	Chart p. 37	$[ ]
Raw materials for freight elevator in home	Chart p. 37	$[ ]
Time spent making freight elevator in home	Chart p. 37	$[ ]
Rent, based on dedication of 25% of home to assembly space and warehousing	Chart p. 37	$[ ]

[3] *See* SD Mot. Exh. 21, Confidential Declaration of Cheong Choon Ng.

Activity	ID Citation	Amount[3]
Website costs	Chart p. 38	$[ ]
Time writing website	Chart p. 38	$[ ]
YouTube instructional videos	Chart p. 38	$[ ]
Craft and Hobby association membership	Chart p. 38	$[ ]
Booth at Craft and Hobby show	Chart p. 38	$[ ]
Advertising to support Craft and Hobby booth	Chart p. 38	$[ ]
Booth at Novi Library	Chart p. 38	$[ ]
Other marketing efforts	Chart p. 38	$[ ]
Value of Mr. Ng's development work time (Oct. 2010-Feb. 2011)	Text p. 35	$[ ]
Modeling clay for prototypes	Text p. 35	$[ ]
Domestic manufacture of prototypes at Wichita State University	Text p. 35	$[ ]
Total		**$[ ]**

We affirm the ID's conclusion that, when viewed in the context of this investigation, Choon's investment is substantial. *See* ID at 42-43. We additionally observe that Mr. Ng's $[ ] investment to establish an entirely new industry amounts to many times what a follow-on competitor would spend to begin manufacturing loom kits. *See* ID at 46 (finding that a competitor could begin manufacturing by spending only $[ ] on tooling). That fact provides additional support for a conclusion that Choon's domestic investment is substantial.

In sum, the ID's findings, as modified above, support a conclusion that Choon's has made a substantial investment in the exploitation of the '565 patent through engineering and research and development of articles protected by the '565 patent. *See* 19 U.S.C. §

1337(a)(3)(C). We need not further discuss the categories of expenditures in the ID that we have set aside above because the record supports a finding of a domestic industry without consideration of those categories.

II. Remedy

The Commission has determined that section 337 has been violated. *See* 80 Fed. Reg. 16023-25 (March 26, 2015). Based on the submissions of the parties, we provide below our determination concerning the appropriate remedy for the violations.

A. General Exclusion Order

1. Legal Standard

When, as here, a respondent appeared before the Commission to contest the allegations in the complaint[4] but other respondents defaulted, section 337(g)(2) does not apply. Rather, the Commission applies section 337(d)(2), which provides as follows:

> The authority of the Commission to issue an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that—
>
> (A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or
>
> (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19 U.S.C. § 1337(d)(2); *Certain Sildenafil or Any Pharmaceutically Acceptable Salt Thereof, such as Sildenafil Citrate, and Products Containing Same*, Inv. No. 337-TA-489, EDIS Doc. ID 210919, Comm'n Op. at 4 (July 23, 2004) (finding that the issuance of a general exclusion order under section 337(d)(2) was appropriate when not all respondents failed to appear to contest the investigation); *see also Certain Energy Drink Products*, Inv. No. 337-TA-678, USITC Pub. No. 4286, Comm'n Op. at 4-7 (Nov. 2011); *Certain Toner Cartridges and*

[4] Respondent Altatac Inc. appeared at the Commission to contest the allegations in the complaint. *See* Notice of Commission Determination Not to Review an Initial Determination Terminating the Investigation as to Respondent Altatac, Inc. (January 13, 2015).

Components Thereof, Inv. No. 337-TA-740, USITC Pub. No. 4376, Comm'n Op. at 24 (Feb. 2013).

2. The ALJ's Recommendation

The ALJ credited evidence that the tooling to manufacture an imitation loom kit costs about $[ ], that it costs about $[ ] to manufacture a loom kit in China, and that it costs about $[ ] to ship a loom kit to the United States. ID at 46. The ALJ concluded that the potential profit from unlicensed loom kits is high enough to invite infringement. ID at 46-47.

The ALJ further found that the websites Alibaba.com, Aliexpress.com, Globalsources.com, DHGate.com, and Made-in-China.com listed hundreds of infringing articles for sale by hundreds of sellers. ID at 45. The ALJ credited evidence that the anonymous nature of Internet sales makes it difficult to identify the source of infringing goods. ID at 47. The ALJ cited Choon's statement that it is impossible to know whether listings on the Internet for infringing loom kits are offered by a specific manufacturer or by intermediate merchants. *Id.*

The ALJ found that Choon's has filed nine lawsuits against infringers of its intellectual property, sent numerous cease and desist letters to websites selling loom kits that infringe the '565 patent, and sent advisory letters to 161 U.S. malls informing them of potential patent infringement and requesting that they do not lease space or kiosks to persons looking to sell infringing loom kits. ID at 47-48.

Additionally, the ALJ noted that Choon's has requested U.S. Customs and Border Protection ("Customs") to exclude counterfeit looms bearing its registered Rainbow Loom® trademark under 19 U.S.C. § 1526 and to exclude counterfeits of its copyrighted material under 17 U.S.C. § 602, but those efforts have resulted in the seizure of only a relatively small number of goods. The ALJ observed that Choon's previous attempts at Customs enforcement could be

thwarted by infringers that avoid using Choon's Rainbow Loom® trademark and Choon's copyrighted picture on their packaging. ID at 47-48.

The ALJ also noted the IA's contention that the record supported the issuance of a general exclusion order.

Based on the foregoing, the ALJ determined that the criteria for issuing a general exclusion order had been met.

3. The Parties' Submissions

In its complaint, Choon's sought a remedy for articles that infringe claims 2, 3, and 4 of the '565 patent. *See* Complaint at 1. In response to the Commission's notice soliciting briefing on remedy, Choon's stated that it "no longer intends to pursue claims 2 and 3, and hereby requests that these claims be withdrawn from the Investigation." Choon's Sub. at 2. Accordingly, Choon's requested a general exclusion order directed to products that infringe claim 4 of the '565 patent. *Id.*

Choon's argued that the record supports a general exclusion order under both subparagraph (A) and subparagraph (B) of section 337(d)(2). Choon's Sub. at 2-3. With respect to the likelihood of circumvention of a limited exclusion order under subparagraph (A), Choon's argued to the ALJ that (1) infringing products were widely available on Internet auctions; (2) there are low barriers to entry into the loom kit market; (3) market conditions invite infringers, (4) it is difficult to identify the source of infringing loom kits; (5) infringement persists despite sending cease-and-desist letters and despite enforcement of Choon's rights under trademark and copyright law; and (6) Choon's would be unreasonably burdened by enforcement actions if a general exclusion order is not entered. SD Mot. at 40-46.

With respect to a pattern of violation of section 337 and difficulty in identifying the source of infringing goods under subparagraph (B), Choon's argued to the ALJ that

(1) infringing products are widely available on Internet auctions by anonymous sellers; (2) customs authorities in Europe had seized a large number of unauthorized loom kits because they had not been approved by safety regulators for use by children; (3) Choon's believes that respondent Wangying (which was never successfully served) used a false name to avoid detection of infringement; (4) ten of the thirteen named respondents defaulted rather than contest infringement; (5) it is difficult to identify the source of infringing loom kits; and (6) the facts here are similar to *Certain Cases for Portable Electronic Devices*, Inv. Nos. 337-TA-867/861, Comm'n Op. (public version July 10, 2014) ("*Cases for Portable Devices*"), where the Commission issued a general exclusion order. SD Mot. at 46-49.

The IA agreed that the record evidence supported a general exclusion order under section 337(d)(2)(B). Response of the Office of Unfair Import Investigations to the Commission's Request for Written Submissions on Remedy, the Public Interest, and Bonding, 5-8 (April 3, 2015) ("IA Resp."). The IA noted that the ALJ's analysis appeared to focus on section 337(d)(2)(B) because the ALJ did not specifically state that a general exclusion order was necessary to avoid circumvention of a limited exclusion order. *Id.* at 6 n.5. The IA argued, however, that a general exclusion order would also be supported under subparagraph (A) "for many of the same reasons analyzed by the ALJ." *Id.*

4. Analysis

Subparagraph (A) and subparagraph (B) of section 337(d)(2) provide two alternative bases for the issuance of a general exclusion order. *See* 19 U.S.C. § 1337(d)(2). Below we compare the record evidence to the requirements in each of those subparagraphs.

Subparagraph (A)

Subparagraph (A) states that the Commission may issue a general exclusion order if it is "necessary to prevent circumvention" of a limited exclusion order. The record of this

investigation supports a conclusion that a limited exclusion order likely would be circumvented. For example, of the eleven products accused in the complaint, only two identify a manufacturer on the packaging. *See* Complaint, Exhs. 8-59. Thus, it appears that manufacturers of infringing loom kits are likely to attempt to circumvent a limited exclusion order by shipping kits that lack manufacturer identification.

Additionally, the record shows that infringing loom kits are widely offered for sale online by anonymous sellers. *See* ID at 47. The vast majority of such Internet sales are fulfilled with infringing imports from China. SD Mot. Exh. 24. If the Commission entered an exclusion order limited to the products of the defaulting respondents, the defaulting respondents could circumvent the order via anonymous sales on the Internet.

The record also shows infringers previously have circumvented attempts to restrict infringing sales. For example, Choon's requested that Internet sites like Alibaba.com and Aliexpress.com remove listings for infringing loom kit sales. But after those websites complied with the request, other anonymous infringing listings appeared. *Compare,* SD Mot. Exh. 35 *with* Exh. 24. That evidence indicates that infringers likely will attempt to circumvent the restrictions of a limited exclusion order.

The ALJ further considered low barriers to entry in his remedy analysis. ID at 46. An infringing manufacturer can set up tooling to make infringing loom kits for about $[ ]. *Id.* The ALJ found that the low barrier to market entry invites others to set up new infringing businesses. *Id.* at 46-47. A limited exclusion order would not reach such infringers. The low cost of tooling also indicates that a named respondent could abandon its existing corporate form, acquire new equipment, and start infringing again in circumvention of a limited exclusion order. *See* SD Mot. Exh. 25.

The foregoing record evidence shows that a general exclusion order is necessary to prevent circumvention of a limited exclusion order. We therefore determine that the requirements for a general exclusion order under section 337(d)(2)(A) have been met.

Subparagraph (B)

The Commission can also issue a general exclusion order under subparagraph (B) if "there is a pattern of violation of this section and it is difficult to identify the source of infringing products." *See* 19 U.S.C. § 1337(d)(2)(B).

We note that many of the facts described above in connection with subparagraph (A) are also relevant to subparagraph (B). For example, as noted above, most of the products found to infringe do not identify a manufacturer. *See* Complaint, Exhs. 8-59. This fact supports an inference that manufacturers of infringing loom kits are likely to attempt to circumvent a limited exclusion order by shipping kits that lack identification, which is relevant to subparagraph (A). This fact also satisfies the requirement of subparagraph (B) that "it is difficult to identify the source of infringing products." Similarly, a large number of anonymous infringing sales on the Internet (ID at 47) supports a likelihood of circumvention under subparagraph (A) and also supports a determination that it is difficult to identify the source of infringing products under subparagraph (B).

In addition to showing difficulty in identifying the source of infringing goods, subparagraph (B) also requires "a pattern of violation of this section." 19 U.S.C. § 1337(d)(2)(B). The record evidence satisfies this requirement. We previously determined that at least ten different respondents imported infringing products from China into the United States or sold such products inside the United States in violation of section 337. *See* 80 Fed.

Reg. 16023-25 (March 26, 2015). The record therefore shows a pattern of violation of section 337.

Additionally, the record shows that infringing loom kits from China are widely available from anonymous sellers through Internet auctions. When those sales are fulfilled in the United States, a violation of section 337 results. The Commission has found in other investigations that numerous online sales of infringing imported goods can constitute a pattern of violation of section 337. *See, e.g.*, *Cases for Portable Devices*, Comm'n Op. at 10. The Internet sales identified here similarly indicate a pattern of violation of section 337.

Based on the foregoing record evidence, we determine that there is a pattern of violation of section 337 with respect to the sale and importation of articles covered by claim 4 of the '565 patent.[5] Additionally, we determine that it is difficult to identify the source of the infringing goods. We therefore determine a general exclusion order is appropriate under section 337(d)(2)(B).

The IA transmitted a draft of the general exclusion order we issue today to Customs for review and comment. After its review, Customs indicated that it had no comments on the order. IA Resp. at 8 n.7. We therefore conclude that enforcement of the general exclusion order is within the ability and expertise of Customs.

B. Cease and Desist Orders

While the ALJ recommended a cease and desist order, the ALJ did not identify any respondent as the subject of such an order. ID at 51. The IA suggested in its briefing to the Commission that recommendation of a cease and desist order "was inadvertent, as the ALJ

[5] As noted above, Choon's has requested that claims 2 and 3 be withdrawn from the investigation. Choon's Sub. at 2. We grant Choon's request and limit the general exclusion order we issue today to articles covered by claim 4 of the '565 patent.

performed no analysis or justification for the issuance of a cease and desist order." IA Resp. at 9. Accordingly, the IA asserts that no cease and desist orders should issue.

Choon's did not request cease and desist orders in its December 2014 motion for summary determination or in its March 31, 2015, response to the Commission's notice soliciting briefing on remedy. Accordingly, no record exists to support issuance of such orders. We therefore have determined not to issue any cease and desist orders in this investigation.

III. Public Interest Considerations

A. Legal Standard

Upon finding a violation, section 337(d) directs the Commission to issue an exclusion order unless the order would have an adverse effect on public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers. 19 U.S.C. § 1337(d)(1). Thus, the statute does not require the Commission to determine that a remedial order would advance the public interest factors but rather requires the Commission to consider whether issuance of such an order will adversely affect the public interest factors. *See Certain Agricultural Vehicles and Components Thereof*, Inv. No. 337-TA-487, USITC Pub. 3735, Comm'n Op. at 17 (Dec. 2004).

B. The Parties' Submissions

Choon's argued that it is undisputed that the continued sale and importation of the subject loom kits will infringe claim 4 of the '565 patent and harm Choon's valuable intellectual property rights. Choon's Sub. at 4. Choon's also contended that "the infringing multiple piece loom kits do not have to comply with standard toy safety testing" and that European customs authorities have acknowledged that fact to be "a sufficient reason to seize hundreds of knockoff multiple piece loom kits." *Id.* Additionally, Choon's asserted that "there is no evidence that issuance of a general exclusion order will have any effect on competitive conditions in the

United States or the production of other loom kit products." *Id.* Accordingly, Choon's concluded that a general exclusion order would not negatively impact the public interest. *Id.*

The IA also argued that the statutory public interest factors do not weigh against entering a general exclusion order. IA Resp. at 9-10. With respect to public health and welfare and U.S. consumers generally, the IA noted that the toy products at issue are not the types of products that have raised public interest concerns in past investigations. *Id.* The IA further argued that competitive conditions are robust in the United States economy for the subject loom kits. *Id.* at 10. The IA additionally contended that Choon's, any of its licensees, and other third parties in the U.S. could replace the products at issue with their own like or directly competitive articles within a commercially reasonable time should an exclusion order go into effect. *Id.*

C. Analysis

When the Commission considers issuing an exclusion order, it must examine the impact on the statutory public interest factors in light of the record of the investigation. *See* 19 U.S.C. § 1337(d)(1). For example, when the facts and circumstances have warranted, the Commission has determined that the exclusion of certain novelties did not raise issues of public health and welfare. *See, e.g., Certain Chemiluminescent Compositions and Components Thereof and Methods of Using, and Products Incorporating the Same*, Inv. No. 337-TA-285, USITC Pub. No. 2370, Comm'n Op. at 13-14 (March 1991) (on the basis of the information in the record of the investigation, "chemiluminescent products used for novelty purposes do not raise issues of public health and welfare"). Additionally, the Commission has issued an exclusion order where the record contained no evidence that the statutory public interest factors would be adversely impacted by the exclusion of a puzzle toy. *See Certain Cube Puzzles*, Inv. No. 337-TA-112, USITC Pub. 1334, Views of Chairman Eckes and Commissioner Haggart at 35 (Jan. 1983).

The record in this investigation contains no evidence that a general exclusion order would have an adverse effect on the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers. The Commission requested submissions from the public concerning the effect of a remedy on the public interest, but no third parties responded to the Commission's notice. 80 Fed. Reg. 16023-25 (March 26, 2015). Additionally, the IA observed that Choon's and third parties could replace the products at issue with their own like or directly competitive articles within a commercially reasonable time should an exclusion order go into effect. IA Resp. at 10. The ALJ's finding that a manufacturer could begin producing covered loom kits with an initial investment of less than $[ ] supports the IA's observation. *See* ID at 46. Based on the record of this investigation, we determine that the issuance of a general exclusion order is not precluded by consideration of the public interest factors set out in section 337(d)(1).

IV. Bond During Period of Presidential Review

A. Legal Standard

During the 60-day period of Presidential review, imported articles otherwise subject to a remedial order are entitled to conditional entry under bond, pursuant to section 337(j)(3). The Commission must specify a bond amount "sufficient to protect the complainant from any injury." 19 U.S.C. § 1337(j)(3); 19 C.F.R. § 210.50. The Commission typically sets the bond based on the price differential between the imported infringing product and the domestic industry article or based on a reasonable royalty. *See, e.g., Certain Microsphere Adhesives, Process for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes,* Inv. No. 337-TA-366, USITC Pub. 2949, Comm'n Op. at 24 (Jan. 1996) (setting bond based on price differentials); *Certain Plastic Encapsulated Integrated Circuits,* Inv. No. 337-TA-315, USITC Pub. 2574, Comm'n Op. at 45 (Nov. 1992) (setting the bond based on a reasonable royalty).

However, where the available pricing or royalty information is inadequate, the bond may be set at one hundred (100) percent of the entered value of the infringing product. *See, e.g., Certain Neodymuim-Iron-Boron Magnets, Magnet Alloys, and Products Containing Same,* Inv. No. 337-TA-372, USITC Pub. 2964, Comm'n Op. at 15 (May 1996).

B. The ALJ's Recommendation

The ALJ found that many sales of infringing loom kits "are made online at various price points and calculating an average price will be difficult and cumbersome." ID at 50. The ALJ therefore concluded that "setting a bond based on price differential is not feasible." *Id.* The ALJ recommended a bond of one hundred (100) percent during the Presidential review period.

C. The Parties' Submissions

Choon's argued that because this investigation concerned a large number of accused products offered at a variety of prices, it is "difficult to reliably compare the price of the domestic industry products to the infringing products." Choon's Sub. at 5. Choon's contended that in such circumstances the Commission has set a bond value of one hundred percent. *Id.* (citing *Cases for Portable Devices*, Comm'n Op. at 21). Choon's urged the Commission to follow that precedent and set the bond here at one hundred percent.

The IA also supported a one hundred percent bond. The IA asserted that "the evidence shows that the variety of pricing information, coupled with the number of accused products, makes it difficult to reliably compare the price of Complainant's domestic industry products to the infringing products." IA Resp. at 11.

D. Analysis

In *Cases for Portable Devices*, the Commission determined that the complainant had established that "many of the accused products are offered for sale on the Internet at different prices based on the website visited, the age of the product, and the quantity purchased."

Comm'n Op. at 21. The Commission further noted that the respondents in default had not provided discovery. *Id.* The Commission concluded those factors made it difficult to reliably compare the price of the domestic industry products to the price of the infringing products. Comm'n Op. at 21. The Commission therefore set the bond at one hundred percent. *Id.*

The facts of *Cases for Portable Devices* are similar to the facts here. The record here shows that a large number of infringing loom kits are sold on the Internet at different prices. *See* ID at 47, 50. Additionally, the defaulting respondents in this investigation provided no discovery, including discovery about pricing. The record therefore lacks a reliable comparison of the price of the domestic industry products to the price of the infringing products. In these circumstances, we determine it is appropriate to set the Presidential review bond in the amount of one hundred (100) percent of the entered value of the infringing imports to ensure the complainant is protected from injury. *See Cases for Portable Devices*, Comm'n Op. at 21; *Certain Oscillating Sprinklers, Sprinkler Components, and Nozzles,* Inv. No. 337-TA-448, USITC Pub. No. 3498, Limited Exclusion Order at 4-6 (Mar. 2002) (setting bond at one hundred percent of entered value for products of defaulting respondent).

V. CONCLUSION

We have determined to issue a general exclusion order barring entry of the subject loom kits for making linked articles. The public interest considerations in section 337(d) do not preclude this remedy. We have further determined that a bond in the amount of one hundred (100) percent of the entered value of the subject articles is necessary to protect the complainant from injury during the Presidential review period. Our determination will be published in the *Federal Register* and is today transmitted to the President, the U.S. Trade Representative, the Secretary of the Treasury, and U.S. Customs and Border Protection. The investigation is terminated in its entirety.

PUBLIC VERSION

By order of the Commission. 

Lisa R. Barton
Secretary to the Commission

Issued: JUN 2 6 2015

CERTAIN LOOM KITS FOR CREATING LINKED ARTICLES **Inv. No. 337-TA-923**

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, John K. Shin Esq., and the following parties as indicated, on **June 26, 2015.**

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

On Behalf of Complainant Choon's Design Inc.:

Timothy J. Murphy, Esq.
CARLSON, GASKEY & OLDS, P.C.
400 W. Maple Rd., Ste. 350
Birmingham, MI 48009

☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other:_____

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC

In the Matter of **CERTAIN LOOM KITS FOR CREATING LINKED ARTICLES**	**Inv. No. 337-TA-923**

NOTICE OF COMMISSION DETERMINATION TO REVIEW AN INITIAL DETERMINATION IN PART AND, ON REVIEW, TO AFFIRM A FINDING OF VIOLATION WITH MODIFICATIONS; REQUEST FOR WRITTEN SUBMISSIONS 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 an initial determination ("ID") (Order No. 13) issued by the presiding administrative law judge ("ALJ") in the above-captioned investigation. Particularly, the Commission has determined to review the determination on domestic industry in the ID. Upon review, the Commission affirms a finding of domestic industry with modifications. The Commission's determination results in a determination of a violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337 or "section 337"). Accordingly, the Commission requests written submissions, under the schedule set forth below, on remedy, public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Clark S. Cheney, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2661. 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 (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 August 6, 2014, based on a complaint filed by Choon's Design, Inc., of Wixom, Michigan ("Choon's"). 79 *Fed. Reg.* 45844-45 (August 6, 2014). The complaint alleged violations of

section 337 by reason of the importation into the United States, the sale for importation, and the sale within the United States after importation of certain loom kits for creating linked articles that infringe U.S. Patent No. 8,485,565 ("the '565 patent"). The notice of investigation named thirteen respondents, all of which either have been found in default or terminated from this investigation. *See* Notice of Commission Determination Not to Review an Initial Determination Terminating the Investigation as to Respondent Creative Kidstuff, LLC (September 26, 2014); Notice of Commission Determination Not to Review an Initial Determination Finding Respondent Island in the Sun LLC in Default (October 16, 2014); Notice of Commission Determination Not to Review Two Initial Determinations Finding Certain Respondents in Default and Terminating the Investigation with Respect to Another Respondent (January 9, 2015); Notice of Commission Determination Not to Review an Initial Determination Terminating the Investigation as to Respondent Altatac, Inc. (January 13, 2015). The respondents in default are Island in the Sun LLC; Quality Innovations Inc.; Yiwu Mengwang Craft & Art Factory; Shenzhen Xuncent Technology Co., Ltd.; My Imports USA LLC; Jayfinn LLC; Hongkong Haoguan Plastic Hardware Co., Ltd.; Blinkee.com, LLC; Eyyup Arga; and Itcoolnomore (collectively, "defaulting respondents").

On December 5, 2014, Choon's moved for a summary determination of a violation of section 337 and for issuance of a general exclusion order. On December 17, 2014, the Commission investigative attorney ("IA") submitted a response supporting the motion. No other responses to the motion were received.

On February 3, 2015, the ALJ issued an ID granting Choon's motion for summary determination of violation and recommending the issuance of a general exclusion order. *See* Order No. 13. On February 13, 2015, the IA submitted a petition for review of the ID in part. The IA argued that the ALJ improperly accepted alleged domestic industry investments in "paying a patent attorney to prosecute U.S. and international patent applications" and "visiting a Chinese factory for a week to investigate manufacturing the Rainbow Loom® kits." *See* ID at 40. The IA also contended that certain foreign expenditures should have been excluded and other domestic expenditures should have been included in the total investment summarized by the ALJ on page 42 of the ID. The IA asserts that, notwithstanding these points, the Commission should affirm the ALJ's conclusion that Choon's has satisfied the domestic industry requirement and that a violation of section 337 has been proven.

On February 18, 2015, Choon's filed a response to the IA's petition. Choon's took no position as to whether patent prosecution costs or visiting Chinese manufacturers count as domestic industry investments. Choon's agreed with the IA that certain domestic expenditures should be included in the domestic investment total and that the economic prong of the domestic industry requirement has been met.

The Commission has determined to review only the domestic industry economic prong determination in the ID. Upon review, the Commission affirms a finding that Choon's has shown a substantial investment in the exploitation of the '565 patent through engineering, and research and development of articles protected by the '565 patent, but the Commission modifies certain portions of the ID regarding the expenditures comprising the domestic industry investments. The Commission's modifications will be specified in a later Commission opinion.

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 one or more respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *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 and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Complainant and the IA are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the date on which the '565 patent expires and the HTSUS subheadings under which the accused products are imported.

Written submissions must be filed no later than close of business on April 3, 2015. Reply submissions must be filed no later than the close of business on April 10, 2015. Such submissions should address the ALJ's recommended determinations on remedy and bonding which were made in Order No. 13. No further submissions on any of 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 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-923") in a prominent place on the cover page and/or the first page. *See* Handbook for Electronic Filing Procedures, http://vvww.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).

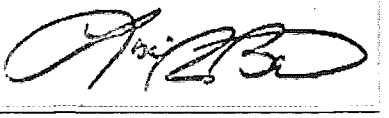
By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: March 20, 2015

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, John K. Shin Esq., and the following parties as indicated, on **March 20, 2015.**



Lisa R. Barton, Secretary
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☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other:_____

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of	
CERTAIN LOOM KITS FOR CREATING LINKED ARTICLES	**Inv. No. 337-TA-923**

ORDER NO. 13: INITIAL DETERMINATION GRANTING COMPLAINANT'S MOTION FOR SUMMARY DETERMINATION WITH RESPECT TO DOMESTIC INDUSTRY AND VIOLATION OF SECTION 337, AND REQUEST FOR GENERAL EXCLUSION ORDER

(February 3, 2015)

On December 5, 2014, Complainant Choon's Design Inc. ("Complainant") filed a motion for summary determination with respect to domestic industry and violation of Section 337 of the Tariff Act of 1930 (Amended) as well as a request for a General Exclusion Order ("GEO"). (Motion No. 923-009.) Complainant seeks a determination that a domestic industry exists, that there has been importation and a violation of Section 337 by Respondents Island In The Sun LLC ("Island"); Quality Innovations Inc. ("Quality"); Yiwu Mengwang Craft & Art Factory ("Yiwu"); Shenzhen Xuncent Technology Co., Ltd ("Shenzhen"); My Imports USA LLC ("My Imports"); Jayfinn LLC ("Jayfinn"); Hongkong Haoguan Plastic Hardware Co. Limited ("HK Haoguan"); Blinkee.com, LLC ("Blinkee"); Eyyup Arga ("Eyyup"); and Itcoolnomore. On December 17, 2014, the Commission Investigative Staff ("Staff") submitted a response supporting the motion. As of the date of this order, no party has responded.

I. BACKGROUND

A. Institution and Procedural History of This Investigation

By publication of a notice in the *Federal Register* on August 6, 2014, 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 looms kits for creating linked articles by reason of infringement of one or more claims 2-4 of U.S. Patent No. 8,485,565 ("the '565 patent"), and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

79 Fed. Reg. 45844 (August 6, 2014).

The complainant is Choon's Design Inc. of Wixom, MI. (*Id.*) The respondents are Wangying of Jinhua, Zhejiang China; Island In The Sun LLC of Little Rock, AR; Quality Innovations Inc. of Irwindale, CA; Yiwu Mengwang Craft & Art Factory of Yiwu City, Zhejiang, China; Shenzhen Xuncent Technology Co., Ltd. of Shenzhen, Guangdong China; Altatac Inc. of Los Angeles, CA ("Altatac"); My Imports USA LLC of Edison, NJ; Jayfinn LLC of Gilbert, AZ; Creative Kidstuff, LLC of Minneapolis, MN; Hongkong Haoguan Plastic Hardware Co. of Shenzhen, Guangdong, China; Blinkee.com, LLC of Fairfax, CA; Eyyup Arga of Lodi, NJ; and Itcoolnomore of Jinhua, Zhejiang, China. (*Id.*) The Office of Unfair Import Investigations is participating in this investigation. (*Id.*) Each of the named respondents has either defaulted or been terminated from this Investigation as summarized in the following table:

Respondents	Status	Docket Entry
Wangying	Terminated based on withdrawal of Complaint	Order No. 10[1] (December 11, 2014)
Island In The Sun LLC	In default	Order No. 5 (September 6, 2014)
Quality Innovations Inc.	In default	Order No. 7 (November 13, 2014)
Yiwu Mengwang Craft & Art Factory	In default	Order No. 7 (November 13, 2014)
Shenzhen Xuncent Technology Co., Ltd	In default	Order No. 7 (November 13, 2014)
Altatac Inc.	Terminated based on withdrawal of Complaint	Order No. 11[2] (December 18, 2014)
My Imports USA LLC	In default	Order No. 7 (November 13, 2014)
Jayfinn LLC	In default	Order No. 7 (November 13, 2014)
Creative Kidstuff, LLC	Terminated based on withdrawal of Complaint	Order No. 3[3] (September 2, 2014)
Hongkong Haoguan Plastic Hardware Co., Limited	In default	Order No. 7 (November 13, 2014)
Blinkee.com, LLC	In default	Order No. 7 (November 13, 2014)
Eyyup Arga	In default	Order No. 7 (November 13, 2014)
Itcoolnomore	In default	Order No. 7 (November 13, 2014)

[1] Notice of Commission Determination Not to Review Two Initial Determinations Finding Certain Respondents in Default and Terminating the Investigation with Respect to Another Respondent, (January 9, 2015).
[2] Notice of Commission Determination Not to Review an Initial Determination Terminating the Investigation as to Respondent Altatac, Inc., (January 13, 2015).
[3] Notice of Commission Determination Not to Review an Initial Determination Terminating the Investigation as to Respondent Creative Kidstuff, LLC, (September 26, 2014).

In compliance with 19 C.F.R. § 210.16(c)(2), Complainant included in its Motion a declaration that it would seek a General Exclusion Order ("GEO"). (Mot. at 1). The defaulting Respondents addressed by Complainant in its Motion are (1) Island, (2) Quality, (3) Yiwu, (4) Shenzhen, (5) My Imports, (6) Jayfinn, (7) HK Haoguan, (8) Blinkee, (9) Eyyup, and (10) Itcoolnomore. On December 9, 2014, the ALJ issued an Initial Determination ("ID") finding nine of these Respondents in default. (Order No. 9). (Respondent Island in the Sun LLC previously elected to default (Order No. 5; (September 16, 2014).) On January 9, 2015, the Commission determined not to review this ID (Order No. 9) (Notice of Commission Determination Not to Review Two Initial Determinations Finding Certain Respondents in Default and Terminating the Investigation with Respect to Another Respondent). On December 22, 2014, the ALJ issued an order granting a joint motion to stay the procedural schedule. (Order No. 12; (December 22, 2014).)

B. The Parties

Complainant Choon's Design Inc. is a Michigan corporation having its principal place of business at 48813 West Road, Wixom, Michigan 48393. (Complaint at 3.) Choon's Design Inc. was founded by Cheong Choon Ng. (*Id.*) Mr. Ng invented the "Rainbow Loom." (*Id.*) The Rainbow Loom has become—without qualification—a smash hit within the toy industry. (*Id.*) On February 15, 2014, the Toy Industry Association voted it "Toy of the Year." (*Id.*)

Wangying is a Chinese corporation with its principal place of business at No. 301 Chang Chun 2 Road #58, Jinhua ZHEJIANG, CHINA 322000. (Complaint at 4.) Wangying is a provider of a loom kit named "Magical Loom." (*Id.*) The Magical Loom is manufactured, assembled, packaged and/or tested outside the United States. (*Id.*) Wangying imports the Magical Loom into the United States. (*Id.*)

Island In The Sun LLC is a limited liability company having its principal place of business at 175 Courts Ln., Little Rock, AR 72222. (Complaint at 4.) As part of its business, Island In The Sun provided customers a loom kit named "Loom Bands Kit Colorful DIY." (*Id.*) The Loom Bands Kit Colorful DIY is manufactured, assembled, packaged and/or tested outside the United States. (*Id.*) The Loom Bands Kit Colorful DIY is imported into the United States where companies, such as Island In The Sun, sell them. (*Id.* at 5.)

Quality Innovations Inc. is a California corporation having its principal place of business at 12941 Ramona Boulevard, Suite D, Irwindale, CA 91706. (Complaint at 5.) As part of its business, Quality Innovations provided customers a loom kit named "Deluxe Magic Loom Kit." (*Id.*) The Deluxe Magic Loom Kit is manufactured, assembled, and/or packaged and tested outside the United States. (*Id.*) The Deluxe Magic Loom Kit is imported into the United States where companies, such as Quality Innovations, sell them. (*Id.*)

Yiwu Mengwang Craft & Art Factory is a Chinese corporation having its principal place of business at 7F, 2 Unit, No. 290 of Jingfa Road, Yiwu City, Zhejiang, Province, China. (Complaint at 5.) As part of its business, Yiwu shipped a loom kit named "Deluxe Magic Loom Kit" from China into the United States to Quality Innovations, Inc. (*Id.*) The Deluxe Magic Loom Kit is manufactured, assembled, and/or packaged and tested outside the United States. (*Id.*) The Deluxe Magic Loom Kit is imported into the United States by Yiwu. (*Id.*)

Shenzhen Xuncent Technology Co., Ltd is a Chinese corporation having its principal place of business at 2nd Floor-A, Bldg. 1, Building l, 5, 6, Zhulongtian Road, Fourth Industrial Zone, Shuitian Community, Shiyan Street, Baoan Dist, Shenzhen, Guangdong, China and 12941 Ramona Boulevard, Suite D, Irwindale, CA 91706. (Complaint at 6.) As part of its business, Shenzhen shipped a loom kit named "Deluxe Magic Loom Kit" from China to the United States

to Quality Innovations, Inc. (*Id.*) The Deluxe Magic Loom Kit is manufactured, assembled, and/or packaged and tested outside the United States. (*Id.*) The Deluxe Magic Loom Kit is imported into the United States by Shenzhen. (*Id.*)

Altatac Inc. is a California corporation having its principal place of business at 532 Mateo Street, Los Angeles, CA 90013. (Complaint at 6.) As part of its business, Altatac provided customers a loom kit named "Krazy Looms Bandz." (*Id.*) The Krazy Looms Bandz kit is manufactured, assembled, and/or packaged and tested outside the United States. (*Id.*) The Krazy Looms Bandz is imported into the United States where companies, such as Altatac, sell them. (*Id.*)

My Imports USA LLC is a New Jersey limited liability company having its primary place of business at 75 Ethel Road, Edison, New Jersey 08817. (Complaint at 6.) My Imports USA imported a loom kit named "Krazy Looms Bandz" and sold it to retailers to be provided to customers. (*Id.* at 7.) The Krazy Looms Bandz kit is manufactured, assembled, and/or packaged and tested outside the United States. (*Id.*) The Krazy Looms Bandz kit is imported into the United States where companies, such as My Imports USA, sell them. (*Id.*)

Jayfinn LLC is a limited liability company having its principal place of business at 3875 E. Cloudburst Dr., Gilbert, AZ 85297. (Complaint at 7.) As part of its business, Jayfinn provided customers a loom kit named "Goodie Looms." (*Id.*) The Goodie Looms kit is manufactured, assembled, packaged and/or tested outside the United States. (*Id.*) The Goodie Looms kit is imported into the United States where companies, such as Jayfinn LLC, sell them. (*Id.*)

Creative Kidstuff, LLC is a limited liability company having its principal place of business at 3939 46th Street, Minneapolis, Minnesota 55406. (Complaint at 7.) Creative

Kidstuff owns and operates retail stores, including a retail store located at 2588 World Gateway Place, Space A2605, Detroit, MI 48242, which provided customers a loom kit named "DIY Loom Bands Colorful." (*Id.*) The DIY Loom Bands Colorful kit is manufactured, assembled, packaged and/or tested outside the United States. (*Id.*) The DIY Loom Bands Colorful kit is imported into the United States where companies, such as Creative Kidstuff, sell them. (*Id.* at 7-8.)

Hongkong Haoguan Plastic Hardware Co, Limited is a Chinese corporation with its principal place of business at Industry Part of Gong Chuang Ying, No. 8 of NanDan Road of Nanwan Street, Long Gang Distrit, Shenzhen City, GuangDong Province Post Code 518100. (Complaint at 8.) Hongkong Haoguan Plastic Hardware is a provider of loom kits named "Cool Rainbow Loom" and "Twist Bandz Mania." (*Id.*) The Cool Rainbow Loom and Twist Bandz Mania kits are manufactured, assembled, packaged and/or tested outside the United States. (*Id.*) The Cool Rainbow Loom and Twist Bandz Mania kits are imported into the United States, or sold for importation into the United States, by Hongkong Haoguan Plastic Hardware. (*Id.*)

Blinkee.com, LLC is a limited liability company having its principal place of business at 769 Center St. PMB 58, Fairfax, CA 94930. (Complaint at 8.) As part of its business, Blinkee.com provided customers a loom kit named "DIY Loom Bands Colorful." (*Id.*) The DIY Loom Bands Colorful kit is manufactured, assembled, packaged and/or tested outside the United States. (*Id.*) The DIY Loom Bands Colorful kit is imported into the United States where companies, such as Blinkee.com, sell them. (*Id.*)

Eyyup Arga is an individual residing at 194 Westminster Pl, Lodi, NJ 07644. (Complaint at 9.) Eyyup Arga sells items via Amazon.com. (*Id.*) As part of his business, Eyyup Arga provided customers a loom kit named "Educational Colorful Loom Kit." (*Id.*) The Educational

Colorful Loom Kit is manufactured, assembled, packaged and/or tested outside the United States. (*Id.*) The Educational Colorful Loom Kit is imported into the United States where individuals and/or companies such as Eyyup Arga sell them. (*Id.*)

Itcoolnomore is a Chinese corporation with its principal place of business at Room 401, Unit 3, Building 15, Xiawan, G 2nd Distric Yiwu, Jinhua Zhejiang, China 322000. (Complaint at 9.) Itcoolnomore is a provider of a loom kit named "Colorful Loom Bands." (*Id.*) The Colorful Loom Bands kit is manufactured, assembled, packaged and/or tested outside the United States. (*Id.*) The Colorful Loom Bands kit is imported into the United States by Itcoolnomore. (*Id.*)

C. U.S. Patent No. 8,485,565

U.S. Patent No. 8,485,565 ("the '565 patent'), entitled "*Brunnian Link Making Device and Kit*," issued on July 16, 2013, based on a patent application filed on September 8, 2011, and claims priority to an earlier provisional application filed on November 5, 2010. (*See* Motion, Ex. 7: '565 patent, cover page.) The '565 patent identifies Mr. Cheong Choon Ng ("Mr. Ng") as the sole inventor, and the assignment records reflect assignment to Choon's Design, LLC, which is now Choon's Design, Inc. ("Complainant"), the Complainant in this investigation. (*Id.*; Complaint at 10; Ex. 2.) Choon's Design, Inc. ("Complainant") is thus the owner by assignment of all right, title, and interest in the '565 patent.

D. The Product at Issue

The product at issue is a toy known as a loom. (Mot. Memo. at 2.) The basic idea of the loom is to use a specifically-machined hook to pull rubber bands (often multi-colored) around pegs supported on a structure and, by doing that, turn those rubber bands into different shapes and patterns—from an American flag to a toy poodle to a three-piece suit. (*Id.* at 3.) Complainant's toy product is known as the Rainbow Loom ®. (*Id.*)

Complainant identifies the following ten defaulting Respondents as being responsible for the importation of nine accused products:

(1) Island (U.S. seller of "Loom Bands Kit Colorful DIY"),
(2) Quality (U.S. seller of "Deluxe Magic Loom Kit"),
(3) Yiwu (Chinese exporter of "Deluxe Magic Loom Kit"),
(4) Shenzhen (Chinese exporter of "Deluxe Magic Loom Kit"),
(5) My Imports (U.S. distributor of "Krazy Looms Bandz"),
(6) Jayfinn (U.S. seller of "Goodie Looms"),
(7) HK Haoguan (Chinese exporter of "Cool Rainbow Loom" and "Twist Bandz Mania"),
(8) Blinkee (U.S. seller of "DIY Loom Bands Colorful"),
(9) Eyyup (U.S. seller of "Educational Colorful Loom Kit"), and
(10) Itcoolnomore (Chinese exporter of "Colorful Loom Bands").

(Complaint at ¶¶ 18-43).

II. LEGAL STANDARDS

Summary Determination

Pursuant to Commission Rule 210.18, summary determination "... shall be rendered if 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); *see also DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001); *Wenger Mfg., Inc. v. Coating Machinery Systems, Inc.*, 239 F.3d 1225, 1231 (Fed. Cir. 2001). The evidence "must be viewed in the light most favorable to the party opposing the motion . . . with doubt resolved in favor of the nonmovant." *Crown Operations Int'l, Ltd. v. Solutia,* Inc., 289 F.3d 1367, 1375 (Fed. Cir. 2002); *see also Xerox Corp. v. 3Com Corp.*, 267 F.3d 1361, 1364 (Fed. Cir. 2001) ("When ruling on a motion for summary judgment, all of the nonmovant's evidence is to be credited, and all justifiable inferences are to be drawn in the nonmovant's favor."). "Issues of fact are genuine only 'if the evidence is such that a reasonable [fact finder]

could return a verdict for the nonmoving party.'" *Id.* at 1375 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The trier of fact should "assure itself that there is no reasonable version of the facts, on the summary judgment record, whereby the nonmovant could prevail, recognizing that the purpose of summary judgment is not to deprive a litigant of a fair hearing, but to avoid an unnecessary trial." *EMI Group North America, Inc. v. Intel Corp.*, 157 F.3d 887, 891 (Fed. Cir. 1998). "Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate." *Sandt Technology, Ltd. v. Resco Metal and Plastics Corp.*, 264 F.3d 1344, 1357 (Fed. Cir. 2001) (Dyk, C.J., concurring). "In other words, '[s]ummary judgment is authorized when it is quite clear what the truth is,' [citations omitted], and the law requires judgment in favor of the movant based upon facts not in genuine dispute." *Paragon Podiatry Laboratory, Inc. v. KLM Laboratories, Inc.*, 984 F.2d 1182, 1185 (Fed. Cir. 1993).

A violation of Section 337 may not be found unless supported by "reliable, probative, and substantial evidence." 35 U.S.C. § 559; *see also Certain Sildenafil or any Pharmaceutically Acceptable Salt Thereof, Such as Sildenafil Citrate and Products Containing Same*, Inv. No. 337-TA-489, Com. Op. Remedy, the Public Interest, and Bonding at 4-5 (July 2004).

III. VALIDITY AND ENFORCEABILITY

A patent is presumed valid under 35 U.S.C. § 282. Therefore, "[t]he burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity." S*ee Certain Devices for Connecting Computers Via Telephone Lines*, ITC Inv. No. 337-TA-360, Initial Determination at 2 (May 24, 1994).

The Staff presumes the validity of the '565 patent, including asserted claim 4. (Staff at 18; *citing* 35 U.S.C. § 282.) The Staff, however, points out that it "is aware of an earlier

challenge to the validity of claims 1 and 5-14 of the '565 patent – but not claim 4 – in a Request for *Inter Partes* Review ("IPR") filed by LaRose Industries, LLC, but which is not a party in this investigation." (*Id.*) Additionally, the Staff mentioned that the Patent Trial and Appeal Board ("PTAB") instituted an IPR, citing one reference in particular by Pugh as likely to anticipate and thus invalidate certain claims of the '565 patent. (*Id.*; *citing* Motion, Ex. 19: GB 2 147 918; *see also* Ex. 20: IPR petition; Ex. 9: PTAB Decision to Institute, at 17-18.) However, in the Staff's view, the Pugh reference (GB 2 147 918) neither anticipates nor renders obvious claim 4.

Complainant submits that Claim 4 of the '565 patent "requires a combination including a base having "upright extending cylinders" extending from a base that are received in "mounting openings" within each of the plurality of pins." (Mot. Memo. at 23.) Complainant then points out that Pugh does not disclose these features. (*Id.*)

Regardless of the IPR proceeding before the PTAB, the ALJ finds that there have been no arguments or evidence presented in this investigation that Claim 4 of the '565 patent is invalid and/or unenforceable. Therefore, the ALJ finds that the '565 patent is valid and enforceable.

IV. IMPORTATION

Section 337(a)(1)(B) declares unlawful "the 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 complainant "need only prove importation of a single accused product to satisfy the importation element." *Certain Purple Protective Gloves*, 337-TA-500, Order No. 17 (September 23, 2004).

Complainant must establish that the Defaulting Respondents' products were imported into the United States, sold for importation, or sold within the United States after importation.

19 U.S.C. § 1337(a)(1)(B). Complainant argues that the accused products were manufactured abroad and were sold in the United States. (Mot. Memo. at 15-22.) The Staff does not dispute the evidence and contends that Complainant has satisfied the importation requirement. (Staff Resp. at 10-11.)

1. Island in the Sun LLC

Complainant points out that Island In The Sun LLC is engaged in the sale within the United States after importation of a loom kit called "Loom Bands Kit Colorful DIY." (Mot. Memo. at 16.) The Loom Bands Kit Colorful DIY is manufactured, assembled, and/or packaged and tested outside of the United States, specifically, at least in China. (*Id.*) These same products are then imported into the United States, sold for importation, and/or sold within the United States after importation. (*Id.*) Complainant points out that around late April 2014, Complainant's counsel ordered the Loom Bands Kit Colorful DIY via the internet. (*Id.*) The Loom Bands Kit Colorful DIY was shipped to Complainant's counsel in Huntington Woods, MI from Island In The Sun LLC, located at 175 Courts Ln., Little Rock, Arkansas 72223. (*Id.*) Complainant submits that according to the packaging, the Loom Bands Kit Colorful DIY was made in China. (*Id.*)

Thus, the evidence shows that Island In The Sun LLC has imported, sold for importation, and/or sold after importation into the United States the accused product.

2. Quality Innovations Inc.

Complainant submits that Quality Innovations Inc. is engaged in the importation, and/or the sale within the United States after importation, of a loom kit called "Deluxe Magic Loom Kit." (Mot. Memo. at 17.) The Deluxe Magic Loom Kit is manufactured, assembled, and/or packaged and tested outside of the United States, specifically, at least in China by Respondents

Yiwu and Shenzhen. (*Id.*) These same products are then imported into the United States, sold for importation, and/or sold within the United States after importation by Quality Innovations Inc. (*Id.*)

Thus, the evidence shows that Quality Innovations Inc. has imported, sold for importation, and/or sold after importation into the United States the accused product.

3. Yiwu Mengwang Craft & Art Factory

Complainant submits that Yiwu Mengwang Craft & Art Factory ("Yiwu") is engaged in the importation and/or the sale for importation of a loom kit called "Deluxe Magic Loom Kit." (Mot. Memo. at 17.) According to Complainant, the Deluxe Magic Loom kit is manufactured, assembled, and/or packaged and tested outside of the United States, specifically, at least in China. (*Id.* at 17-18.) These same products are then shipped from China to the United States by Yiwu. (*Id.* at 18.)

Thus, the evidence shows that Yiwu Mengwang Craft & Art Factory has imported, sold for importation, and/or sold after importation into the United States the accused product.

4. Shenzhen Xuncent Technology Co., Ltd

Complainant submits that Shenzhen Xuncent Technology Co., Ltd ("Shenzhen") is engaged in the importation and/or the sale for importation of a loom kit called "Deluxe Magic Loom Kit." (Mot. Memo. at 18.) According to Complainant, the Deluxe Magic Loom kit is manufactured, assembled, and/or packaged and tested outside of the United States, specifically, at least in China. (*Id.*) These same products are then shipped from China to the United States by Shenzhen. (*Id.*)

Thus, the evidence shows that Shenzhen Xuncent Technology Co., Ltd has imported, sold for importation, and/or sold after importation into the United States the accused product.

5. My Imports USA LLC

Complainant submits that My Imports USA LLC is engaged in the importation from China and the sale within the United States after importation of a loom kit called "Krazy Looms Bandz Set." (Mot. Memo. at 19.) According to Complainant, My Imports USA imported the Accused Products and distributed to others, such as Altatac Inc., for sale to customers. (*Id.*)

Thus, the evidence shows that My Imports USA LLC has imported, sold for importation, and/or sold after importation into the United States the accused product.

6. Jayfinn LLC

Complainant submits that Jayfinn LLC is engaged in the sale within the United States after importation of a loom kit called "Goodie Looms." (Mot. Memo. at 19.) According to Complainant, the Goodie Looms kit is manufactured, assembled, and/or packaged and tested outside of the United States, specifically, at least in China. (*Id.*) These same products are then imported into the United States, sold for importation, and/or sold within the United States after importation. (*Id.*) Around late April, 2014, Complainant's counsel ordered the Goodie Looms kit via the internet. (*Id.*) The Goodie Looms kit was shipped to Complainant's counsel in Huntington Woods, MI from Jayfinn LLC, via a shipping facility located at 172 Trade Street, Lexington, Kentucky 40511. (*Id.*)

Thus, the evidence shows that Jayfinn LLC has imported, sold for importation, and/or sold after importation into the United States the accused product.

7. Hongkong Haoguan Plastic Hardware Co. Limited

Complainant submits that Hongkong Haoguan Plastic Hardware Co., Limited is engaged in the importation, and/or the sale for importation, of a loom kit called "Cool Rainbow Loom."

(Mot. Memo. at 20.) According to Complainant, the Cool Rainbow Loom is manufactured, assembled, and/or packaged and tested outside of the United States, specifically, at least in China. (*Id.*) These same products are then imported into the United States, sold for importation, and/or sold within the United States after importation. (*Id.*) According to Complainant, around mid-May 2014, the Cool Rainbow Loom was purchased on ebay.com and was shipped to Complainant's counsel in Rochester, MI from a warehouse in Lexington, Kentucky. (*Id.*) According to the box, the Cool Rainbow Loom kit was made in China. (*Id.*)

Thus, the evidence shows that Hongkong Haoguan Plastic Hardware Co., Limited has imported, sold for importation, and/or sold after importation into the United States the accused product.

8. Blinkee.com, LLC

Complainant submits that Blinkee.com, LLC is engaged in the sale after importation of a loom kit called "DIY Loom Bands Colorful." (Mot. Memo. at 21.) According to Complainant, around May 2014, the DIY Loom Bands Colorful kit was purchased on Amazon.com and was shipped to Complainant's Counsel in Royal Oak, MI from Blinkee.com, LLC, located at 769 Center St. PMB 58, Fairfax, California 94930. (*Id.*) The DIY Loom Bands Colorful kit was made in China. (*Id.*)

Thus, the evidence shows that Blinkee.com, LLC has imported, sold for importation, and/or sold after importation into the United States the accused product.

9. Eyyup Arga

Complainant submits that Eyyup Arga is engaged in the importation, and/or the sale within the United States after importation, of a loom kit called "Educational Colorful Loom Kit." (Mot. Memo. at 22.) According to Complainant, around May 2014, the Educational Colorful

Loom Kit was ordered online, and was shipped to Complainant's counsel in Royal Oak, MI from Eyyup Arga, located at 194 Westminster Pl., Lodi, New Jersey, 07644. (*Id.*) The Educational Colorful Loom Kit was made in China. (*Id.*)

Thus, the evidence shows that Eyyup Arga has imported, sold for importation, and/or sold after importation into the United States the accused product.

10. Itcoolnomore

Complainant submits that Itcoolnomore is engaged in the importation, and/or the sale for importation, of a loom kit called "Colorful Loom Bands." (Mot. Memo. at 22.) According to Complainant, around late May 2014, the Colorful Loom Bands kit was ordered online, and was shipped to Complainant's counsel in Royal Oak, MI from Itcoolnomore, located at Room 401, Unit 3, Building 15, Xiawan, G 2nd Distric Yiwu, Jinhua Zhejiang, China 322000. (*Id.*) The Colorful Loom Bands kit was made in China. (*Id.*)

Thus, the evidence shows that Itcoolnomore has imported, sold for importation, and/or sold after importation into the United States the accused product.

V. INFRINGEMENT

Pursuant to the Notice of Investigation, this investigation is a patent-based investigation. (*See* 79 Fed. Reg. 45844 (August 6, 2014).) Accordingly, all of the unfair acts alleged by Complainant to have occurred are instances of infringement of the '565 patent.

A finding of infringement or non-infringement requires a two-step analytical approach. First, the asserted patent claims must be construed as a matter of law to determine their proper scope.[4] Claim interpretation is a question of law. *Markman v. Westview Instruments, Inc.*, 52

[4] Only claim terms 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).

F.3d 967, 979 (Fed. Cir. 1995) (*en banc*), *aff'd*, 517 U.S. 370 (1996); *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1455 (Fed. Cir. 1998). Second, a factual determination must be made as to whether the properly construed claims read on the accused devices. *Markman*, 52 F.3d at 976.

1. Claim Construction

"The words of a claim are generally given their ordinary and customary meaning as understood by a person of ordinary skill in the art when read in the context of the specification and prosecution history." *Thorner v. Sony Computer Entm't Am. LLC*, 669 F.3d 1362, 1365–67 (Fed. Cir. 2012) (*citing Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (en banc)). In construing claims, the ALJ should first look to intrinsic evidence, which consists of the language of the claims, the patent's specification, and the prosecution history, as such intrinsic evidence "is the most significant source of the legally operative meaning of disputed claim language." *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996); *see also Bell Atl. Network Servs., Inc. v. Covad Comm'n. Group, Inc.*, 262 F.3d 1258, 1267 (Fed. Cir. 2001). The words of the claims "define the scope of the patented invention." *Id.* And, the claims themselves "provide substantial guidance as to the meaning of particular claim terms." *Phillips*, 415 F.3d at 1314. It is essential to consider a claim as a whole when construing each term, because the context in which a term is used in a claim "can be highly instructive." *Id.* Claim terms are presumed to be used consistently throughout the patent, such that the usage of the term in one claim can often illuminate the meaning of the same term in other claims. *Research Plastics, Inc. v. Federal Pkg. Corp.*, 421 F.3d 1290, 1295 (Fed. Cir. 2005). In addition:

> . . . in clarifying the meaning of claim terms, courts are free to use words that do not appear in the claim so long as the resulting claim interpretation . . . accord[s] with the words chosen by the patentee to stake out the boundary of the claimed

property.

Pause Tech., Inc. v. TIVO, Inc., 419 F.3d 1326, 1333 (Fed. Cir. 2005).

Idiosyncratic language, highly technical terms, or terms coined by the inventor are best understood by reference to the specification. *Phillips*, 415 F.3d at 1315–16. While the ALJ construes the claims in light of the specification, limitations discussed in the specification may not be read into the claims. *See Abbott Labs. v. Sandoz, Inc.*, 566 F.3d 1282, 1288 (Fed. Cir. 2009). Some claim terms do not have particular meaning in a field of art, in which case claim construction involves little more than applying the widely accepted meaning of commonly understood words. *Phillips*, 415 F.3d at 1314. Under such circumstances, a general purpose dictionary may be of use.[5] *See Advanced Fiber Tech. (AFT) Trust v. J & L Fiber Servs., Inc.*, 674 F.3d 1365, 1374–75 (Fed. Cir. 2012).

Claim terms should generally be given their ordinary and customary meaning except "1) when a patentee sets out a definition and acts as his own lexicographer, or 2) when the patentee disavows the full scope of a claim term either in the specification or during prosecution." *Thorner*, 669 F.3d at 1365. "To act as its own lexicographer, a patentee must 'clearly set forth a definition of the disputed claim term . . . .'" *Id.* (*quoting CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002)). And "[w]here the specification makes clear that the invention does not include a particular feature, that feature is deemed to be outside . . . the patent," even if the terms might otherwise be broad enough to cover that feature. *Id.* at 1366 (internal citation omitted). Thus, if a claim term is defined contrary to the meaning given to it by those of ordinary skill in the art, the specification must communicate a deliberate and clear

[5] Use of a dictionary, however, may extend patent protection beyond that to which a patent should properly be afforded. There is also no guarantee that a term is used the same way in a treatise as it would be by a patentee. *Phillips*, 415 F.3d at 1322.

preference for the alternate definition. *Kumar v. Ovonic Battery Co.*, 351 F.3d 1364, 1368 (Fed. Cir. 2003). In other words, the intrinsic evidence must "clearly set forth" or "clearly redefine" a claim term so as to put one reasonably skilled in the art on notice that the patentee intended to so redefine the claim term. *Bell Atl.*, 262 F.3d at 1268. For example, disclaiming the ordinary meaning of a claim term—and thus, in effect, redefining it—can be affected through "repeated and definitive remarks in the written description." *Computer Docking Station Corp. v. Dell, Inc.*, 519 F.3d 1366, 1374 (Fed. Cir. 2008) (citing *Watts v. XL Sys.*, 232 F.3d 877, 882 (Fed. Cir. 2000)); *see SafeTCare Mfg., Inc. v. Tele–Made, Inc.*, 497 F.3d 1262, 1270 (Fed. Cir. 2007) (finding disclaimer of "pulling force" where "the written description repeatedly emphasized that the motor of the patented invention applied a pushing force").

When the meaning of a claim term is uncertain, the specification is usually the first and best place to look, aside from the claim itself, in order to find that meaning. *Phillips*, 415 F.3d at 1315. The specification of a patent "acts as a dictionary" both "when it expressly defines terms used in the claims" and "when it defines terms by implication." *Vitronics*, 90 F.3d at 1582. For example, the specification "may define claim terms by implication such that the meaning may be found in or ascertained by a reading of the patent documents." *Phillips*, 415 F.3d at 1323. "The 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. However, as a general rule, particular examples or embodiments discussed in the specification are not to be read into the claims as limitations. *Markman*, 52 F.3d at 979.

The prosecution history "provides evidence of how the inventor and the PTO understood the patent." *Phillips*, 415 F.3d at 1317; *see also Pass & Seymour, Inc. v. Int'l Trade Comm'n*, 617 F.3d 1319, 1327 (Fed. Cir. 2010) (*quoting Multiform Desiccants, Inc. v. Medzam, Ltd.*, 133

F.3d 1473, 1478 (Fed. Cir. 1998)). The ALJ may not rely on the prosecution history to construe the meaning of the claim to be narrower than it would otherwise be unless a patentee limited or surrendered claim scope through a clear and unmistakable disavowal. *Trading Tech. Int'l, Inc. v. eSpeed, Inc.*, 595 F.3d 1340, 1352 (Fed. Cir. 2010) (internal citations omitted); *Vitronics*, 90 F.3d at 1582–83. For example, the prosecution history may inform the meaning of the claim language by demonstrating how an inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it otherwise would be. *Vitronics*, 90 F.3d at 1582-83; *see also Chimie v. PPG Indus., Inc.*, 402 F.3d 1371, 1384 (Fed. Cir. 2005) (stating, "The purpose of consulting the prosecution history in construing a claim is to exclude any interpretation that was disclaimed during prosecution."); *Microsoft Corp. v. Multi-tech Sys., Inc.*, 357 F.3d 1340, 1350 (Fed. Cir. 2004) (stating, "We have held that a statement made by the patentee during prosecution history of a patent in the same family as the patent-in-suit can operate as a disclaimer."). The prosecution history includes the prior art cited, *Phillips*, 415 F.3d at 1317, as well as any reexamination of the patent. *Intermatic Inc. v. Lamson & Sessions Co.*, 273 F.3d 1355, 1367 (Fed. Cir. 2001).

Differences between claims may be helpful in understanding the meaning of claim terms. *Phillips*, 415 F.3d at 1314. A claim construction that gives meaning to all the terms of a claim is preferred over one that does not do so. *Merck & Co. v. Teva Pharms. USA, Inc.*, 395 F.3d 1364, 1372 (Fed. Cir.), *cert. denied*, 546 U.S. 972 (2005); *Alza Corp. v. Mylan Labs. Inc.*, 391 F.3d 1365, 1370 (Fed. Cir. 2004). In addition, the presence of a specific limitation in a dependent claim raises a presumption that the limitation is not present in the independent claim. *Phillips*, 415 F.3d at 1315. This presumption of claim differentiation is especially strong when the only difference between the independent and dependent claim is the limitation in dispute. *SunRace*

Roots Enter. Co., v. SRAM Corp., 336 F.3d 1298, 1303 (Fed. Cir. 2003). "[C]laim differentiation takes on relevance in the context of a claim construction that would render additional, or different, language in another independent claim superfluous." *AllVoice Computing PLC v. Nuance Commc'ns, Inc.*, 504 F.3d 1236, 1247 (Fed. Cir. 2007).

Finally, when the intrinsic evidence does not establish the meaning of a claim, the ALJ may consider extrinsic evidence, *i.e.*, all evidence external to the patent and the prosecution history, including inventor testimony, expert testimony and learned treatises. *Phillips*, 415 F.3d at 1317. Extrinsic evidence may be helpful in explaining scientific principles, the meaning of technical terms, and terms of art. *Vitronics*, 90 F.3d at 1583; *Markman*, 52 F.3d at 980. However, the Federal Circuit has generally viewed extrinsic evidence as less reliable than the patent itself and its prosecution history in determining how to define claim terms. *Phillips*, 415 F.3d at 1318. With respect to expert witnesses, any testimony that is clearly at odds with the claim construction mandated by the claims themselves, the patent specification, and the prosecution history should be discounted. *Id.* at 1318.

If the meaning of a claim term remains ambiguous after a review of the intrinsic and extrinsic evidence, then the patent claims should be construed so as to maintain their validity. *Id.* at 1327. However, if the only reasonable interpretation renders a claim invalid, then the claim should be found invalid. *See Rhine v. Casio, Inc.*, 183 F.3d 1342, 1345 (Fed. Cir. 1999).

U.S. Patent No. 8,485,565

U.S. Patent No. 8,485,565 ("the '565 patent'), entitled "*Brunnian Link Making Device and Kit*," issued on July 16, 2013, based on a patent application filed on September 8, 2011, and claims priority to an earlier provisional application filed on November 5, 2010. (*See* Motion, Ex. 7: '565 patent, cover page.) The '565 patent identifies Mr. Cheong Choon Ng ("Mr. Ng") as the

sole inventor, and the assignment records reflect assignment to Choon's Design, LLC, which is now Choon's Design, Inc., the Complainant in this investigation. (*Id.*; Complaint at ¶ 48; Ex. 2.) The Complainant is thus the owner by assignment of all right, title, and interest in the '565 patent.

The '565 patent generally claims a novel method and device for creating a linked item. ('565 patent, claims 1-18.) The '565 patent issued with two independent claims[6] and 16 dependent claims. Complainant points out that it is only asserting dependent claim 4 ("Asserted Claim[7]"). Complainant's multi-piece loom kit is known as the "Rainbow Loom®," which is a commercial embodiment of at least claim 4 of the '565 patent. Claim 4, along with claims 1-3 from which claim 4 ultimately depends upon, reads as follows[8]:

> 1. A **kit** for creating an item consisting of a series of **links**, the device comprising:
> a **base**; and
> at least one **pin bar** **supported on** the base, the pin bar including a plurality of **pins** each including a **top flared portion** for holding a link in a desired orientation and an **opening on a front side** of each of the plurality of pins.
>
> 2. The kit as recited in claim 1, wherein the pin bar and the base including corresponding **mating features** for securing the pin bar to the base.
>
> 3. The kit as recited in claim 2, wherein the base includes a plurality of **mating structures** receivable within **a mounting opening** defined within each of the plurality of pins with an interface between each of the mating structures and mounting openings defining an **interference fit**.
>
> 4. The kit as recited in claim 3, wherein each of the mating structures comprises **upright extending cylinders** and the mounting openings are **round** to receive a corresponding one of the cylinders.

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[6] Choon later disclaimed independent claim 1 (along with claims 5-8, 10 and 11) by way of Disclaimer in Patent under 37 C.F.R. §1.321(a) that was filed on June 24, 2014 in order to end an Inter Partes Review proceeding. (SUMF ¶ 4).

[7] Choon indicates that it intends to withdraw claims 2-3 from the Investigation if its Motion is granted. (*See* Mot. Memo. at 2, FN2).

[8] Certain claim terms have been emphasized which the Complainant identified for proposed constructions. (*See* Mot. Memo. at 13-15).

Complainant points out that the asserted claim in this investigation, claim 4, depends from claim 3, which depends from claim 2, which depends from claim 1. (Mot. Memo. at 12.) Thus, construction of claim 4 includes a construction of claims 1-3. (*Id.*; *citing Monsanto Co. v. Syngenta Seeds, Inc.*, 503 F.3d 1352, 1359 (Fed. Cir. 2007) ("... claims in dependent form include all the limitations of the claim incorporated by reference into the dependent claim.").)

Complainant notes that "there is presently no 'dispute' over the meaning of any particular claim terms in this Investigation, as there are no participating Respondents, and Staff has not taken a position as to the meaning of any particular terms." (Mot. Memo. at 13.) Complainant does define a person of ordinary skill in the art as "a person having knowledge of the challenges faced by a designer for items for bracelet-making – in particular, challenges associated with both the design and manufacture of bracelet-making kits." (Mot. Memo. at 24-25, FN8.) Additionally, Complainant contends "[t]he person may have acquired this knowledge through experience with handicrafts [and] [t]he person may have earned at least a high school diploma." (Mot. Memo. at 24-25, FN8.) Even though Complainant points out that there is no dispute as to any claim terms, Complainant's offers the below claim construction chart for dependent claim 4, which is based on the plain and ordinary meaning of the claim terms, interpreted in light of the specification, and with reference to comments from the PTAB from its Decision to Institute the Investigation in IPR2014-00218. (Mot. Memo. at 13; *see* Exhibit 9, the Decision to Institute dated May 20, 2014 in IPR2014-00218.)

Claims of the '565 Patent	Choon's Proposed Construction
1. A **kit** for creating an item consisting of a series of **links**, the device comprising:	**Kit**: a packaged collection of related structures (http://www.merriam-webster.com/dictionary/kit) ('565 patent at col 2, ll. 28-30; see the kit 10) **Link**: a closed loop ('565 patent at col. 2, ll. 27-28; see the looped elastic items 20)

a **base**; and	**Base**: the bottom of a structure (http://www.merriamwebster.com/dictionary/base) ('565 patent at col. 2, ll. 42-53; see the base 12)
at least one **pin bar supported on** the base, the pin bar including a plurality of **pins** each including a **top flared portion** for holding a link in a desired orientation and an **opening on a front side** of each of the plurality of pins.	**Pin bar**: a structure from which a plurality of pins extend ('565 patent at col. 2, ll. 42-44; see the pin bar 14) **Supported on**: integral with or attached to (http://www.merriamwebster.com/dictionary/support) ('565 patent at col. 2, ll. 46-53) **Pin**: a structure capable of supporting a link (http://www.merriam-webster.com/dictionary/pin) ('565 patent at col. 3, ll. 8-10; see the pins 26) **Top flared portion**: the pins have a portion that projects outward near the top (http://www.merriam-webster.com/dictionary/flare) ('565 patent at col. 3, ll. 10-12; see the flanged top 38) for holding a link in a desired orientation (See IPR2014-00218, Decision to Institute, **Exhibit 9** at page 8) **Opening on a front side**: there is a space or groove ('565 patent at col. 3, ll. 12-14; see the access groove 40) in the forward part of the pins (http://www.merriam-webster.com/dictionary/front) (Note: in the Decision to Institute, the PTAB said that each pin could have its own "front side." See IPR2014-00218, Decision to Institute, **Exhibit 9** at pages 8-9).
2. The kit as recited in claim 1, wherein the pin bar and the base including corresponding **mating features** for securing the pin bar to the base.	**Mating features**: features of the base and pin bar that are configured to mate with one another (http://www.merriamwebster.com/dictionary/mating) ('565 patent at col. 2, ll. 57-60)
3. The kit as recited in claim 2, wherein the base includes a plurality of **mating structures** receivable within **a mounting opening** defined within each of the plurality of pins with an interface between each of the mating structures and mounting openings defining an **interference fit**.	**Mating structures**: structures in the base configured to mate with another structure (http://www.merriamwebster.com/dictionary/mating) (see the upward extending cylinders 28) **Mounting opening**: an empty space in the pins capable of receiving a mating structure of the base (http://www.merriamwebster.com/dictionary/opening) (see the openings 30 in the pins 26) **Interference fit**: a fit that assures a positive mounting and securing of the base to prevent separation during use ('565 patent

	at col. 4, ll. 41-44).
4. The kit as recited in claim 3, wherein each of the mating structures comprises **upright extending cylinders** and the mounting openings are **round** to receive a corresponding one of the cylinders.	**Upright extending cylinders**: a cylindrical body extending upward from the base (http://www.merriamwebster.com/dictionary/cylinder) (see the upward extending cylinders 28) **Round**: the mounting openings in the pins are shaped like a circle to correspond to the [cylindrical] bodies (http://www.merriam-webster.com/dictionary/round)

Table 1 Complainant's Proposed Claim Constructions

The Staff proffers that each of the claim terms identified by Complainant in its Motion should be given its plain and ordinary meaning if the ALJ determines that any of these terms need to be construed. (Staff at 8.) The Staff does not have any objection to Complainant's proposed definition of a person of ordinary skill in the art. (Staff at 8; *citing* Mot. Memo. at 24-25, FN8.) The Staff contends that the proposed constructions are consistent with the understanding of one of ordinary skill in the art in view of the intrinsic evidence, and they are further supported by each term's dictionary definition.

Based on the constructions as proposed by Complainant in line with support from the Staff that the proposed constructions are consistent with the understanding of one of ordinary skill in the art in view of the intrinsic evidence and the dictionary definitions, the ALJ agrees with and adopts the constructions as proposed by Complainant in *Table 1 Complainant's Proposed Claim Constructions* as the proposed constructions are supported by the '565 patent specification to one of ordinary skill in the art.

2. Infringement Determination

In a section 337 investigation, the complainant 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, Commission Notice of Final Determination of No Violation of Section

337, 2002 WL 448690 at 59, (March 22, 2002); *Enercon GmbH v. Int'l Trade Comm'n,* 151 F.3d 1376 (Fed. Cir. 1998). Each patent claim element or limitation is considered material and essential to an infringement determination. *See London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538 (Fed. Cir. 1991). 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. *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. The Supreme Court has described the essential inquiry of the doctrine of equivalents analysis in terms of whether the accused product or process contains elements identical or equivalent to each claimed element of the patented invention. *Warner-Jenkinson Co., Inc. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 40 (1997).

Under the doctrine of equivalents, infringement may be found if the accused product or process performs substantially the same function in substantially the same way to obtain substantially the same result. *Valmont Indus., Inc. v. Reinke Mfg. Co.,* 983 F.2d 1039, 1043 (Fed. Cir. 1993). The doctrine of equivalents does not allow claim limitations to be ignored. Evidence must be presented on a limitation-by-limitation basis, and not for the invention as a whole. *Warner-Jenkinson*, 520 U.S. at 29; *Hughes Aircraft Co. v. U.S.*, 86 F.3d 1566 (Fed. Cir. 1996). Thus, if an element is missing or not satisfied, infringement cannot be found under the doctrine of equivalents as a matter of law. *See, e.g., Wright Medical*, 122 F.3d 1440, 1444 (Fed. Cir. 1997); *Dolly, Inc. v. Spalding & Evenflo Cos., Inc.*, 16 F.3d 394, 398 (Fed. Cir. 1994); *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538-39 (Fed. Cir. 1991); *Becton Dickinson and Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 798 (Fed. Cir. 1990).

i) Island in the Sun LLC

Complainant submits that Exhibit 10 is an infringement chart showing images of the Loom Bands Kit Colorful DIY as supplied by Island in the Sun LLC, and details the manner in which the kit infringes claim 4 of the '565 patent, with reference to the claim construction above. (Mot. Memo. at 16; *citing* Exh. 10.) Complainant contends that there is no genuine issue of material fact as to literal infringement by this Defaulting Respondent. (*Id.*) Furthermore, the Staff is of the view that Island's Loom Bands Kit Colorful DIY practices each element of, and therefore infringes, claim 4 of the '565 patent. (Staff at 12; *citing* Mot. Memo. at 16-17; Ex. 10).

The ALJ finds that the evidence shows that the Loom Bands Kit Colorful DIY as supplied by Island in the Sun LLC contains each and every limitation of claim 4 of the '565 patent. (*See* Mot. Memo. Exh. 10.) The ALJ finds that the Complainant has demonstrated by substantial, reliable, and probative evidence that the Loom Bands Kit Colorful DIY as supplied by Island in the Sun LLC practices each element of claim 4 of the '565 patent. Accordingly, the ALJ finds that the Loom Bands Kit Colorful DIY as supplied by Island in the Sun LLC infringes claim 4 of the '565 patent.

ii) Quality Innovations Inc., Yiwu Mengwang Craft & Art Factory and Shenzhen Xuncent Technology Co., Ltd

Complainant submits that Exhibit 11 is an infringement chart showing images of the Deluxe Magic Loom Kit as distributed by Yiwu Mengwang Craft & Art Factory and Shenzhen Xuncent Technology Co., Ltd, and imported by Quality Innovations Inc., and details the manner in which the kit infringes claim 4 of the '565 patent, with reference to the claim construction above. (Mot. Memo. at 16-18; *citing* Exh. 11.) Complainant contends that there is no genuine issue of material fact as to literal infringement by these Defaulting Respondents. (*Id.*) Furthermore, the Staff is of the view that the Deluxe Magic Loom Kit, distributed by Yiwu

Mengwang Craft & Art Factory and Shenzhen Xuncent Technology Co., Ltd and imported by Quality Innovations Inc. practices each element of, and therefore infringes, claim 4 of the '565 patent. (Staff at 13; *citing* Mot. Memo. at 16-17; Ex. 11).

The ALJ finds that the evidence shows that the Deluxe Magic Loom Kit as distributed by Yiwu Mengwang Craft & Art Factory and Shenzhen Xuncent Technology Co., Ltd, and imported by Quality Innovations Inc. contains each and every limitation of claim 4 of the '565 patent. (*See* Mot. Memo. Exh. 11.) The ALJ finds that the Complainant has demonstrated by substantial, reliable, and probative evidence that the Deluxe Magic Loom Kit as distributed by Yiwu Mengwang Craft & Art Factory and Shenzhen Xuncent Technology Co., Ltd, and imported by Quality Innovations Inc. practices each element of claim 4 of the '565 patent. Accordingly, the ALJ finds that the Deluxe Magic Loom Kit as distributed by Yiwu Mengwang Craft & Art Factory and Shenzhen Xuncent Technology Co., Ltd, and imported by Quality Innovations Inc. infringes claim 4 of the '565 patent.

iii) My Imports USA LLC

Complainant submits that Exhibit 12 is an infringement chart showing images of the Krazy Looms Bandz Set as imported into the United States from China and sold within the United States after importation, and details the manner in which the kit infringes claim 4 of the '565 patent, with reference to the claim construction above. (Mot. Memo. at 19; *citing* Exh. 12.) Complainant contends that there is no genuine issue of material fact as to literal infringement by this Defaulting Respondent. (*Id.*) Furthermore, the Staff is of the view that My Imports USA LLC's Krazy Looms Bandz Set practices each element of, and therefore infringes, claim 4 of the '565 patent. (Staff at 14; *citing* Mot. Memo. at 18-19; Ex. 12).

The ALJ finds that the evidence shows that the Krazy Looms Bandz Set contains each and every limitation of claim 4 of the '565 patent. (*See* Mot. Memo. Exh. 12.) The ALJ finds that the Complainant has demonstrated by substantial, reliable, and probative evidence that the Krazy Looms Bandz Set practices each element of claim 4 of the '565 patent. Accordingly, the ALJ finds that the Krazy Looms Bandz Set infringes claim 4 of the '565 patent.

iv) Jayfinn LLC

Complainant submits that Exhibit 13 is an infringement chart showing images of the Goodie Looms kit as imported into the United States from China and sold within the United States after importation, and details the manner in which the Goodie Looms kit infringes claim 4 of the '565 patent, with reference to the claim construction above. (Mot. Memo. at 19-20; *citing* Exh. 13.) Complainant contends that there is no genuine issue of material fact as to literal infringement by this Defaulting Respondent. (*Id.*) Furthermore, the Staff is of the view that the Goodie Looms kit practices each element of, and therefore infringes, claim 4 of the '565 patent. (Staff at 15; *citing* Mot. Memo. at 19-20; Ex. 13).

The ALJ finds that the evidence shows that the Goodie Looms kit contains each and every limitation of claim 4 of the '565 patent. (*See* Mot. Memo. Exh. 13.) The ALJ finds that the Complainant has demonstrated by substantial, reliable, and probative evidence that the Goodie Looms kit practices each element of claim 4 of the '565 patent. Accordingly, the ALJ finds that the Goodie Looms kit infringes claim 4 of the '565 patent.

v) Hongkong Haoguan Plastic Hardware Co. Limited

Complainant submits that Exhibit 14 is an infringement chart showing images of the Cool Rainbow Loom and Exhibit 15 is an infringement chart showing images of the Twist Bandz Mania Kit, and details the manner in which the Cool Rainbow Loom and the Twist Bandz Mania

Kit, respectively, infringe claim 4 of the '565 patent, with reference to the claim construction above. (Mot. Memo. at 20-21; *citing* Exhs. 14 and 15.) Complainant contends that there is no genuine issue of material fact as to literal infringement by this Defaulting Respondent. (*Id.*) Furthermore, the Staff is of the view that the Cool Rainbow Loom and the Twist Bandz Mania Kit, respectively, practice each element of, and therefore infringe, claim 4 of the '565 patent. (Staff at 15-16; *citing* Mot. Memo. at 20-21; Exhs. 14 and 15).

The ALJ finds that the evidence shows that the Cool Rainbow Loom and the Twist Bandz Mania Kit, respectively, contain each and every limitation of claim 4 of the '565 patent. (*See* Mot. Memo. Exh. 10.) The ALJ finds that the Complainant has demonstrated by substantial, reliable, and probative evidence that the Cool Rainbow Loom and the Twist Bandz Mania Kit, respectively, practice each element of claim 4 of the '565 patent. Accordingly, the ALJ finds that the Cool Rainbow Loom and the Twist Bandz Mania Kit, respectively, infringe claim 4 of the '565 patent.

vi) Blinkee.com, LLC

Complainant submits that Exhibit 16 is an infringement chart showing images of the DIY Loom Bands Colorful kit, and details the manner in which the DIY Loom Bands Colorful kit infringes claim 4 of the '565 patent, with reference to the claim construction above. (Mot. Memo. at 21; *citing* Exh. 16.) Complainant contends that there is no genuine issue of material fact as to literal infringement by this Defaulting Respondent. (*Id.*) Furthermore, the Staff is of the view that the DIY Loom Bands Colorful kit practices each element of, and therefore infringes, claim 4 of the '565 patent. (Staff at 16; *citing* Mot. Memo. at 21; Ex. 16).

The ALJ finds that the evidence shows that the DIY Loom Bands Colorful kit contains each and every limitation of claim 4 of the '565 patent. (*See* Mot. Memo. Exh. 16.) The ALJ

finds that the Complainant has demonstrated by substantial, reliable, and probative evidence that the DIY Loom Bands Colorful kit practices each element of claim 4 of the '565 patent. Accordingly, the ALJ finds that the DIY Loom Bands Colorful kit infringes claim 4 of the '565 patent.

vii) Eyyup Arga

Complainant submits that Exhibit 17 is an infringement chart showing images of the Educational Colorful Loom Kit, and details the manner in which the Educational Colorful Loom Kit infringes claim 4 of the '565 patent, with reference to the claim construction above. (Mot. Memo. at 22; *citing* Exh. 17.) Complainant contends that there is no genuine issue of material fact as to literal infringement by this Defaulting Respondent. (*Id.*) Furthermore, the Staff is of the view that the Educational Colorful Loom Kit practices each element of, and therefore infringes, claim 4 of the '565 patent. (Staff at 17; *citing* Mot. Memo. at 22; Ex. 17).

The ALJ finds that the evidence shows that the Educational Colorful Loom Kit contains each and every limitation of claim 4 of the '565 patent. (*See* Mot. Memo. Exh. 17.) The ALJ finds that the Complainant has demonstrated by substantial, reliable, and probative evidence that the Educational Colorful Loom Kit practices each element of claim 4 of the '565 patent. Accordingly, the ALJ finds that the Educational Colorful Loom Kit infringes claim 4 of the '565 patent.

viii) Itcoolnomore

Complainant submits that Exhibit 18 is an infringement chart showing images of the Colorful Loom Bands kit, and details the manner in which the Colorful Loom Bands kit infringes claim 4 of the '565 patent, with reference to the claim construction above. (Mot. Memo. at 22-23; *citing* Exh. 18.) Complainant contends that there is no genuine issue of material fact as to

literal infringement by this Defaulting Respondent. (*Id.*) Furthermore, the Staff is of the view that the Colorful Loom Bands kit practices each element of, and therefore infringes, claim 4 of the '565 patent. (Staff at 17; *citing* Mot. Memo. at 22-23; Ex. 18).

The ALJ finds that the evidence shows that the Colorful Loom Bands kit contains each and every limitation of claim 4 of the '565 patent. (*See* Mot. Memo. Exh. 18.) The ALJ finds that the Complainant has demonstrated by substantial, reliable, and probative evidence that the Colorful Loom Bands kit practices each element of claim 4 of the '565 patent. Accordingly, the ALJ finds that the Colorful Loom Bands kit infringes claim 4 of the '565 patent.

VI. DOMESTIC INDUSTRY

In patent proceedings under Section 337, a complainant must establish that an industry "relating to the articles protected by the patent...exists or is in the process of being established" in the United States. 19 U.S.C. § 1337(a)(2). Under Commission precedent, the domestic industry requirement of Section 337 consists of two prongs, a "technical prong" and an "economic prong." *Certain Video Graphic Display Controllers*, ITC Inv. No, 337-TA-412, Initial Determination at 9 (May 17, 1999).

A. Technical Prong

In order to satisfy the technical prong, the complainant must show that it practices the patent-in-suit in the United States. *Crocs, Inc. v. International Trace Comm'n*, 598 F.3d 1294, 1306-1307 (Fed. Cir. 2010). The test for determining whether the technical prong is met through the practice of the patent "is essentially the same as that for infringement, i.e., a comparison of domestic products to the asserted claims." *Alloc v. Int'l Trade Comm'n*, 342 F.3d 1361, 1375 (Fed. Cir. 2003). Commission precedent only requires that there be one claim of the asserted patent for which there is a domestic industry, not a domestic industry for each patent claim

asserted. *Certain Microsphere Adhesives*, ITC Inv. No. 337-TA-336, Comm. Op. at 16 (Jan. 16, 1996).

Complainant points out that Exhibit 23 of its Memorandum in Support of its Motion shows images of Complainant's Rainbow Loom® product relative to claims 1-4 of the '565. (Mot. Memo. at 38; Exh. 23.) Complainant submits that it sells the Rainbow Loom ® within the United States via its website, and the Rainbow Loom® is imported into the U.S. when it is shipped to Choon's Design and stores like Michaels from Bestway Plastic & Metal Products Ltd ("Bestway"), the Chinese manufacturer of the Rainbow Loom®. (*Id.* at 38-39.) Complainant therefore contends that it practices the '565 patent in the United States.

In support, the Staff points out that "the material facts set forth by Complainant Choon support a finding that its Rainbow Loom® product satisfies the technical prong of the domestic industry requirement relating to the asserted '565 [p]atent." (Staff at 21.) The Staff notes that even though "the Rainbow Loom® is manufactured in China, the Complainant sells the Rainbow Loom® within the United States via its website. (Staff at 21.) Furthermore, the Staff submits that "[t]he Rainbow Loom® is imported into the U.S. from China where it is shipped to Choon's Michigan distribution facilities as well as directly to national stores like Michaels. (*Id.*) In sum, "the Staff submits that no issues of material fact exist regarding whether the Rainbow Loom® product practices claim 4 of the '565 [p]atent." (Staff at 22.) Therefore, the Staff supports the Complainant's contention that it is entitled to summary determination that it satisfies Section 337's technical prong requirement for the establishment of a domestic industry related to the '565 patent with respect to its Rainbow Loom® product. (*Id.*)

The evidence shows that Complainant's Rainbow Loom® product practices each and every limitation of claim 4 of the '565 patent. (Mot. Memo. Exh. 23.) Additionally, the

evidence shows that the Complainant sells the Rainbow Loom® within the United States via its website. Therefore, the ALJ finds that the Complainant has satisfied the technical prong of the domestic industry requirement.

B. Economic Prong

In order to satisfy the economic prong of the domestic industry requirement it must be determined that one of the economic activities set forth in subsections (A), (B), or (C) of subsection 337(a)(3) have taken place or are taking place with respect to the protected articles. *Certain Adjustable Keyboard Support Sys.*, Inv. No. 337-TA-670, Order No. 27 (Nov. 4, 2009). Specifically, it must be shown that there is (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).

19 U.S.C. § 1337(a)(3)(C)[9]

Complainant contends that it has made a substantial investment and continues to make a substantial investment in the exploitation of the '565 patent including research and development in order to satisfy the domestic industry requirement under 19 U.S.C. § 1337(a)(3)(C). (Mot. Memo. at 29.) Complainant contends that all of the inventive activity and initial work (including prototyping, reevaluating and assessing designs and production parts, and assembling loom kits) occurred in the United States notwithstanding that its Rainbow Loom® is currently manufactured outside the United States. (Mot. Memo. at 30.)

Initially, the Complainant asserts that Mr. Ng fashioned an original Rainbow Loom prototype in his home in Michigan using a wooden board and push pins and thereafter used

[9] The ALJ finds that genuine issues of material fact exist as to whether the Complainant satisfies the domestic industry requirements under Sections 337(a)(3)(A) and (B). Nevertheless, as set forth *infra*, the ALJ finds that Complainant satisfies the domestic industry requirement under Section 337(a)(3)(C).

modeling clay to fashion other prototypes. (Mot. Memo. at 31.) Complainant then points out that Mr. Ng paid Wichita State University to manufacture a number of successful plastic prototypes. (*Id.*) The Complainant asserts that Mr. Ng continued refining the concept, and in particular the base and C-clips of the loom kit. (*Id.*) The Complainant also points out the Mr. Ng paid a patent attorney to draft Provisional, International (PCT), and Non-Provisional patent applications covering the prototype loom kit. (*Id.*) The Complainant summarizes the expenditures of Mr. Ng's development work as [redacted] in his time and effort, approximately [redacted] in modeling clay for the prototypes, [redacted] to manufacture the initial prototypes, [redacted] for the provisional patent application and [redacted] for the international and U.S. non-provisional patent applications. (Mot. Memo. at 32.)

With respect to the production of the Rainbow Loom®, the Complainant points out that Mr. Ng spent several thousand dollars on molds, and took a week off from his full-time job in order to visit the Chinese factory that would produce the Rainbow Loom® kits. (Mot. Memo. at 33.) Furthermore, the Complainant submits that the aforementioned "*expenses were extremely significant to Mr. Ng.*" (*Id.* (emphasis in original).) Additionally, the Complainant asserts that "the money Mr. Ng used to pay the Chinese manufacturer represented the entirety of his family's savings at the time." (*Id.*) The Complainant summarizes the production expenses paid for by Mr. Ng related to the Rainbow Loom® kits in Exhibit 21 as follows:

Description	**Value**	**Support**
Mold for original base design	[redacted]	Exhibit 21 at ¶ 22
Mold for pin bar		Exhibit 21 at ¶ 22
Initial order of elastic bands		Exhibit 21 at ¶ 23
Mold for C-clips		Exhibit 21 at ¶ 26
Mold for revised base design		Exhibit 21 at ¶ 27
Trip to visit Chinese factory	About [redacted]	Exhibit 21 at ¶ 30

Lost salary from weeklong trip to China	At least [redacted]	Exhibit 21 at ¶ 30
Initial Order of metal hooks	[redacted]	Exhibit 21 at ¶ 32
Packaging for initial kits	[redacted]	Exhibit 21 at ¶ 33
Instruction manuals for kits	[redacted]	Exhibit 21 at ¶ 37

(Mot. Memo. at 33.)

With respect to the aforementioned expenses, the Complainant points out that these expenses represented a serious risk to Mr. Ng's life savings for his family (wife and two daughters). (Mot. Memo. at 33-34.)

Furthermore, the Complainant points out that Mr. Ng and his wife (now the CEO of Choon's Design), using approximately 25% of their home, personally spent countless hours assembling the loom kits in his home in Michigan throughout all of 2011 and a majority of 2012. (Mot. Memo. at 34.) The Complainant also states that Mr. Ng designed and built a freight elevator in his home to move heavy items into the kit assembly area at a cost of [redacted] for an electric winch. (*Id.*) The Complainant purchased a tractor to move heavy packages around the exterior of his house and a parts washer to wash parts, such as elastic bands, prior to loom kit assembly. (*Id.*)

The Complainant contends that much of Mr. Ng's time during the assembly of the loom kits was spent on quality control and quality enhancement. (Mot. Memo. at 35.) Specifically, the Complainant points out that Mr. Ng's efforts in supporting the quality of the loom kits was value added beyond acting as a mere distribution center. (*Id.*) In the table below, the Complainant summarizes the efforts of Mr. Ng with respect to the assembly of the loom kits in his home and contends that the information shows a significant investment on behalf of Mr. Ng in the exploitation of the '565 patent in order to support the early sales of the multiple piece loom kits. (Mot. Memo. at 35.)

Description	Value	Support
Assembly/quality control time	About [redacted]	Exhibit 21 at ¶¶ 39-43
Raw materials for freight Elevator	About [redacted]	Exhibit 21 at ¶ 40
Time spent making freight elevator in home	About [redacted]	Exhibit 21 at ¶ 40
Rent, based on dedication of 25% of home to assembly space and warehousing	About [redacted]	Exhibit 21 at ¶ 43

(Mot. Memo. at 35.)

Additionally, the Complainant points out that Mr. Ng took an unpaid three month sabbatical from his engineering position at Nissan to develop his loom kit business on a full-time basis vice working around his full-time job. (Mot. Memo. at 36.) Specifically, the Complainant contends that Mr. Ng gave up at least [redacted] in salary [redacted] and also risked his seniority and status at Nissan. (*Id.*) The Complainant avers that Mr. Ng's time away from his job at Nissan represented a serious opportunity cost. (*Id.*)

Moreover, the Complainant submits that Mr. Ng put forth significant effort and expenditures for sales and marketing of the loom kits. (Mot. Memo. at 36.) Specifically, the Complainant points out that in the December 2010 timeframe, Mr. Ng created a website to market the multiple piece loom product. (*Id.*) Additionally, the Complainant states that "Mr. Ng also spent many hours planning, directing, and shooting instructional YouTube videos in order to teach customers how to use the multiple piece loom kit." (*Id.* at 36-37.) As well, the Complainant notes that "Mr. Ng also rented booths at a Craft and Hobby association trade show and a local Michigan library in order to showcase his product." (*Id.* at 37.) In the table below,

the Complainant summarizes the marketing and sales efforts of Mr. Ng with respect to the loom kit. (*Id.*)

Description	Value	Support
Website costs	About [redacted]	Exhibit 21 at ¶ 25
Time writing website	About [redacted]	Exhibit 21 at ¶ 25
YouTube instructional videos	About [redacted]	Exhibit 21 at ¶¶ 40, 47
Craft and Hobby association Membership	[redacted]	Exhibit 21 at ¶ 46
Booth at Craft and Hobby Show	[redacted]	Exhibit 21 at ¶ 46
Advertising to support Craft and Hobby booth	[redacted]	Exhibit 21 at ¶ 46
Booth at Novi Library	[redacted]	Exhibit 21 at ¶ 50
Other marketing efforts	[redacted]	Exhibit 21 at ¶ 51

(Mot. Memo. at 37.)

Overall, the Complainant contends that Mr. Ng's expenditures, sacrifices and work constitute a substantial investment in the exploitation of the multi-piece Rainbow Loom® kit. (Mot. Memo. at 37.) Additionally, the Complainant argues that the details surrounding Mr. Ng's "sweat equity" in the exploitation of the Rainbow Loom kit is distinguishable from the details in the *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm'n Op. (May 16, 2008) ("Stringed Instruments"). (Mot. Memo. at 37-38.)

Specifically, the Complainant points out that unlike the situation at hand with Mr. Ng, "[i]n *Stringed Instruments*, the inventor (McCabe) had five prototypes of his product created over a course of 18 years [and] [o]utside of having these five prototypes made, the inventor made a handful of unsuccessful efforts to have someone license his technology to begin making his product." (Mot. Memo. at 38; *citing In re Certain Stringed Musical Instruments*, 2009 ITC LEXIS 2250, 41-44 (Int'l Trade Comm'n Dec. 1, 2009).) With respect to the *Stringed*

Instruments investigation, "[t]he Commission highlighted that McCabe's case did not show a "focused and concentrated effort" toward research, development, or licensing." (*Id.*) Thus, the Complainant submits that "[w]hereas the *Stringed Instruments* inventor took 18 years to make five prototypes and never ultimately manufactured a commercial product, Mr. Ng took the Rainbow Loom (then called Twistz Bands) from conception (September of 2010) to full production (July of 2011) in 10 months. Unlike McCabe, Mr. Ng's efforts were certainly 'focused and concentrated.'" (*Id.*)

Additionally, the Complainant noted that Mr. Ng has received various accolades and publicity due to his development of the Rainbow Loom® kit. Specifically, on February 15, 2014, the Toy Industry Association voted it "Toy of the Year" and Mr. Ng was named an "Entrepreneur of the Year" 2014 Michigan and Northwest Ohio by Ernst and Young. (Complaint at 3.) Additionally, Mr. Ng's "rags to riches" story has been publicized by *The New York Times*, the *Today Show* and *Jimmey Kimmel Live*. (*Id.*)

The Staff contends that the material facts set forth by the Complainant support a finding that its investments in its domestic industry products are substantial and that it satisfies the economic prong of the domestic industry requirement at least under Section 337(a)(3)(C), based on its domestic engineering, research and development expenditures in the United States. (Staff at 23; *citing Certain Liquid Crystal Display Modules, Prods. Containing Same, & Methods for Using the Same,* Inv. No. 337-TA-634, Order No. 8 at 10 (Nov. 7, 2008) ("The Commission has found that domestic research and development expenditures directed to products that incorporate the patented technologies at issue are sufficient to satisfy the economic prong of the domestic industry requirement under 337(a)(3)(C).").) Specifically, the Staff points out that "[t]he Commission has stated that in order to determine whether a Complainant has made a

'substantial' investment, 'there is no minimum monetary expenditure that a complainant must demonstrate to qualify as a domestic industry under the 'substantial investment' requirement of [section 337(a)(3)(C)],' and instead 'the requirement for showing the existence of a domestic industry will depend on the industry in question, and the complainant's relative size.'" (Staff at 23-24; citing *Certain Stringed Musical Instruments and Components Thereof* ("*Stringed Instruments*"), Inv. No. 337-TA-586, Comm'n Op. at 16 (May 16, 2008).) Thus, the Staff submits that Complainant has set "forth adequate facts to support a finding that it satisfies the economic prong of the domestic industry requirement, at least under 337(a)(3)(C), as it has demonstrated substantial investment – including Mr. Ng's substantial contribution of his "sweat equity" – in the exploitation of the '565 [p]atent through his continuous and focused work on engineering and research and development." (Staff at 25.)

The ALJ finds that Complainant has made investments in research and development of the Rainbow Loom® Kits. Specifically, the ALJ finds that Complainant's (*i.e.*, Mr. Ng) investments include prototypes for the Rainbow Loom® kits, funding manufacturing development at Wichita State University, paying a patent attorney to prosecute U.S. and international patent applications, visiting a Chinese factory for a week to investigate manufacturing the Rainbow Loom® kits, using 25% of Mr. Ng's home in Michigan to assemble the loom kits during 2011 and most of 2012, building a freight elevator in Mr. Ng's home, purchasing a tractor to move packages around the outside of his home, and purchasing a parts washer to clean parts before loom kit assembly. Additionally, Mr. Ng took an unpaid sabbatical from his full-time engineering job at Nissan to work on the development and assembly of the loom kits. And, Mr. Ng continuously added value to the loom kits during assembly by quality control and quality enhancement. Mr. Ng spent considerable time and effort in marketing and

sales of the loom kits by developing a website and Youtube instructional videos as well as renting a booth at a Craft and Hobby association trade show. In sum, Mr. Ng spent approximately [redacted] from his personal savings in the 2010-2011 timeframe and took the Rainbow Loom (then called Twistz Bands) from conception (September of 2010) to production (July of 2011) in 10 months. Therefore, the ALJ finds that the Complainant's activities are investments in research and development of the domestic industry product, the Rainbow Loom® Kit.

The statute specifically states that there must be "**substantial** investment in [the patent's] exploitation, including engineering, research and development." (See 19 U.S.C. § 1337(a)(3)(C) (emphasis added).) "The Commission has found that domestic research and development expenditures directed to products that incorporate the patented technologies at issue are sufficient to satisfy the economic prong of the domestic industry requirement under 337(a)(3)(C)." (*Certain Liquid Crystal Display Modules, Prods. Containing Same, & Methods for Using the Same,* Inv. No. 337-TA-634, Order No. 8 at 10 (Nov. 7, 2008).) In relying on engineering, research and development activities to satisfy subsection (C), the Complainant must show that there is a nexus between the activities upon which it relies and the asserted patent. (*See Certain Stringed Musical Instruments and Components Thereof,* Inv. No. 337-TA-586, Initial Determination (December 3, 2007).) The activities enumerated in subsection (C) provide Section 337 remedies to persons making a substantial investment in activities related to the exploitation of patent, copyright, trademark, or design, including engineering, research and development. Thus, subsection (C) assures access to the ITC by entities, such as individual inventors, small businesses and universities, who have a significant stake in the United States.

With the facts in hand as explained by the Complainant and supported by the Staff, the ALJ finds that Mr. Ng clearly made an investment of time and monetary resources as well as undertook various activities to exploit the '565 patent in order to create a domestic industry in the United States. However, the ALJ must determine whether the investment of time and monetary resources was substantial as required by the statute. According to the Commission, "there is no minimum monetary expenditure that a complainant must demonstrate to qualify as a domestic industry under the 'substantial investment' requirement of [subsection 337(a)(3)(C)]," and in fact "the requirement for showing the existence of a domestic industry will depend on the industry in question, and the complainant's relative size." (*Certain Stringed Musical Instruments and Components Thereof* ("*Stringed Instruments*"), Inv. No. 337-TA-586, Comm'n Op. at 25-26 (May 16, 2008).) Moreover, "there is no need to define or quantify the industry itself in absolute mathematical terms." (*Id.* at 26.) The ALJ finds that the Complainant has shown that Mr. Ng made a "substantial investment" in the activities related to the exploitation of the '565 patent by his engineering, research and development activities throughout 2011 and 2012 in creating a domestic industry for the Rainbow Loom® kits. The ALJ, using a basketball analogy, notes that Mr. Ng used a full-court press to exploit the '565 patent with his personal money [redacted] as well as his focused and concentrated efforts (*i.e.*, so called "sweat equity) to create a successful Rainbow Loom® kit business within a couple of years and thus created a domestic industry for his loom kit. (*Id.* at 26 ("evidence or testimony would have to demonstrate a sufficiently focused and concentrated effort to lend support to a finding of a 'substantial investment.'").) In sum, the ALJ finds that the Complainant has provided sufficient evidence of substantial investment of the type needed for subsection 337(a)(3)(C) to exploit the '565 patent by investing over [redacted] to develop, perfect and market his loom kits, retrofitting and using 25% of his home for his initial

work, advertising and marketing his loom kit products and moving to mass production of the loom kits within a few years to launch a successful business. The sufficiency of the evidence is bolstered further by the success of the Rainbow Loom® kit in a relatively short time (i.e., 2010 to the present) as illustrated by the following accolades: (1) 2014 "Toy of the Year" by the Toy Industry Association and (2) "Entrepreneur of the Year" 2014 Michigan and Northwest Ohio by Ernst and Young as well as (3) publicity via *The New York Times*, the *Today Show* and *Jimmey Kimmel Live.* Thus, the ALJ finds that the Complainant has met the domestic industry requirement under Subsection 337(a)(3)(C).

Accordingly, based on the evidence discussed above, the ALJ finds that the Complainant has satisfied the economic prong of the domestic industry requirement.

As such, the motion for summary determination is hereby **GRANTED**. It is the INITIAL DETERMINATION of the ALJ that the Complainant has satisfied the domestic industry requirement and that there have been violations of Section 337 of the Tariff Act of 1930 (Amended) by the Defaulting Respondents.

VII. REMEDY

A. General Exclusion Order

Under Section 337(d), the Commission may issue either a limited or a general exclusion order. A limited exclusion order instructs the U.S. Customs and Border Protection ("CBP") to exclude from entry all articles that are covered by the patent at issue and that originate from a named respondent in the investigation. A general exclusion order instructs the CBP to exclude from entry all articles that are covered by the patent at issue, without regard to source.

A general exclusion order may issue in cases where (a) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named

respondents; or (b) there is a widespread pattern of violation of Section 337 and it is difficult to identify the source of infringing products. 19 U.S.C. § 1337(d)(2). The statute essentially codifies Commission practice under *Certain Airless Paint Spray Pumps and Components Thereof*, Inv. No. 337-TA-90, Commission Opinion at 18-19, USITC Pub. 119 (Nov. 1981) ("*Spray Pumps*"). *See Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing the Same,* Inv. No. 337-TA-372 ("*Magnets*"), Commission Opinion on Remedy, the Public Interest and Bonding at 5 (USITC Pub. 2964 (1996)) (statutory standards "do not differ significantly" from the standards set forth in *Spray Pumps*). In *Magnets*, the Commission confirmed that there are two requirements for a general exclusion order: a "widespread pattern of unauthorized use" and "certain business conditions from which one might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles." The focus now is primarily on the statutory language itself and not an analysis of the *Spray Pump* factors. *Ground Fault Circuit Interrupters and Products Containing Same*, Inv. No. 337-TA-615, Comm'n Op. at 25 (March 9, 2009); *Hydraulic Excavators and Components Thereof*, Inv. No. 337-TA-582, Comm'n Op. at 16-17 (January 21, 2009).

The Complainant argues that a general exclusion order prohibiting the entry of all infringing loom kits for creating linked articles is warranted.

1. Widespread Pattern of Unauthorized Use

The Complainant argues that there is a widespread pattern of unauthorized use as evidenced by widespread presence of loom kits available via the internet. (Mot. Memo. at 40-49.)

i) Widespread Presence of Loom Kits Available via the Internet

Based on the research of a law clerk working with Complainant's attorneys, the Complainant shows thousands of listings for infringing multi-piece loom kits available via the internet. (Mot. Memo. at 41.) The Complainant's research results are summarized in the following table:

Website	Total Hits	Infringing Listings	Unique sellers	Support[10]
Alibaba.com	3,358	320	77	Exhibit 24
Aliexpress.com	499	112	52	Exhibit 24
Globalsources.com	82	47	7	Exhibit 24
DHGate.com	13,331	774	441	Exhibit 24
Made-in-China.com	650	88	35	Exhibit 24

(Mot. Memo. at 41.)

As evidenced in the table, there are hundreds of listings of infringing products by hundreds of sellers, which are spread over five websites.

The ALJ finds the evidence clearly shows that infringing multi-piece loom kits are widely available via the internet.

2. Business Conditions

The Complainant contends that certain business conditions warrant a general exclusion order, namely (i) low barriers to entry into the market; (ii) market conditions that invite infringers due to high potential profits on loom kits; (iii) difficulty in identifying sources of knockoff Rainbow Loom® kits; and (iv) the continued counterfeiting of Rainbow Loom® kits despite the threat of multiple lawsuits, numerous cease and desist letters and use of other intellectual property to stop the infringement.

[10] The table on page 41 of Mot. Memo. mistakenly lists **Exhibit 23** in the "Support" column; however, it is clear from the Exhibit as well as the introductory verbiage on page 40 that the "Support" column intended reference **Exhibit 24.**

The ALJ finds the evidence clearly shows that business conditions exist to allow parties other than Respondents to enter the market to provide infringing multi-piece loom kits.

i) Low Barriers to Entry into the Market

The Complainant contends that it faces a challenge due to the relatively easy entry into the loom market by those willing to copy the Rainbow Loom® kit. (Mot. Memo. at 41.) To show this easy entry into the loom market, the Complainant provides a declaration with accompanying startup costs from a Mr. [redacted] who is an employee of [redacted], a manufacturing company in Hong Kong and China. (*Id.*) The Complainant points out that Mr. [redacted] has worked at [redacted] for nearly 10 years, and is intimately familiar with the company's operations, which primarily involves the design and manufacture of plastic and electronic children's toys and games. (*Id.*) According to Mr. [redacted], the total tooling required to manufacture an imitation loom kit is on the order of [redacted]. (*Id.* at 42.) As such, the Complainant contends that one can invest [redacted] into tooling, and then begin making and assembling loom kits for as little as [redacted] each with the use of relatively high quality plastic. (*Id.*; *see also* FN15.) Additionally, the Complainant contends that the aforementioned loom kits can then be shipped into the United States for as little as [redacted] per kit. (*Id.*) Accordingly, the Complainant asserts that there are extremely low barriers to entry. (*Id.*)

The ALJ finds the evidence clearly shows that there is relatively easy entry into the loom market by those willing to copy the Rainbow Loom® kit.

ii) Market Conditions Invite Infringers due to High Potential Profits on Loom Kits

The Complainant contends that the potential profit on loom kits is high and invites infringers. (Mot. Memo. at 42.) As an example, the Complainant points out that it sells its loom kits wholesale for approximately [redacted] each at a profit of approximately [redacted] each. (*Id.* at 42-43.)

Thus, the Complainant notes that "[e]ven if the accused infringers sold for half that amount, [redacted], the potential profit is high enough to invite infringers." (*Id.* at 43.) Specifically, the Complainant contends that "[u]sing Mr. [redacted] estimated cost of [redacted] to produce a loom kit, the infringers stand to make a substantial profit." (*Id.*)

The ALJ finds the evidence clearly shows that the market conditions invite infringers due to the potential profits.

iii) Difficult to Identify Sources of Knockoff Rainbow Loom kits

The Complainant submits that the anonymous nature of internet sales makes it difficult to identify the source of the copied Rainbow Loom® products. (Mot. Memo. at 43.) To illustrate this point, the Complainant points out that it is impossible to know whether the infringing listings for infringing multi-piece loom kits available via the internet were offered by a manufacturer or simply an intermediate merchant. (*Id.*) Thus, the Complainant contends that it cannot reasonably identify the manufacturers of the infringing goods. (*Id.* at 44.)

The ALJ finds the evidence clearly shows that it is difficult to identify the source of the knockoff Rainbow Loom® kits.

iv) Rainbow Loom® kit Counterfeiting has Continued in the Face of Multiple Lawsuits

The Complainant states that over the past few years it has filed nine lawsuits against multiple piece loom kits, sent numerous cease and desist letters, and sent 161 advisory letters to 161 U.S. malls informing them of the infringement problems and requesting that they do not lease space (or kiosks) to persons looking to sell infringing loom kits. (Mot. Memo. at 45.) Additionally, the Complainant points out that it has used U.S. Customs in an attempt to stop the more blatant copycats and Customs has used the Complainant's Registered RAINBOW LOOM mark and copyright registration to seize a relatively small number of goods. (*Id.*) However, the

Complainant submits that U.S. Customs cannot seize infringing goods based on the Complainant's patent rights alone without a GEO and therefore U.S. Customs' seizures have been relatively limited. (*Id.*) Thus, according to Complainant, an infringer could skirt U.S. Customs completely by simply avoiding use of the RAINBOW LOOM mark and not using Complainant's copyrighted picture on the packaging. (*Id.*)

The ALJ finds the evidence clearly shows that the counterfeiting of the Complainant's Rainbow Loom® kits persists even as the Complainant uses various other means to attempt to stop the infringers.

3. Commission Investigative Staff Supports a General Exclusion Order

The Staff submits that a GEO pursuant to 19 U.S.C. § 1337(d)(2)(A) as justified in this case because market conditions for multi-piece loom kits invite wide-spread counterfeiting. (Staff at 33.) The Staff draws a direct comparison between the facts of this investigation with the situation in *Certain Protective Cases and Components Thereof* ("*Protective Cases*"), Inv. No. 337-TA-780, Comm'n Op. at 25-26 (November 19, 2012) and points out that unknown manufacturers of the asserted products frequently knock-off or counterfeit the Complainant's multi-piece loom kit product that is protected by the '565 patent. (*Id.*) Then, the Staff asserts that Mr. Wai Or, who is involved with the design and manufacture of toys in China for Longshore Limited, is aware of the numerous Rainbow Loom® copycats, and he estimated a relatively low start-up cost of approximately [redacted] in necessary tooling costs in order for a manufacturer to create an imitation multi-piece loom kit. (*Id.*; *citing* Mem. In Support at 41-43; Ex. 25: Or Decl. at ¶¶ 1-16).) Therefore, the Staff submits that "[b]ased on a conservative profit margin of at least a couple of dollars per imitation kit (which is approximately double the estimated manufacturing and shipping cost of [redacted]), the Staff is of the view that the profit

potential is high enough to invite infringers. (*Id.*) Specifically, the Staff points out that "[i]n November 2014, there were over 1,000 internet auctions of multi-piece Rainbow Loom® kit knock-offs. (*Id.*; *citing* Mem. In Support at 40-41; Complaint at ¶¶ 147-161; Ex. 24: Ebert Dec., at ¶¶ 2- 20).) Additionally, the Staff contends that it is apparent that the Respondents may easily circumvent a limited exclusion order by selling knock-off and counterfeit goods online and that the Complainant loses substantial sales and revenue each year due to the sale of counterfeit and knock-off multi-piece loom kits. (*Id.*; *citing* Mem. In Support at 41; Ex. 26: Rainbow Loom® sales from 2011-2014).) Accordingly, the Staff recommends issuance of a GEO. (*Id.*)

4. Issuance of a General Exclusion Order

Accordingly, based on the evidence presented above, the ALJ finds that the issuance of a general exclusion order is warranted in this investigation for products that infringe claim 4 of the '565 patent.

5. Public Interest

The Complainant further argues that a general exclusion order is consistent with the public interest as there is no evidence that it would be an undue burden on public health and welfare, competitive conditions in the United States or on U.S. customers. (Memo at 49-50.)

The ALJ finds no evidence that a general exclusion order would place an undue burden on public health and welfare or competitive conditions in the United States or on U.S. customers.

B. Bonding

The ALJ and Commission must determine the amount of bond to be required of a respondent, pursuant to Section 337(j)(3), during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to issue such a

remedy. The purpose of the bond is to protect the complainant from any injury. 19 C.F.R. § 210.42(a)(1)(ii), § 210.50(a)(3).

When reliable price information is available, the Commission has often set the bond to eliminate the differential between the domestic product and the imported, infringing product. (*See Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-336, Comm'n Op. at 24 (1995).) The Complainant argues that the bond be set at 100%. (Mot. Memo. at 50-51.) Staff agrees that a bond of 100% is appropriate. (Staff at 36.) While the Commission could calculate the bond rate using the average price differential between the Complainant's multi-piece loom kits and infringing products, the evidence shows that many sales are made online at various price points and calculating an average price will be difficult and cumbersome making a bond value of 100% appropriate. (*Id.*)

The ALJ finds that an average price differential between the Complainant's loom kits and the infringing products would be difficult to calculate due to the high volume of internet sales at various prices, setting a bond based on price differential is not feasible. Therefore, the ALJ recommends a bond of 100% during the Presidential review period.

VIII. CONCLUSION

Based on the reasons set forth herein, the ALJ finds that Complainant has shown by reliable, probative and substantial evidence that a domestic industry exists and a violation of Section 337 has occurred. Therefore, the Complainant's motion for summary determination is **GRANTED**.

The ALJ recommends that the Commission issue a general exclusion order as well as a cease and desist order. The ALJ further recommends that a bond be set at 100% of the entered value of the imported infringing products.

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.

Within seven days of the date of this document, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not it seeks to have any portion of this document deleted from the public version. Any party seeking to have any portion of this document deleted from the public version thereof shall also submit to this office a copy of this document with red brackets indicating any portion asserted to contain confidential business information. The parties' submissions may be made by facsimile and/or hard copy by the aforementioned date. The parties' submissions concerning the public version of this document need not be filed with the Commission Secretary.

SO ORDERED.

Theodore R. Essex
Administrative Law Judge

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER NO. 13 INITIAL DETERMINATION** has been served by hand upon the Commission Investigative Attorney, John K. Shin, Esq., and the following parties as indicated, on **February 11, 2015.**

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

On Behalf of Complainant Choon's Design Inc.:

Timothy J. Murphy, Esq.
CARLSON, GASKEY & OLDS, P.C.
400 W. Maple Rd., Ste. 350
Birmingham, MI 48009

( ) Via Hand Delivery
(✓) Via Express Delivery
( ) Via First Class Mail
( ) Other:_____