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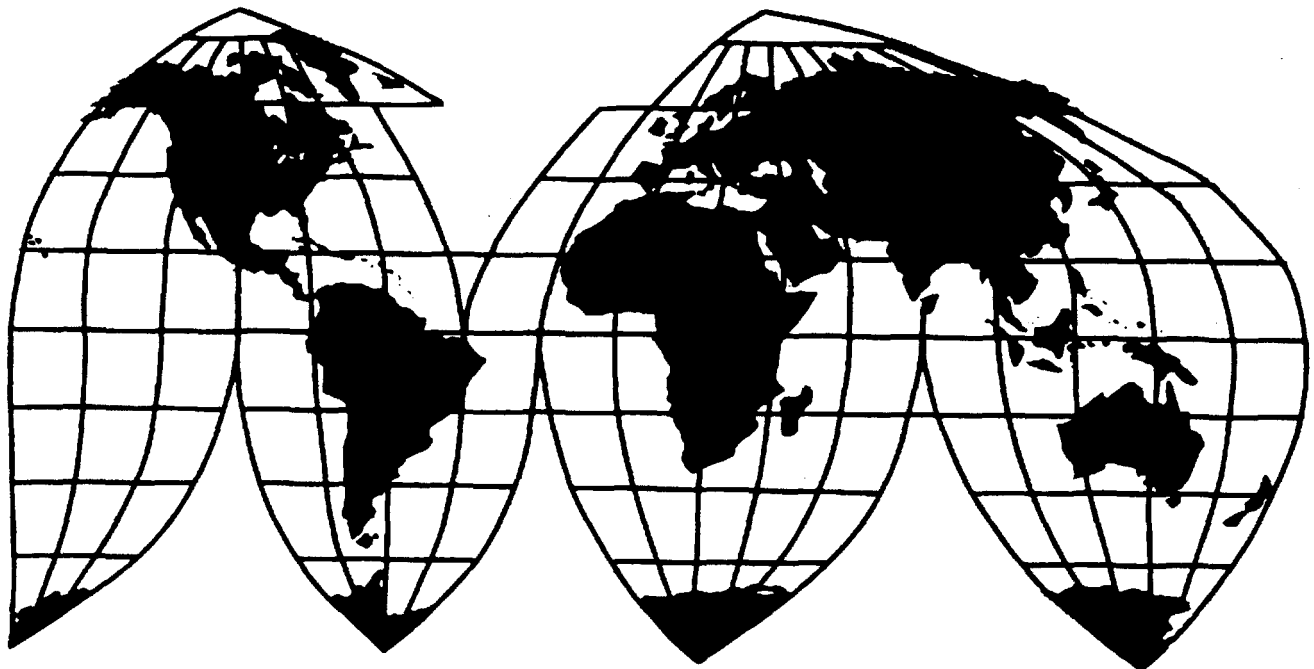
In the Matter of
Certain Bearings and Packaging Thereof

Investigation No. 337-TA-469

Publication 3736

December 2004

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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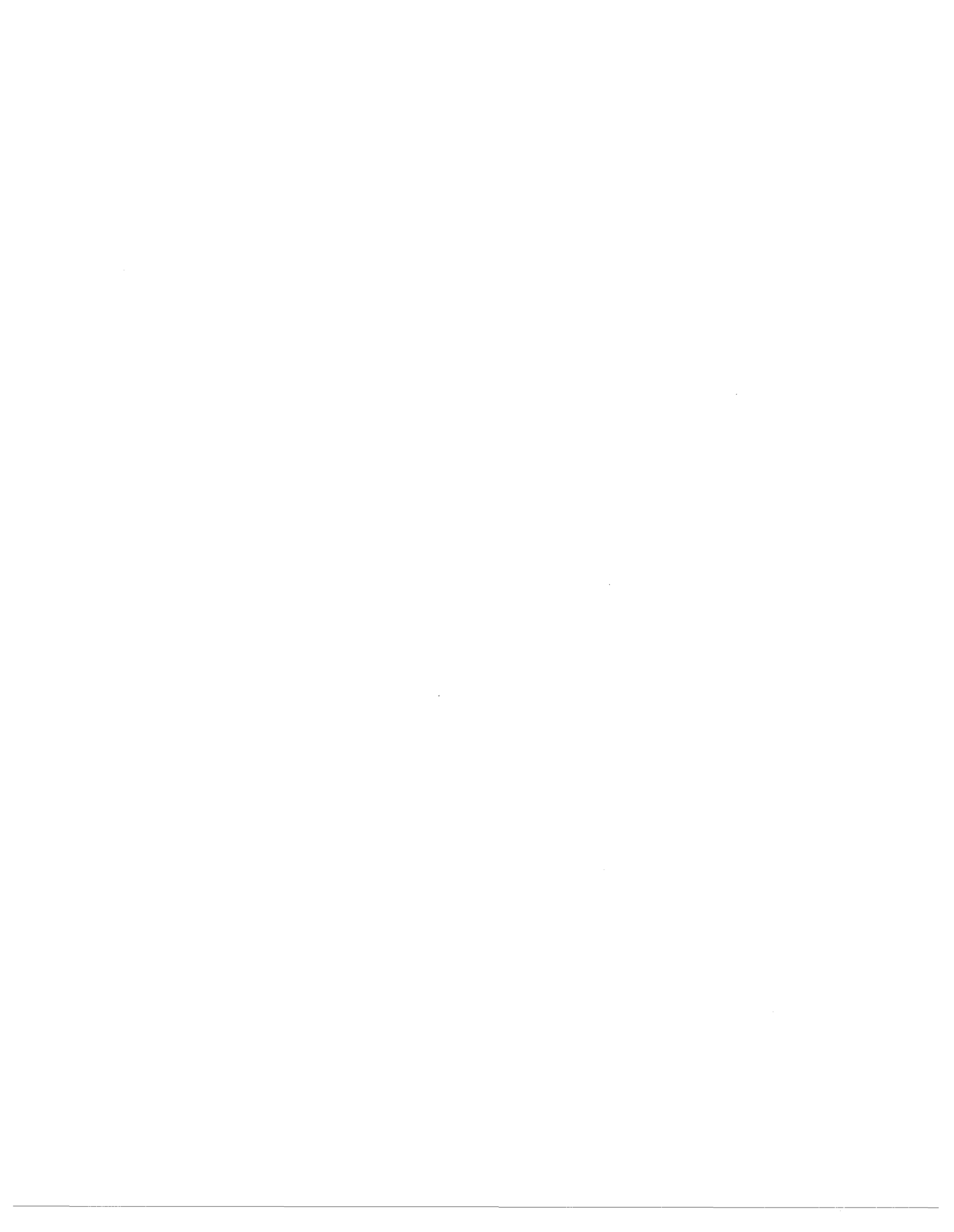
In the Matter of **Certain Bearings and Packaging Thereof**

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

In the Matter of)	
CERTAIN BEARINGS AND)	
PACKAGING THEREOF)	Inv. No. 337-TA-469

**NOTICE OF COMMISSION DETERMINATION TO REVERSE AN INITIAL
DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE THAT
SECTION 337 HAS BEEN VIOLATED; TERMINATION OF INVESTIGATION
WITH A FINDING OF NO VIOLATION OF SECTION 337**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to reverse the presiding administrative law judge's finding of violation of section 337 of the Tariff Act of 1930, as amended, in the above-referenced investigation, and has terminated the investigation with a finding of no violation of section 337.

FOR FURTHER INFORMATION CONTACT: Jean Jackson, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3104. Copies of the Commission's Order, the public version of the ALJ's final initial determination (ID), and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on April 16, 2002, based on a complaint filed by SKF USA, Inc. (SKF USA) of Norristown, PA against fourteen respondents. 67 FR 18632 (2002). Four respondents remain active in the investigation, with ten respondents having either settled with complainant or been found in default. The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930 in the importation into the United States, sale for importation, and sale within the United States after importation of certain bearings by reason of infringement of registered and common


law trademarks, dilution of trademarks, various acts in violation of the Lanham Act, and passing off. A count concerning "unfair pecuniary benefits" was dismissed by the Commission on September 23, 2002.

On April 10, 2003, the ALJ issued his ID on violation and his recommended determination on remedy and bonding. The ALJ found a violation of section 337 by reason of infringement of SKF USA's registered and common law trademarks by each of the four remaining respondents, viz., Bearings Limited, Bohls Bearing and Transmission Service, CST Bearing Company, and McGuire Bearings Company, and recommended the issuance of a general exclusion order and cease and desist orders to the respondents found in violation. All active parties remaining in the investigation, including the Commission investigative attorney, filed petitions for review on April 21, 2003, and replies to the petitions on April 28, 2003.

On May 27, 2003, the Commission determined to review the ID in part and asked the parties to brief several questions relating to the issue of material differences in the context of trademark infringement by gray market goods. 68 FR 32766-7 (June 2, 2002). Responses to the Commission's questions were filed on June 6, 2003, by all parties remaining in the investigation. Replies to the responses were filed by the same parties on June 13, 2003. Having examined the parties' submissions and the record in this investigation, including the ALJ's ID, the petitions for review, and the responses thereto, the Commission determined on August 6, 2003, to remand the investigation to the ALJ for further fact finding concerning the material differences between complainant's and respondents' bearings. In order to allow sufficient time for the further fact finding, the Commission extended the target date for completion until May 12, 2004. The ALJ issued his additional findings on December 30, 2003. The parties to the investigation filed comments on the additional findings on January 12, 2004, and response comments on January 20, 2004.

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

By order of the Commission.


Marilyn R. Abbott
Secretary to the Commission

Issued: May 12, 2004

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

In the Matter of)

CERTAIN BEARINGS AND)
PACKAGING THEREOF)

Inv. No. 337-TA-469

ORDER

On April 10, 2003, the presiding administrative law judge (ALJ) issued his final initial determination (ID) on violation and his recommended determination on remedy and bonding. The ALJ found a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) by reason of infringement of complainant SKF USA's registered and common law trademarks by each of the four remaining respondents, viz., Bearings Limited, Bohls Bearing and Transmission Service, CST Bearing Company, and McGuire Bearings Company, and recommended the issuance of a general exclusion order and cease and desist orders to the respondents found in violation. He further recommended that the cease and desist orders not apply to inventory acquired before SKF USA filed its complaint. All parties remaining in the investigation, including the Commission investigative attorney (IA), filed petitions for review on April 21, 2003, and replies to the petitions on April 28, 2003.


On May 27, 2003, the Commission determined to review the ID in part and asked the parties to brief several questions relating to the issue of material differences in the context of trademark infringement by gray market goods. 68 FR. 32766-7 (June 2, 2002). After examining the parties' submissions and the record in this investigation, including the ALJ's final ID, the petitions for review, and the responses thereto, the Commission determined that it required

additional facts in order to complete the investigation. Accordingly, the Commission remanded the investigation to the ALJ for additional fact finding. On December 30, 2003, the ALJ issued his additional findings. The parties to the investigation filed comments on the additional findings on January 12, 2004, and response comments on January 20, 2004.

Upon considering the ID, the additional findings, and all filings made by the parties during the investigation, it is hereby ORDERED that ---

1. The investigation is terminated with a finding of no violation of section 337.
2. The Secretary shall serve a copy of this Order and the Commission Opinion in support thereof, as soon as it is issued, upon each party to the investigation.
3. The Secretary publish notice of this order and termination of the investigation in the *Federal Register*.

By order of the Commission.



Marilyn R. Abbott
Secretary to the Commission

Issued: May 12, 2004

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached NOTICE OF COMMISSION DETERMINATION TO REVERSE AN INITIAL DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE THAT SECTION 337 HAS BEEN VIOLATED; TERMINATION OF INVESTIGATION WITH A FINDING OF NO VIOLATION OF SECTION 337, was served upon the following parties via first class mail and air mail where necessary on May 12, 2004.



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

In the Matter of

**CERTAIN BEARINGS AND
PACKAGING THEREOF**

Inv. No. 337-TA-469

OPINION

The presiding administrative law judge (ALJ) issued a final initial determination (ID) finding a violation of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337 ("section 337") by reason of infringement of complainant's registered and common law trademarks and false designation of source by four respondents in the importation of gray market bearings. "Gray market" products are lawfully affixed with a trademark in their country of origin, but are imported into the United States without the consent of the U.S. trademark owner. The ALJ also found that laches prevented the issuance of cease and desist orders barring sales of inventory acquired before SKF USA's complaint was filed. Upon review, we reverse the ALJ's determination that section 337 has been violated, and do not reach the issue of whether laches should be applied in this investigation to deny any particular form of relief to complainant.

BACKGROUND

The Commission instituted this investigation on April 16, 2002, based on a complaint filed by SKF USA, Inc. (SKF USA) of Norristown, PA against fourteen respondents. *67 Fed. Reg.* 18632 (2002). Four respondents remain in the investigation; ten respondents have either settled with complainant or have been found in default. The complaint, as supplemented, alleged

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violations of section 337 in the importation into the United States, sale for importation, and sale within the United States after importation of certain bearings by reason of: (1) infringement of U.S. Trademark Registration Nos. 502,839, 502,840, 1,944,843, and 2,053,722 in violation of section 32 of the Lanham Act, 15 U.S.C. § 1114(1)(a); (2) infringement of common law trademarks; (3) false representation of source in violation of section 43(a)(1)(A) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A); (4) dilution of registered and common law trademarks in violation of section 43(c)(1), 15 U.S.C. § 1125 (c)(1); (5) false advertising in violation of section 43(a)(1)(B) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B); and (6) passing off.¹

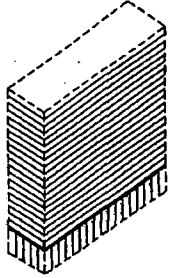
Complainant asserted the following four registered trademarks in this investigation:



¹ In addition, a count denoted “unfair pecuniary benefits” concerning respondents’ allegedly benefitting from the lowered antidumping duties achieved by SKF USA was dismissed by the Commission on September 23, 2002.

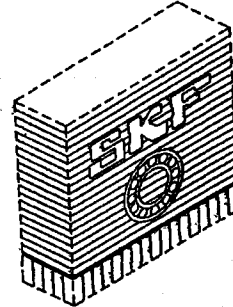
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**TRADEMARK
PRINCIPAL REGISTER**



'843 Mark

**TRADEMARK
PRINCIPAL REGISTER**



'722 Mark

The '839 and '840 marks cover the "SKF" name in varying stylized forms. The '843 and '722 marks cover the distinctive blue, red, and white design and SKF logo, respectively. SKF USA also claims common law trademark rights in the same marks.

The ALJ found that the bearings at issue in this investigation are bearings etched with the SKF mark and often sold in packaging bearing one or more SKF trademarks. ID at 13. The accused bearings are sold by entities having common corporate control with complainant. As is the case with gray market imports, the SKF trademarks are lawfully applied to the imported bearings in their country of origin; however, the bearings have been imported into the United States without the consent of the U.S. trademark owner, complainant SKF USA. ID at 13.

SKF USA manufactures SKF-marked bearings in the United States and imports SKF-marked bearings that are manufactured abroad by SKF Manufacturing Units ("MUs"). SKF USA and the MUs are owned by the same parent company, AB SKF, which is incorporated under the laws of Sweden. ID at 9. SKF USA sells bearings at all levels of the market, both

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directly to large original equipment manufacturers (OEMs) and to end users through a network of authorized distributors. SKF USA also sells its bearings to distributors that are not authorized SKF USA distributors. ID at 67-68. SKF USA has itself imported bearings manufactured by foreign MUs, ID at 58, and complainant's authorized distributors have purchased gray market bearings, including some from respondents. ID at 66-67.

The ALJ found a violation of section 337 by reason of infringement of SKF's registered and common law trademarks and false designation of source by four respondents, viz., Bearings Limited (BL), Bohls Bearing and Transmission Service (Bohls), CST Bearing Company (CST), and McGuire Bearings Company (McGuire), and recommended issuance of a general exclusion order and cease and desist orders to the respondents found in violation. The ALJ found, and the parties agreed, that a claim of false designation of source under the Lanham Act, 15 U.S.C. § 1125(a)(1)(A), is based on the same "material differences" test used for trademark infringement in the gray market context. Accordingly, the ALJ's finding of a violation of section 337 due to false representation of source was based on the same reasoning and evidence on which he found gray market trademark infringement. ID at 151. The ALJ found that complainant had not carried its burden in proving false advertising or trademark dilution. ID at 155 and 162, respectively. Complainant withdrew its claim of passing off, and the ALJ ruled that there was no violation based on that claim. ID at 163.

Petitions for review were filed by the complainant, the Commission investigative attorney (IA), and the four remaining respondents, who filed a joint petition for review covering

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common issues. Respondent CST filed an additional petition concerning the affirmative defense of equitable estoppel as it applies to CST only. Complainant SKF USA designated its petition “contingent,” explaining that while it was satisfied with the ALJ’s ID, it wanted to bring certain errors to the Commission’s attention in the event that the Commission determined to review the ID. All parties filed responses to the petitions on April 28, 2003.

On May 27, 2003, the Commission determined to review the issues of common law and registered trademark infringement, false designation of source, and laches. During its review, the Commission determined that it needed additional information and so remanded the case to the ALJ for further fact finding on August 6, 2003. On December 30, 2003, the ALJ completed his fact finding. On January 12, 2004, the parties filed comments on the ALJ’s findings. The parties filed response comments on January 20, 2004.

STANDARD ON REVIEW

Once the Commission determines to review an ID, its review is conducted under a *de novo* standard. *Certain Polyethylene Terephthalate Yarn and Products Containing Same*, Inv. No. 337-TA-457, Commission Opinion at 9 (June 18, 2002). Upon review the “Commission has ‘all the powers which it would have in making the initial determination,’ except where the issues are limited on notice or by rule.” *Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, Commission Opinion on the Issues Under Review and on Remedy, the Public Interest, and Bonding at 9-10 (June 2, 1997), USITC Pub. 3046 (July 1997) (quoting *Certain Acid-Washed Denim Garments and Accessories*, Inv. No. 337-TA-324, Commission

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Opinion at 5 (Nov. 1992)). Commission practice in this regard is consistent with the Administrative Procedure Act. *Certain EPROM, EEPROM, Flash Memory, and Flash Microcontroller Semiconductor Devices and Products Containing Same*, Inv. No. 337-TA-395, Commission Opinion at 6 (Dec. 11, 2000); *see also* 5 U.S.C. § 557(b).

Upon review, “the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge. The Commission may also make any findings or conclusions that in its judgment are proper based on the record in the proceeding.” 19 C.F.R. § 210.45. This rule reflects the fact that the Commission is not an appellate court, but is the body responsible for making the final agency decision. On appeal, only the Commission’s final decision is at issue. *Fischer & Porter Co. v. USITC*, 831 F.2d 1574, 1576-77 (Fed. Cir. 1987).

THE COMMISSION’S REVIEW AND REMAND

I. The Parameters of the Commission’s Review

The Commission determined to review the issues of common law and statutory trademark infringement, false designation of source, and laches. The Commission did not review the ALJ’s determinations: (1) that there was no violation of section 337 based on false advertising or trademark dilution, or passing off (a claim withdrawn by SKF USA); (2) that the Commission has jurisdiction over the bearings, by virtue of their importation, and over the respondents; (3) that respondents did not establish the affirmative defenses of estoppel, acquiescence, or unclean hands; and (4) that SKF USA established a threat of economic injury (if a violation is found).

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These determinations became the Commission's final determinations by operation of rule when the Commission declined to review them. 19 C.F.R. § 210.42(h). The Commission also affirmed ALJ Order No. 95 which disqualified complainant's expert witness on quality control.

The Commission's notice of review requested the parties to brief several questions concerning the ALJ's rulings on material differences in warranty, product recall procedures, and post-sale technical and engineering services, as well as the issues of remedy, the public interest, and bonding in the event that the Commission determined there is a violation of section 337. 68 *Fed. Reg.* 32766 (June 2, 2003). Upon review of the parties' submissions, it became apparent that a significant volume of authorized SKF-marked bearings that are put into the U.S. market by complainant SKF USA may not be accompanied by the post-sale services that SKF USA alleges constitute a material difference between its bearings and the bearings of respondents. These sales include sales by SKF USA division Chicago Rawhide, sales of authorized bearings by distributors that are not authorized SKF distributors, sales on the surplus market, and sales made by Roller Bearing Company/Tyson Bearing Company (RBC/Tyson).² The Commission therefore ordered the ALJ to make additional findings on remand concerning those sales.

² SKF USA licensed RBC/Tyson to use the SKF trademark as part of its sale of a production line to RBC/Tyson.

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II. Issues Encompassed by the Commission's Review

A. General Gray Market Trademark Issues

1. The ID

The ALJ determined that the asserted U.S. trademarks are valid and owned by SKF USA, a finding that is not disputed by the parties. He found that SKF USA's registration of the marks with the U.S. Patent and Trademark Office clarified the ambiguity as to which party owns the trademarks in the United States by expressing an intention that SKF USA, not AB SKF, owns the marks in the United States. Accordingly, the ALJ found that SKF USA, not AB SKF, possesses the exclusive right to use the marks in commerce in the United States. He also found that the registrations have become incontestable as a matter of law. ID at 40, citing 15 U.S.C. § 1115(b).

The ALJ found that the issue of whether the good will associated with the marks inures to the benefit of SKF USA alone or to the SKF Group and AB SKF as a whole depends on whether there are material differences between the authorized SKF USA bearings and the unauthorized SKF brand bearings imported and sold by respondents. ID at 43, relying on *Certain Agricultural Tractors Under 50 Power Take-Off Horsepower*, Inv. No. 337-TA-380, ID at 13, USITC Pub. No. 3026 (March 1997) ("*Tractors*"), affirmed sub nom. *Gamut Trading Co. v. U.S. International Trade Commission*, 200 F.3d 775 (Fed. Cir. 1999) ("*Gamut*"). Thus, he found that SKF USA can prevent the importation and sale of the gray market bearings only if the gray market bearings are materially different from the authorized goods. ID at 45-46. He found that the presence or absence of material differences between the authorized product and the gray

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market product drives the infringement analysis, not the corporate relationship between AB SKF and SKF USA. ID at 46.

2. Analysis

“The term ‘gray market goods’ refers to genuine goods that . . . are of foreign manufacture, bearing a legally affixed foreign trademark that is the same mark as is registered in the United States; gray goods are legally acquired abroad and then imported without the consent of the U.S. trademark holder.” *Gamut*, 200 F.3d at 778, citing *K-Mart v. Cartier, Inc.*, 486 U.S. 281, 286-87 (1987) (*K-Mart*). Respondents argue that the goodwill in the SKF trademark inures to the benefit of all SKF Group companies worldwide, not only SKF USA. They cite testimony showing that AB SKF imposes standards that are followed by all SKF Group companies. Clark, Tr. 4585:16 -4586:1; RX-0291. They also note that SKF USA imports [] percent of the bearings that it sells in the United States from foreign MUs of AB SKF, citing ID at 58. Respondents argue that since SKF USA and the foreign MUs are under common control, SKF USA cannot prevent the importation of gray market goods under the Supreme Court’s holding in *K-Mart*. Respondents assert that *K-Mart* holds that commonly controlled entities cannot prevent the importation of genuine trademarked goods, and submit that *Gamut* held that the common control exception gives way only when there are material differences. Respondents also argue that the “first sale” doctrine prevents a finding of infringement here because the trademark rights were extinguished upon the first sale of the bearings at issue by the foreign MUs. These arguments are based on respondents’ contention that their bearings are not materially different from the

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authorized bearings.

The IA and SKF USA counter that *K-Mart* dealt exclusively with the issue of “whether the Secretary of the Treasury’s regulation permitting the importation of certain gray-market goods, 19 CFR § 133.21 (1987), is a reasonable interpretation of section 526 of the Tariff Act of 1930.” *K-Mart*, 486 U.S. at 285. They argue that *K-Mart* is limited to determining whether the Customs regulations implementing section 526 were reasonable, and that the Supreme Court explicitly did not consider the Lanham Act in *K-Mart*. 486 U.S. at 290 n.3. Moreover, the IA and SKF USA argue that subsequent precedent makes it clear that *K-Mart* does not apply in the Lanham Act context, citing, e.g., *Lever Bros. Co. v. United States*, 981 F.2d 1330 (D.C. Cir. 1993) (*Lever II*), which noted the Supreme Court’s statement to that effect. Finally, the IA points out that Customs has amended the very regulation at issue in *K-Mart* to make it clear that Customs will now bar physically materially different goods otherwise subject to the “common control” exception. 19 C.F.R. § 133.23; 64 *Fed. Reg.* 9058 (Feb. 24, 1999) (adopting the so-called “Lever Rule”). The IA and SKF USA submit that the first sale doctrine is territorial in nature and that a sale outside the United States does not excuse the importation of goods that infringe a U.S. trademark, citing *Martin’s Herend Imports, Inc. v. Diamond & Gem Trading USA, Co.*, 112 F.3d 1296, 1303 (5th Cir. 1997).

In gray market cases the question of trademark infringement by commonly controlled entities turns on the existence of “material differences” between the authorized products and the gray market products, *Gamut*, 200 F.3d at 779. A material difference is a difference that

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consumers are likely to find significant when purchasing the product because such differences would suffice to erode the goodwill of the domestic source. *Id.* The Federal Circuit considered the issues of common corporate control and the first sale doctrine in *Gamut* and held that the “basic question in gray market cases concerning goods of foreign origin is not whether the trademark was validly affixed, but whether there are differences between the foreign and domestic product and if so whether the differences are material.” *Id.* Respondents have not demonstrated any defect in the ALJ’s conclusion that, under *Gamut*, the question of gray market trademark infringement turns on the material differences test. Accordingly, we determine that the doctrines of common control and first sale do not apply if there are material differences between the authorized products and respondents’ products, and we affirm the ALJ’s finding that resolution of the infringement issue depends on whether there are material differences between the SKF-brand bearings sold by SKF USA and the gray market bearings sold by respondents. In order to establish gray market trademark infringement, SKF USA must demonstrate that material differences exist between its bearings and those of the respondents.

We also affirm the ALJ’s finding that bearing purchasers are highly sophisticated consumers. ID at 79. This finding was not disputed by the parties.

B. Material Differences

1. Whether There Are Any Physical Material Differences Between SKF USA’s Bearings and Respondents’ Gray Market Bearings

a. The ID

The ALJ found no physical differences between SKF USA’s bearings and the gray market

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bearings imported by respondents. He rejected complainant's argument that there are physical differences between the two groups of bearings in that respondents do not sell the JEM-type bearing, a sealed bearing having a particular type of lubricant and unique internal clearances, on the ground that not all SKF USA bearings are of the JEM type. ID at 57. He rejected SKF USA's argument that a material physical difference exists because respondents sell old bearings, finding that precedent supports a determination that shelf life is a matter of quality control rather than a physical difference. ID at 57. He also rejected complainant's argument that respondents' bearings are materially different because some are etched with the word "MALAYSIA," finding that SKF USA had itself sold bearings with identical markings. ID at 58.

The ALJ concluded that substantial and probative record evidence demonstrates that SKF USA sells SKF-brand bearings that are not physically different from the SKF-brand bearings that respondents sell. ID at 58. Accordingly, he found no gray market trademark infringement due to physical material differences. The ALJ also found that there were no physical differences between SKF USA's bearings and the gray market bearings of respondents because SKF USA also imports bearings from foreign MUs. He found that over [] percent of the bearings sold by SKF USA within the past five years were manufactured abroad. ID at 58, referencing FF 20, Jt. Stip. No. 3, ¶ 2.

b. Analysis

SKF USA argues that the ALJ erred in treating shelf life as a quality control issue rather than as a physical difference. According to SKF USA, respondents sell old bearings that are

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physically different from new bearings because of their age. SKF USA states that some models of bearings are sealed and the grease is added at the time of manufacture. According to SKF USA, when these bearings age, the grease may degrade, thus making the bearings physically different from newer bearings.

The IA and respondents point out that the federal courts have consistently treated shelf life as a component of quality control rather than as a physical difference, citing *Warner-Lambert Co. v. Northside Dev. Corp.*, 86 F.3d 3, 6 (2d Cir. 1996) (“*Warner-Lambert*”) (addressing the sale of stale cough drops as a quality control issue); *Societe des Produits Nestle, S.A. v. Casa Helvetia, Inc.*, 982 F.2d 633, 642 (1st Cir. 1992) (addressing the sale of expired candies as part of quality control); *Iberia Foods Corp. v. Romeo*, 150 F.3d 298, 304 (3d Cir. 1998) (addressing sale of dated cleaning products). They also point out that the ALJ found no quality control differences between SKF USA’s bearings and the gray market bearings, and submit that, even if shelf life were treated as a physical difference, the ALJ found that SKF USA failed to prove that there were material differences in the shelf lives of the authorized and gray market bearings.

Precedent cited by the IA and respondents supports the proposition that shelf life is properly analyzed as a component of quality control rather than as a physical difference. Moreover, as we discuss below, we affirm the ALJ’s finding that SKF USA established no material differences based on shelf life, when he considered the issue as part of his discussion of quality control. Thus, even if shelf life were properly considered to be a physical difference, we find that complainant has not established the existence of any material differences based on shelf

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life.

We make one modification to the ALJ's analysis of the issue of physical differences. In discussing the Commission's determination in *Tractors*, the ID states:

the Commission sustained the Administrative Law Judge's Initial Determination on the facts in *Tractors* that the evidence failed to show 'that any of the 20 [unauthorized] KBT models . . . is materially different from the closest corresponding [authorized] KTC model with respect to any of the differences found to be 'material' in the ID,' save one non-physical material difference. *Id.* (emphasis added).

ID at 59. In fact, the Commission stated:

We therefore find that evidence on the record does not demonstrate that any of the 20 [unauthorized] KBT models identified . . . is materially different from the closest corresponding [authorized] KTC model with respect to any of the differences found to be 'material' in the ID, aside from having Japanese-language labels.

Tractors, Commission Opinion at 14. The Commission, however, did not characterize the Japanese-language labels as a non-physical difference, rather it stated, "[i]n our view, the labels attached to a tractor at sale are not a non-physical or aftermarket item like the availability of replacement parts, service, or operator's manuals, but rather an integral part of the tractor, *i.e.*, a physical difference." *Tractors* at 9. We therefore modify the ID accordingly.

2. Whether as a Matter of Law a Trademark Owner Can Prohibit the Importation of Physically Identical Trademarked Products That Are Produced by an Affiliated, Commonly-Controlled Entity

a. The ID

The ALJ found that "[i]t is well established in Commission and Federal Circuit precedent that the "material differences" analysis of gray market trademark infringement under the Lanham

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Act can encompass non-physical differences,” ID at 124, citing *Gamut*, 200 F.3d at 781. He also found it was settled that “when ‘material differences’ exist between the authorized product and the unauthorized product, trademark infringement can be found ‘even when the holders of the domestic and foreign trademarks are related companies,’” *Id.* citing *Gamut*, 200 F.3d at 779. Nevertheless, the ALJ found this to be a case of first impression as to whether trademark infringement can be found where there are no material physical differences, only one non-physical material difference, and the gray market products are manufactured by firms that are controlled by the same entity that controls the trademark holder. ID at 125.

The ALJ interpreted the Federal Circuit’s decision in *Gamut* to indicate that the lack of a physical difference between the products would not prevent a finding of infringement in this case, although *Gamut* does not so expressly hold.³ He found that a trademark holder has the burden of proving, by a preponderance of the evidence, that identified differences are “material” ones, in that “consumers would be likely to consider the differences between the foreign and domestic products to be significant when purchasing the product, for such differences would suffice to erode the goodwill of the domestic source.” ID at 125, citing *Gamut*, 200 F.3d at 779. He found that even one non-physical material difference between SKF USA’s bearings and respondents’ gray market bearings can support a finding of trademark infringement, ID at 125, citing *Tractors*, Commission Opinion at 10 (“[T]he courts have stated that a single material

³ *Gamut* affirmed the Commission’s determination in *Tractors*, in which the Commission found at least one physical material difference as to each tractor found to infringe the asserted trademark. *Tractors*, Comm. Opinion at 9-10

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difference is sufficient to establish trademark infringement.”). ID at 125. He found this to be the case even though SKF USA is a related company to AB SKF and the foreign SKF Group MUs that supply physically identical bearings to both SKF USA and respondents. ID at 125.

b. Analysis

Complainant SKF USA asserts that both legal precedent and policy considerations support the conclusion that physical differences are not required to find gray market infringement or false designation of source. SKF USA maintains that no case has held that physical differences are required to find infringement by gray market goods. It argues that, in fact, because the imported product is genuine in a gray market case, there is a greater likelihood that a U.S. consumer will expect the full panoply of services and guarantees that are provided by the trademark owner when it purchases a gray market product.

Complainant notes that in *Gamut*, the Federal Circuit highlighted several non-physical differences in services and support between the gray market tractors and the authorized tractors and did not use the word “physical differences” in its decision. Complaint also asserts that the Federal Circuit did not find a difference in labeling to be a physical difference. This assertion, however, ignores the fact that the *Gamut* court affirmed the Commission’s determination, which in turn held that the differences in labeling were physical differences. *Tractors*, Commission Opinion at 9.

Complainant cites two federal district court cases, both from the U.S. District Court for the Southern District of New York, that found gray market trademark infringement even though

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the gray market and authorized goods were physically identical. Complainant notes that the first case, *Osawa & Co. v. B & H Photo*, 589 F. Supp. 1163, 1168-69 (S.D.N.Y. 1984), was cited as persuasive authority in *Gamut*. The second case is *Ahava (USA), Inc. v. J.W.G., Ltd.*, 250 F. Supp. 2d 366 (S.D.N.Y. 2003). SKF USA also cites the statement by the *Nestle* court that “[w]e think that the appropriate test should not be strictly limited to physical differences. Other sorts of differences -- differences in, say, warranty protection or service commitments -- may well render products non-identical in the relevant Lanham Act sense, (citations omitted).” *Nestle*, 982 F.2d 633, 639, n.7. Complainant acknowledges, however, that the *Nestle* case actually turned on physical differences.

Complainant submits that, although the vast majority of gray market cases involve gray market products that are physically different from the authorized goods, courts have relied on non-physical differences, when present, as much as physical differences in finding infringement.⁴ Complainant submits that in many other cases, courts cited a wide variety of physical and non-physical differences as bases for infringement, but no particular material difference seemed to

⁴Complainant cites *Goldie Electrical, Inc. v. Loto Corp.*, 2000 U.S. Dist LEXIS 18594 (S.D.N.Y. 2000) (finding of infringement based on warranties, repair, and maintenance services, which the court found to be integral components of quality control efforts); *Fender Musical Instruments Corp. v. Unlimited Music Center, Inc.* 1995 U.S. Dist LEXIS 15746 (D.Conn. Feb 16 1995)(despite presence of physical differences, the court’s infringement holding cited only service differences); and *Montblanc-Simplo GmbH v. Staples, Inc.*, 172 F.Supp.2d 231, *vacated on other grounds*, 175 F.Supp.2d 95 (D.Mass. 2001) (the gray market goods did not contain the serial number and another marking found on the authorized pens, but the court also relied on the non-physical difference of product recall procedures, which were integral to the mark holder’s overall quality control efforts).

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drive the outcome.⁵

Complainant argues that as a policy matter the Commission should reject a *per se* rule that would require the presence of a physical material difference in order to find trademark infringement. It points out that no court has adopted such a *per se* rule and that the test for gray market trademark infringement in the Federal Circuit is whether “consumers would be likely to consider the differences between the foreign and domestic products to be significant when purchasing the product,” *Gamut*, 200 F.3d at 779. SKF USA submits that there is no reason to presume that non-physical differences cannot confuse consumers in the absence of physical differences, and contends that subtle differences are more likely to be confusing than overt physical differences. SKF USA also notes that courts have recognized that a mark holder is damaged if gray marketeers free ride on a mark holder’s advertising and goodwill, citing *Osawa*, 589 F.Supp. at 1169, and argues that there is no reason to presume that a mark holder’s good will is safe from attack so long as there are no physical differences.

The IA argues that a finding of material differences based solely on non-physical

⁵Complainant cites, e.g., *Certain Cigarettes and Packaging Thereof*, 2000 ITC LEXIS 319 (U.S.I.T.C. Oct. 16, 2000) (citing differences in product flavor, packaging, quality control procedures, product return policies, nightclub promotions, and direct mail initiatives); *R.J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc.*, 1999 U.S. Dist. LEXIS 10706 (N.D. Ill. June 30, 1999) (citing differences in formulation, ingredients, packaging, promotional awards, advertising programs, warranties, and post-manufacture quality control procedures); *Phillip Morris Inc. v. Allen Distributors, Inc.*, 48 F. Supp. 2d 844 (S.D. Ind. 1999) (differences in packaging and quality control); *Pepsico, Inc. v. Pacific Produce, Ltd.*, 2000 U.S. Dist. LEXIS 12085 (D. Nev. May 4, 2000); (differences in bottle labels, quality control, marketing and advertising efforts, and bottle return policies); *Pepsico, Inc. v. Nostalgia Products Corp.*, 1990 U.S. Dist. LEXIS 18990 (N.D. Ill. Dec. 20, 1990) (same).

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differences is fully consistent with both the law and the policy behind section 337 and the Lanham Act as applied to gray market goods. He submits that trademark law protects against the diminishment of the markholder's reputation by sales of lower-quality gray market products, regardless of whether the lower quality derives from physical or non-physical attributes of the products.

The IA notes that the courts have identified two key bases for granting trademark protection: (1) protection of consumers from confusion and deceit, and (2) protection of trademark holders from misappropriation of their goodwill, citing *Gamut*, 200 F.3d 775, 782 (Fed. Cir. 1999) ("We conclude that the Commission applied the correct standard, for this standard implements the two fundamental policies of trademark law: to protect the consumer and to safeguard the goodwill of the producer.") and *Nestle*, 982 F.2d 633, 636 (1st Cir. 1992). The IA argues that the importation and sale of gray market goods that have non-physical material differences from authorized goods clearly misappropriate the goodwill that SKF USA has built up in its trademarks.

The IA submits that non-physical differences are among the many differences that may confuse consumers, and notes that the Federal Circuit has made it clear that "the consuming public, associating a trademark with goods having certain characteristics, would be likely to be confused or deceived by goods bearing the same mark but having materially different characteristics." *Gamut*, 200 F.3d at 779. He asserts that the Lanham Act's goal of protecting consumers from confusion will not be well-served if a gray marketeer is permitted to continue

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selling materially different goods under the manufacturer's trademarks, regardless of whether the material differences are physical or non-physical. He submits that it should not matter whether that difference is physical or non-physical in nature so long as it is of the type that consumers are likely to find significant, *i.e.*, a material difference, *citing Gamut*, 200 F.3d at 779. The IA acknowledges that there have been cases in which only physical differences have been at issue.⁶ However, he contends that none of these cases can be read to stand for the proposition that non-physical differences *cannot* be material, and he notes that the Commission has held that "a single material difference is sufficient to establish trademark infringement." *Tractors*, Commission Opinion at 13.

Contrary to SKF USA and the IA, who argue that this case is very much like precedent, respondents assert that the Commission must decide an issue of first impression. They frame the issue as one of whether importation of gray market bearings that are physically identical to the authorized bearings, and are manufactured by the same entities for the same market as the authorized bearings, will support a gray market trademark infringement claim brought by a complainant that is commonly controlled with the manufacturers. They contend that the evidence clearly shows that: (1) the SKF bearings at issue are physically identical and were not manufactured especially for any country-specific market (ID at 57-59); (2) the SKF Group has

⁶ The IA cites *Martin's Herend*, 112 F.3d 1296 (barring the importation of materially different ceramic figurines, but permitting the import of identical products); *Weil Ceramics & Glass, Inc. v. Dash*, 878 F.2d 659 (3d Cir.) (finding no violation in the sale of identical gray market goods), *cert denied*, 493 U.S. 853 (1989); *NEC Elecs., Inc. v. CAL Circuit Abco*, 810 F.2d 1506 (9th Cir.) (finding no violation in the sale of identical gray market goods), *cert. denied*, 484 U.S. 851 (1987).

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not granted complainant SKF USA an exclusive distributorship in the United States and has not restricted sales by its foreign MUs or distributors (ID at 41 n.3); and (3) SKF bearings imported by complainant, as well as those manufactured by complainant, may reach end users through any number of circuitous and unregulated distribution channels (ID at 50-53), a situation that results in some authorized bearings not being accompanied by SKF USA's bundle of services. Respondents submit that, under these circumstances, neither law nor policy provides a basis for finding trademark infringement.

Respondents contend that complainant's focus on "non-physical" differences in the availability of aftermarket services reveals that its true aim is protection of its authorized distribution network. They argue that U.S. trademark law protects the goodwill of the SKF marks, but may not be used to create for complainant, and thereby for its parent company, a market niche, insulated from intrabrand competition, in the United States. Moreover, they argue that it is inappropriate to use the U.S. Bureau of Customs and Border Protection to enforce a prohibition on imports that could be achieved by private means within the SKF Group.

Respondents assert that no precedent has found material differences on the sole basis of non-physical differences in services bundled with sales of the products at issue. Rather, they assert that every previous gray market case has dealt with physical differences in product composition or in material aspects of product packaging, and that every previous gray market case has addressed differences between products manufactured for the U.S. market and products manufactured for a foreign market. Respondents distinguish *Osawa* because in that case the

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evidence demonstrated that the defendants had misrepresented that their gray market products were covered by the trademark owner's warranty, *Osawa*, 589 F. Supp. at 1168. Respondents point out that, unlike the sellers in *Osawa*, they have not misrepresented either the availability of services or their status as unauthorized distributors to consumers. Respondents distinguish *Ahava* on the ground that the court in that case focused on allegations concerning quality control, which has a physical dimension, and because the court explicitly noted the absence of common control of the manufacturer and U.S. trademark owner. *Ahava*, 250 F. Supp. 2d at 367.

Respondents urge that the doctrine of first sale, or trademark exhaustion, and the doctrine of common control are relevant here because those doctrines may be ignored only when there are material differences between the products at issue, citing, e.g., *Gamut*, 200 F.3d at 779 (“when there are material differences between the domestic product and the foreign product bearing the same mark, most of the courts that have had considered the issue have excluded the gray goods, even when the holders of the domestic and foreign trademarks are related companies”). Respondents assert that *Gamut* expressly recognized the existence of the doctrine of common control, but found that the doctrine was inapplicable under the facts of that case, where there were material physical differences between the structure and labeling of tractors manufactured for the Japanese market and tractors manufactured for the U.S. market.

Respondents point out that SKF bearings are intended for the global market and submit that the policies underlying the doctrine of common control must inform the Commission's decision. They urge that the material differences inquiry be conducted in light of *all* of the

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circumstances of record, including the facts that the bearings at issue already have been sold legitimately by the SKF Group members that affixed the SKF trademark and that the SKF Group members who manufactured and sold the bearings are commonly controlled with complainant. Respondents submit that it is foreseeable that, if complainant is granted relief, many international entities who do business through a wholly-owned U.S. subsidiary will take like measures to gain the anticompetitive advantages of a market niche insulated from intrabrand competition. Respondents submit that it is significant that Congress, although repeatedly petitioned to render all gray market importation illegal, regardless of common control, has declined to enact such legislation.⁷

Respondents argue that, on a practical level, the fact that “authorized” SKF bearings are physically identical to gray market SKF bearings renders application of the material differences test nearly impossible. They point out that, although complainant alleges that its post-sale services are available to all end users of authorized SKF bearings, the record evidence demonstrates that authorized SKF bearings may reach end users by any number of circuitous channels of distribution. ID at 50-53. Respondents submit that, under such circumstances, it is not credible that complainant or anyone else could differentiate an authorized SKF USA bearing from a physically identical gray market bearing for the purpose of determining whether services are or are not available. Respondents also contend that it is not possible that consumers who

⁷ Respondents assert that a proposed amendment to the Lanham Act that would have done away with the doctrine of common control in the context of trademark infringement has four times failed to pass the Senate, *citing* S. 894, 102d Cong., 1st Sess. (1991); S. 626, 101st Cong., 1st Sess. (1989); S. 2903, 100th Cong., 2d Sess. (1988); S. 1671, 100th Cong., 1st Sess. (1987).

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have encountered authorized SKF USA bearings under such circumstances would expect SKF USA's services.

We agree with the ALJ that the question of whether material differences can be found in a gray market case based solely on non-physical differences is a matter of first impression for the Commission and the Federal Circuit. SKF USA and the IA cited two district court cases, *Osawa*, and *Ahava*, that found gray market trademark infringement solely on the basis of non-physical differences. Those cases, however, can be distinguished from the case before the Commission. In *Osawa* there were fraudulent misrepresentations concerning service and warranty, *Osawa*, 589 F. Supp at 1168, a situation not found here. In *Ahava*, the manufacturer of the allegedly infringing goods was not under common control with the trademark owner. *Ahava*, 250 F. Supp. 2d at 367, 369.

The Ninth Circuit appears to require physical differences between authorized goods and gray market goods in order to find Lanham Act violations. In *NEC Electronics, Inc. v. CAL Circuit Abco*, 810 F.2d 1506, 1509 (9th Cir.), *cert. denied*, 484 U.S. 851 (1987), the Ninth Circuit found the goods at issue to be physically identical and reversed a district court infringement finding of infringement based on consumer confusion regarding service and warranties for physically identical products. The *NEC* court stated that if defendants were representing that their goods were covered by *NEC*'s warranty, plaintiff's remedy was properly grounded in contract or tort, rather than under the trademark laws. The D.C. Circuit found that section 42 of the Lanham Act bars imports of "physically different" rather than "materially different" goods in

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a case involving Sunlight® dishwashing liquid and Shield® soap. *Lever Bros. Co. v. United States*, 877 F.2d 101, 109 (D.C. Cir. 1993) (*Lever I*); and *Lever II*, 981 F.2d at 1338. However, the First Circuit's decision in *Nestle*, which is widely followed, found trademark infringement based on a variety of physical differences, yet stated in a footnote that “[w]e think that the appropriate test should not be strictly limited to physical differences. Other sorts of differences -- differences in, say, warranty protection or service commitments -- may well render products non-identical in the relevant Lanham Act sense, (citations omitted).” *Nestle*, 982 F.2d 633, 639, n.7.

The Federal Circuit did not state that a physical material difference is necessary to show gray market trademark infringement when it affirmed the Commission's determination in *Gamut*, even though the Commission had held that the difference in labeling on two otherwise identical tractors was a physical difference. The *Gamut* opinion spoke instead only of “material” differences and did not use the term “physical” in its discussion. Moreover, the Federal Circuit relied on *Osawa*, a case in which infringement was found despite the absence of physical material differences, in its discussion of the material differences test. The *Gamut* court also noted *NEC* in its material differences discussion, and relied on *Lever II* in its decision. Perhaps significantly, however, the *Gamut* court referred to the goods at issue in *Lever II* as “materially different,” rather than “physically different,” as the *Lever II* court had done.

The Federal Circuit relied chiefly on the *Nestle* decision in formulating its test for material differences, *i.e.*, whether there are differences between the foreign and domestic product and if so whether the differences are material. *Gamut*, 200 F.3d at 779-780. The *Gamut* court

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held that the threshold for materiality was low, requiring no more than a showing that consumers would be likely to consider the differences between the foreign and domestic products to be significant when purchasing the product, for such differences would suffice to erode the goodwill of the domestic source. *Id.* The court adopted the *Nestle* view that “[a]ny higher threshold would endanger a manufacturer’s investment in product goodwill and unduly subject consumers to potential confusion by severing the tie between a manufacturer’s protected mark and its associated bundle of traits.” *Id.*, citing *Nestle*, 982 F.2d at 641. Accordingly, we determine that adoption of a *per se* rule that would require a physical material difference in order to find gray market trademark infringement would not be consistent with the reasoning underlying the *Gamut* decision. We therefore determine that physical material differences are not required in order to show gray market infringement, even where the manufacturer of the foreign goods and the U.S. trademark owner are under common control.

We also determine that the basis for a trademark holder’s claim of material differences is the goods that the trademark holder allows into the marketplace, because these are the goods that consumers will associate with the trademarks at issue. *Gamut*, 200 F.3d at 779 (“the consuming public, associating a trademark with goods having certain characteristics would be confused by materially different goods bearing the same mark”). The Commission found in *Tractors* that a material difference is a difference that is integral to the goods that the trademark owner puts into U.S. commerce, *i.e.*, a difference that consistently accompanies the trademark owner’s goods. *See Tractors*, Commission Opinion at 9 (materially different labels were integral parts of the

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tractors at issue). As we explain below, application of these standards leads to a finding of no violation of section 337 in this investigation.⁸

3. **Appropriate Channels of Distribution to Be Considered in Determining Whether There Are Material Differences in the Post-Sale Technical and Engineering Support Offered by SKF USA and Respondents**

a. **The ID**

The ALJ found a single material difference between authorized SKF bearings and the bearings sold by respondents, *viz.*, post-sale technical and engineering services, and further found that this material difference supported a presumption of a likelihood of confusion. ID at 77-80. The ALJ found that respondents did not rebut the presumption that the differences in post-sale technical and engineering services were material by showing such services were not important to purchasers. ID at 80. He therefore found infringement and a violation of section 337 based on material differences in post-sale technical and engineering services. ID at 80.

The post-sale technical and engineering services on which the ALJ relied include on-site

⁸ The ID contains a statement that is inconsistent with the material differences test as articulated by the Federal Circuit. The ALJ stated:

Material differences that are “blatant” cannot cause an erosion of goodwill because blatant differences would not confuse the reasonably prudent consumer. “Material differences,” by contrast, are “subtle differences, for it is by the subtle differences that consumers are most easily confused.” *See Nestle, supra*, 982 F.2d at 641. Therefore, it is the burden of the trademark holder to traverse between the Scylla of identicalness (including all bundled services embedded in the product at its point of sale) and the Charybdis of blatancy in order to establish subtle “material differences.”

ID at 21. The Federal Circuit, however, does not subscribe to this view, holding that “[a]s precedent illustrates, differences that may be readily apparent to consumers may nevertheless be material.” *Gamut*, 200 F. 2d at 781. Accordingly, we do not adopt this statement by the ALJ.

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support by trained industry specialists and technical support by way of a telephone hotline. ID at 77-79. The ALJ did not include SKF USA's "failure analysis" as a post-sale (or warranty) service because he deemed it to be an ancillary service that is provided only upon payment of a fee. ID at 77, n.13; FF 81; FF 181.

As part of his findings concerning on-site technical services, the ALJ found that SKF USA employs a group of field engineers who specialize in particular industries. ID at 77; FF 82. These "industry specialists" include engineers who have expertise in the equipment used in pulp and paper mills, petrochemical plants, and steel mills. ID at 77; FF 83. The ALJ found that these industry specialists provide on-going technical and engineering assistance to end users who purchase SKF-marked bearings from SKF USA authorized distributors. ID at 77; FF 86.

The ALJ found that the SKF USA telephone hotline answers questions from distributors and end users concerning the maintenance, installation, and lubrication of SKF products. ID at 80. FF 102. He found that it is undisputed that the SKF USA hotline is designed to serve only customers of SKF USA authorized distributors.⁹ ID at 79; FF 101. The customer enters a five-

⁹ Throughout the ID, the term "authorized distributor" is used by the ALJ and the parties to mean distributors that are authorized to sell SKF bearings purchased from SKF USA under the terms and conditions of contracts between the distributors and SKF USA. ID at 92. See FF 247, CX-1064 (Industrial Distributorship Agreement). The ID uses the term "unauthorized distributor" to describe a distributor that does not have an Industrial Distributor Agreement with SKF USA, as well as to describe gray marketers, including respondents. The ID, as well as the submissions from the parties, sometimes uses the term "authorized bearing" to mean any bearing that SKF USA has either manufactured or imported. These bearings are sometimes sold to distributors that do not have an Industrial Distributorship Agreement with SKF USA. At other times the ID appears to use the term "authorized bearing" to refer to a bearing that is sold by either SKF USA or its authorized distributors. Gray market bearings may become authorized in this sense if they are acquired by an authorized SKF USA dealer.

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digit customer number, which he has procured from his SKF USA authorized distributor, when he accesses the hotline. ID at 78; FF 100. The customer number assures the caller of a preferential place in the telephone queue. Tr. 498.

The ALJ found that anyone can call the SKF hotline, but any caller is not *ipso facto* entitled to receive technical assistance. FF 495; Snyder, Tr. 7017:8-7019:12. He found that SKF USA instituted the use of a “black list” to prevent use of the hotline by unauthorized customers ID at 78; FF 103. The black list contains the names of bearings distributors that SKF USA has cause to believe purchase gray market bearings. CX-2113C. The black list was drawn up by SKF USA’s counsel and instituted by SKF USA in July 2002, four months after SKF USA filed its section 337 complaint with the Commission. Worden 496:16-497:25. Technicians who answer the hotline are instructed to refuse to give information to black list distributors and their customers. Worden Tr. 497. The ALJ found:

a significant number of unauthorized customers are unaware of the fact that the SKF hotline is inaccessible to them because the names of their unauthorized distributors appear on SKF USA’s recently instituted “black list,” which is designed to thwart unauthorized use of the hotline. Thus, their reliance upon SKF USA’s technical and engineering support, which they consider to be important, will be frustrated.”

ID at 75.¹⁰

The ALJ found a material difference between the authorized bearings and the gray market bearings in that access to the SKF USA hotline by purchasers of authorized SKF bearings is

¹⁰ The term “unauthorized customers” appears to refer to customers who have purchased bearings from a company on the black list.

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assured, whereas access to the SKF USA hotline by purchasers of gray market bearings is not. ID at 75. The ALJ rejected respondents' argument that the SKF USA hotline is still essentially available to all purchasers of SKF bearings, and therefore cannot be a material difference. He found that this argument fails because "if a consumer purchases SKF bearings from an unauthorized source believing she will have access to the SKF hotline without impediment, her expectations will be dashed causing confusion and damaging the goodwill of the SKF trademarks." ID at 79.

The issue of whether post-sale technical and engineering services consistently and predictably accompany SKF USA's bearings involves a consideration of the channels of distribution through which authorized bearings reach end users.¹¹ The ALJ rejected SKF USA's position that only its own operations and not those of its authorized distributors must be considered in the material differences analysis. He found that since SKF USA seeks a remedy that would affect all U.S. markets and not just the markets served by respondents, the comparison of differences must be made at all levels. ID at 50. He therefore rejected SKF USA's argument that sales by its Chicago Rawhide division, which sells to the vehicle service market ("VSM"), also known as the automotive aftermarket (for cars) and heavy duty aftermarket (for trucks and other commercial vehicles), should be excluded from the analysis. ID at 52. The ALJ found that, when determining whether material differences between authorized and unauthorized goods

¹¹ As noted below, the channels of distribution also affect, to a lesser extent, the determination as to whether other post-sale services, such as warranty service and product recall, consistently accompany the authorized product.

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are confusing to consumers, the proper comparison is between (i) bearings authorized to carry the SKF trademarks that are sold by SKF USA and its authorized distributors, including those that are sold by Chicago Rawhide, and (ii) unauthorized gray market bearings that are imported into the United States and sold by respondents. ID at 52.

The ALJ further found that the relevant purchasers for the purpose of analyzing material differences between SKF USA's authorized bearings and respondents' unauthorized bearings are end-users of such products and resale distributors who buy such products from SKF USA, its distributors, and Chicago Rawhide in all markets, including the industrial aftermarket, the VSM, and the OEM market. ID at 53. The ALJ found that relevant purchasers do not include those who repurchase such products further downstream in the chain of distribution of any market. ID at 53. Thus, he excluded the purchasers of authorized SKF bearings from nonauthorized distributors who acquired the authorized bearings in downstream distribution from his analysis. He supported his analysis by stating that SKF USA could not control those channels of distribution, even though SKF USA is responsible for the presence of those bearings in the U.S. market. The ALJ noted respondents' argument that, because SKF USA and its authorized distributors buy from and sell to unauthorized distributors, there can be no material difference between authorized and unauthorized SKF bearings, citing ID at 78, but found the argument unavailing because his analysis considered only bearings sold by SKF USA and its distributors. In discussing respondents' position on post-sale services, the ALJ stated:

It appears that Respondents rely on the global argument that because SKF USA and SKF USA authorized distributors buy from and sell to unauthorized

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distributors there can be no material difference between authorized and unauthorized SKF bearings. This argument, however, is misplaced because there is a basic difference separating the other alleged bases for material difference and post-sale technical and engineering support. For example, it is certainly true that SKF bearings pass between SKF USA and SKF USA authorized distributors and unauthorized distributors to such an extent that it undermines SKF USA's quality controls because significant numbers of SKF bearings are sold to end users that are not subject to quality controls through the distribution chain.

Now contrast that with this issue. It is not disputed that SKF USA will provide post-sale customer support to consumers who buy SKF bearings from SKF USA authorized distributors regardless of where the SKF bearings came from. . . . Thus, if an SKF USA authorized distributor purchases SKF bearings from the gray market and then sells them to an end user, SKF USA will provide post-sale customer service support despite the fact that the SKF bearings came from the gray market. This constitutes a clear difference between, for example, SKF USA quality controls, and post-sale technical and engineering services. If an unauthorized distributor sells a SKF bearing to a consumer, and at the point of sale that consumer believes she is entitled to post-sale technical and engineering support by virtue of purchasing a genuine SKF bearing, her expectations will be dashed because SKF USA only provides support to those who buy SKF bearings, again regardless of the source, from SKF USA authorized distributors.

ID at 78 (emphasis in original).

The ALJ did not address the issue of whether post-sale services are available to end users of authorized bearings that are originally put into U.S. commerce by SKF USA, but are eventually sold to end users by entities other than authorized distributors. Thus, the ALJ's analysis omits the sales of bearings manufactured by RBC/Tyson which are authorized to be marked "SKF" under a license agreement with SKF USA. Information concerning the volume of sales made under the RBC/Tyson licensing agreement was in the evidentiary record, but the ALJ

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was evidently unaware of the extent of these sales at the time that he issued the original ID.¹²

The ID mentions the agreement only once in a footnote which states:

From 1999 to 2002, SKF USA and RBC/Tyson Bearing Company (“RBC”) were parties to a trademark licensing agreement. The agreement was a temporary arrangement meant only to facilitate the sale of a SKF USA facility in Glasgow, Kentucky to RBC. CRB 70-71. The evidence of record contains little beyond the licensing agreement itself and is therefore not dealt with herein. See RX-0541C.

ID at 13, n.4. The ALJ’s analysis also omits the sales of authorized bearings that are sold by entities that are neither SKF USA, its authorized distributors, nor respondents. These entities include distributors that do not have an Industrial Distributorship Agreement with SKF USA, some of which are surplus distributors.

b. Analysis

Complainant asserted that Chicago Rawhide’s sales should be excluded from the material differences analysis based on post-sale services (technical and engineering services, warranty, and product recall) because (1) SKF USA and its authorized distributors sell to the industrial aftermarket, (2) Chicago Rawhide sells to the vehicle service market (VSM), and (3) there is virtually no overlap between the two markets. In the original proceedings, respondents attempted to prove that they sold into both the industrial market and the VSM by producing a list of companies which had purchased their bearings, which companies had the word “automotive,” or a variation thereof, in their name. The ALJ found this to be insufficient evidence to establish that

¹² SKF USA did not disclose its licensing agreement with RBC/Tyson in its complaint, as required by Commission rule 210.12(d), and respondents learned of the agreement during discovery.

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respondents sold into the VSM. ID at 52, n. 6. We do not agree with the ALJ's implicit finding that respondents have the burden of proof on this issue. Nonetheless, evidence gathered during the remand findings, which is noted below, establishes that respondents do in fact sell into the VSM. Consequently, we determine that Chicago Rawhide's sales must be included in the material differences analysis for this reason as well as the reason relied on by the ALJ.

Respondents argue that the ALJ unduly restricted the scope of sales of SKF USA authorized product that he deemed to be relevant to his material differences analysis, and as a result committed both legal error and factual error. Respondents argue that where non-physical differences are at issue, the analysis must necessarily place much more emphasis on the points of sale, not just on the products. They argue that because complainant is claiming that its post-sale services are part of a "bundle" that is integral to the product, it is critical to determine exactly what the relevant consumers expect as part of that bundle – *i.e.*, at what points of sale purchasers associate the product they are buying with the complainant and its trademarks, what non-physical characteristics (if any) those purchasers understand to be integral to the trademarked product, and what characteristics are in fact integral to the product itself.

Respondents note that the ALJ properly observed that in defining the authorized products the focus is on "the goods that consumers will associate with the trademarks at issue," ID at 52, and that a "proper trademark infringement analysis cannot automatically be truncated at any particular level of the chain of distribution, nor can it be restricted to any particular level of the chain of distribution. ID at 52. Instead, the analysis "must be applied down the entire chain and

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across all channels to reach all purchasers who rely upon the trademark as a symbol of a product's source." ID at 50. Respondents argue, however, that the ALJ erred when, despite stating that all channels of distribution should be considered, he ultimately restricted the scope of relevant authorized products to bearings that are sold by SKF USA, its authorized distributors, and its Chicago Rawhide division, and excluded other types of sales of authorized bearings. These other types of sales included downstream resales by distributors that do not have an Industrial Distributorship Agreement with SKF USA, downstream sales by OEMs, sales by SKF's licensee, RBC/Tyson, sales on the surplus market, and sales by respondents who had settled with SKF USA [].

Respondents contend that if the Commission considered these sales in its material differences analysis, it would be clear that SKF USA's post-sale services did not accompany a sizable volume of sales of authorized bearings.

We found that the ALJ's decision to limit his material differences analysis to bearings sold through limited channels of distribution was not consistent with his finding, with which we agree, that "'material differences' should be evaluated by comparing authorized goods to unauthorized goods, not by comparing authorized channels of distribution with unauthorized channels of distribution." ID at 53. Accordingly, we remanded the investigation to the ALJ for further fact finding concerning the authorized bearings that were sold through alternate channels of distribution. We requested that the ALJ make findings of fact concerning sales by RBC/Tyson, sales on the surplus market, and sales by unauthorized (*i.e.*, nonauthorized)

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distributors. We determined to exclude downstream sales by OEMs because, in our view, the doctrine of first sale likely applies to those sales. We determined not to rely on information contained in the settlement agreements on policy grounds, given the confidential nature of such information and the possibility that such use of the information could have a chilling effect on settlements in future cases.

4. The Remand

a. Terms of the Remand Order

The Commission asked the ALJ to make findings on remand concerning:

- (a) The volume of sales made by complainant SKF USA, its divisions, and its authorized distributors to unauthorized bearing distributors, including sales on the surplus market, within the last five (5) years;
- (b) The volume of sales of SKF-marked bearings under the Roller Bearing Company/Tyson Bearing Company License Agreement; and
- (c) The warranties, product recall procedures, and post-sale technical services that are passed on to the end user with the sales listed in (a) and (b) above.

Commission Order of August 6, 2003.

The parties disputed the meaning of the term “unauthorized bearing distributors” as used in the remand order and the five-year period relevant to the Commission’s remand.¹³ SKF USA takes the position that any sale that it makes is *ipso facto* an authorized sale, so therefore any distributors to which it sold bearings were *ipso facto* authorized. Accordingly, SKF USA contends that the term “unauthorized distributor” in the Commission’s order refers only to gray

¹³ We note that no party filed a request for clarification of the Commission’s order, apparently preferring to make their case based on their own interpretation of the order.

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marketers, and therefore that only sales to gray marketers were responsive to the Commission's order. SKF USA states that it made only \$[] in such sales and that those sales were made by mistake. SKF USA argued that its sales to other distributors that did not have an Industrial Distributor Agreement should be classified as sales to various categories of "reseller customers" such as "original equipment servicers" and niche markets such as "agricultural suppliers," and as such, these sales were not included in the Commission's remand order.

Respondents argue that the term "unauthorized distributor" as used in the remand order logically refers to all distributors who do not have an Industrial Distributor Agreement with SKF USA, and maintain that that was the way the term was used in the ID. They submit that the clause "including sales on the surplus market" in the remand order indicates that the Commission wanted information about a broader category of sales other than sales to the gray marketers.

The IA submits that the conflict over the term "unauthorized distributor" is illusory. He states that, in a gray market investigation, the infringement analysis is properly based on whether the domestic product that the particular distributor sells has the features that are claimed to distinguish the domestic product from the gray market product. He therefore believes that there is no reason to pigeonhole the distributors of the domestic product in any particular way.

When we issued our remand order, we intended that the term "unauthorized distributor" would refer to distributors that did not have an Industrial Distributor Agreement with SKF USA. We agree with the IA, however, that it is not important how resellers of the domestic product are categorized. Rather, the issue is whether the domestic product has the features that SKF USA

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claims distinguish its product from those of the gray market. Sales of all domestic products (*i.e.*, authorized by SKF USA) are relevant to our analysis regardless of the category of seller. In order to avoid confusion, we use the term “nonauthorized distributor” to refer to distributors that do not have an Industrial Distributor Agreement, and use the terms “gray market” or “respondents” where appropriate.

The Commission requested information concerning the volume of sales made by SKF USA to nonauthorized distributors over the last five years, and the bundle of services that accompanied those sales. Respondents argue that the Commission requested information on the five-year period preceding the filing of the complaint, March 1997-March 2002, because that is the relevant time for which there is information in the record concerning respondents’ sales. SKF USA contends that the five-year period should be measured literally from the date of the remand order, *i.e.*, for the period of August 1998 to August 2003. The IA argues that the precise time period is not significant and uses data from the entire six and one-half year period from 1997-2003 in making his arguments. The ALJ made alternate findings based on the five years preceding the filing of the complaint on March 11, 2002 (1997-2001), the five years preceding the remand order (August 1998-August 2003), and the total six and one-half year period. The parties’ stipulations contain data based on all three periods as well.

We intended in drafting our remand order that the ALJ issue findings concerning the sales made in the relevant channels of distribution in the five years preceding the filing of SKF USA’s complaint. Given that the record contains information on respondents’ sales during the five years

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preceding the filing of the complaint, and that SKF USA's sales must be compared to respondents' sales, we determine that the time periods we examine should be consistent. Moreover, it is appropriate to consider the conditions that existed when the complaint was filed. *Bally/Midway Mfg. Co. v. USITC*, 714 F.2d 1117 (Fed. Cir. 1983) (proper date for determining whether a domestic industry exists under section 337 is the date that the complaint is filed). Consequently, our analysis focuses on sales of the domestic product in the alternate channels of distribution during the five-year period 1997-2001.

b. The Remand Findings on Volume of Sales in the Channels of Distribution of Interest.

The total bearing sales by SKF USA and its divisions during the years 1997-2001 to both authorized and nonauthorized distributors are as follows:

\$[] SKF USA Bearings Unit.	Jt. Stip. 22, Table 1
\$[] Chicago Rawhide Division.	Jt. Stip. 19, Table 4
\$[_____] MRC Division	FF 394; Jt. Stip. 23
\$[] TOTAL	

Sales by SKF USA's Chicago Rawhide are made chiefly into the VSM market. Its sales to nonauthorized VSM distributors totaled \$[], Jt. Stip. 19, Table 5, or [] percent of total SKF USA sales (\$[]/\$[]). On remand, respondents established that they sold into the VSM market and that a number of Chicago Rawhide's customers, including its

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biggest customer [],¹⁴ is among the customers identified by respondents.¹⁵ This evidence demonstrates, contrary to SKF USA's assertion, that the VSM and industrial markets in fact overlap. Accordingly, we believe there is no basis for excluding Chicago Rawhide sales from the material differences analysis.

Sales by SKF USA Bearings Unit to distributors on SKF USA's "black list" totaled \$[] during the five-year period under review. Jt. Stip. 22, Table 11. The ALJ also found that authorized distributors sold bearings to gray marketers and companies on the black list. FF 413-418, FF 423-425. The evidence indicates that black list companies [] and [] purchased between \$[] and \$[] in bearings from authorized distributors []. FF 493, RX-9013C; RX-9063C. It also indicates that [] bought \$[] in SKF bearings from authorized SKF USA distributors during the period of investigation. FF 424-425. The ALJ's findings indicate that authorized distributors made

¹⁴ See Jt. Stip. 19, Table 3.

¹⁵ See, e.g., Jt. Stip. 11, Attachments B, C, D (CX-280C, CX-281C, CX-282C, respectively) at CX-281C p. MGB000703 (McGuire customers include []), CX-281C pp. MGB000528, MGB000529, MGB000535, MGB000772 (various [] locations), CX-281C p. MGB000515 ([]), CX-281C p. MGB000551 ([]), CX-280C p. MGB000807, CX-281C pp. MGB000472, MGB000502, MGB000680, MGB000702, MGB000707, MGB000793, CX-282C p. MCGY001645 (various [] locations), CX-281C p. MGB000497, CX-282C p. MCGY001642 ([]); CX-2569C at, e.g., CSTA000018, CSTA000126, CSTA000175, CSTA000261, CSTA000371, CSTA000402, CSTA000514 (CST customers include []), CX-2570C at CSTA000596, CSTA000599, CSTA000608, CSTA000609, CSTA000620, CSTA000627 ([]); Jt. Stip. 19 Table 7 at pp. 7 (Chicago Rawhide customers include []), 8 ([]), 11 ([]), 14 ([]), 15 ([]), 18 ([]), 19 ([]).

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additional sales to black listed distributors, but there was little specific information concerning the amount of these sales. See FF 413-418, 423. Accordingly, sales to black list companies by either the SKF USA Bearings Unit or SKF USA authorized distributors total at least approximately []dollars during the period of investigation.

On remand, SKF USA acknowledged that its trademark licensing agreement with RBC/Tyson, which ran from June 1999 to June 2002, has resulted in sales of approximately \$[] in bearings etched with the SKF trademark, but manufactured by RBC/Tyson. It. Stip. 21, ¶ 2. The ALJ's remand findings concerning the surplus market are incomplete. Although he recognized that at least five surplus bearing houses exist in the United States, FF 420, he made findings concerning only one, []. The ALJ found that [] purchased \$[] in bearings from [], FF 385, and \$[] in bearings from [] FF 421, for a total of \$[] between March 1997 and March 2002.

Respondents complain that the ALJ limited the time they had for testimony, and that as a consequence only one surplus distributor, [] was able to testify. Respondents state that four other witnesses were available at the remand hearing, but that the ALJ would not allow them to testify. At the original hearing, Ben Baker of Baker Bearings testified that there were at least ten surplus dealers in the market. Baker Tr. 4291:12-23. Baker also testified that he estimated the U.S. surplus bearing market (covering all brands of bearings) to total \$100 million in sales *per year*. Baker Tr. 4291.

Since SKF USA is indisputably a major player in the U.S. bearings market, it can be

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reasonably inferred that significantly more than [] worth of authorized bearings were sold into the surplus market during the five years at issue. The IA suggests that the size of the surplus market be extrapolated to be five times the amount of sales to [] because the ALJ found that four surplus houses competed with [] FF 420. Using this methodology, we find that sales to gray market distributors and the surplus market by SKF USA and its distributors total approximately \$[] in the five years preceding the date the complaint was filed.

SKF USA's Bearing Units sold approximately \$[] in bearings to nonauthorized distributors in the five years preceding the complaint being filed, Jt. Stip. 22, Table 9. [] of SKF USA's approximately 70 authorized distributors reported that they sold \$[] in bearings to nonauthorized distributors during the same time period. Jt. Stip. 20, Table 1. These [] distributors account for [] percent of the sales that SKF USA makes to distributors. FF 400. Thus, we determine that the record supports a finding that a total of at least \$[] in sales of authorized bearings, or approximately [] percent of SKF USA's total bearings sales, were sold to nonauthorized distributors during the five-year period under investigation.

5. Whether There Are Material Differences Based on Post-Sale Technical and Engineering Services.

a. The ALJ's Remand Findings on Post-Sale Technical and Engineering Services

The ALJ found that Chicago Rawhide provides on-site technical service to its customers, but that such services are available on a discretionary basis. FF 499. In the majority of cases, Chicago Rawhide's decision on whether to provide on-site technical service to its customers

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depends on the size of the customer and/or whether a customer has had multiple problems. FF 499, citing Diggory, Tr. 7186:19-7187:6. The ALJ found that Chicago Rawhide provides its own hotline services to customers and can provide SKF USA's hotline services to its customers when necessary. FF 500-FF 505. There is no evidence that Chicago Rawhide employs any sort of black list.

The ALJ found that neither SKF USA nor its divisions offer post-sale technical services to end users of SKF-marked bearings that are manufactured by RBC/Tysons under the license agreement. Rather, RBC/Tysons provides its own post-sale technical services. FF 524-527. The ALJ found that the RBC/Tyson license agreement with SKF USA [

]. FF 528. The ALJ found that unless a surplus bearing can be traced back to an authorized distributor, SKF USA does not generally provide technical support for bearings sold into surplus. FF 495. He found that SKF USA cannot generally trace a bearing once it has been sold into surplus. FF 461.

The ALJ made findings on three particular instances of hotline services being provided by SKF USA to entities who had purchased SKF-marked bearings from nonauthorized distributors, FF 484-485, and one case of post-sale technical and engineering services being provided to an end user who had purchased a bearing from respondent McGuire. FF 486-487. He also made broad findings on the issue of whether SKF USA provides technical and engineering support to end users that purchase originally authorized bearings from nonauthorized distributors (including

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those in the surplus market). He found:

FF 477. SKF USA's SKF Bearings unit provides technical and engineering support to end users that purchase authorized SKF bearings from SKF USA's Bearings unit, or from unauthorized distributor customers (including those in the surplus market) who have purchased a bearing initially placed into the stream of commerce by SKF USA. Further, the same technical support is provided by SKF USA for SKF and non-SKF bearings that it sells. Snyder, Tr. 6966:7-6968:5, 7007:24-7012:19, 7013-25, 7050-57.

FF 478. SKF USA provides technical support free of charge with sales of SKF bearings (and non-SKF bearings). Support is provided in connection with all sales, including sales to authorized resellers, unauthorized resellers and authorized distributors, who then sell to end users. Snyder, Tr. 6970:16-6971:1, 6988:3-11, 7030:6-7031:5, 7033:16-7034:9; CPX-315C.

FF 531. Particularly with respect to on-site post-sale technical support and the SKF hotline, SKF USA has demonstrated that post-sale technical support was either accorded to or knowingly available to end user customers who purchased SKF bearings from unauthorized distributors who in turn acquired SKF bearings through authorized channels. See FF. 425, FF. 428, FF. 431, FF. 432, FF. 433, FF. 434, FF. 435, FF. 436, FF. 460, FF. 461, FF. 464, FF. 465, FF. 466, FF. 468, FF. 469.

As we discuss below, we find that these broad findings are not supported by the record.

b. Analysis

i. Whether Post-Sale Technical and Engineering Services are Consistently Associated with Authorized SKF Bearings Sold Through Alternate Channels of Distribution

The parties did not dispute that SKF USA's full panoply of post-sale technical and engineering services accompany its direct sales and sales through its authorized distributors.

Further, the evidence shows that only respondent McGuire offers any post-sale technical services and that its services are limited. Our decision on whether there are material differences in post-sale technical and engineering services therefore turns on whether the asserted post-sale services

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are consistently associated with authorized bearings that are sold through the alternate distribution channels which were the subject of the remand findings.

Respondents submit that on-site services by industry specialists do not predictably accompany sales of authorized bearings. Rather, they argue that such on-site services are discretionary on the part of SKF USA, and in fact accompany the sale of bearings made to only the largest or most important customers. Respondents submit that because SKF USA employs specialists in [] the following industries, [

] ID at 77;FF 83, cannot be the case that all industrial purchasers of SKF USA bearings are entitled to on-site services by specialists. Moreover, they maintain that bearings purchased in the VSM market from SKF USA's Chicago Rawhide division are rarely, if ever, accompanied by on-site services.

Respondents assert that the only evidence that the ALJ has cited to support FF 477 and FF 478, concerning the availability of post-sale services to end users who purchased authorized bearings from nonauthorized distributors, is the self-serving testimony of an SKF USA employee, Snyder. They maintain that the testimony cited by the ALJ and other record evidence confirms that SKF USA will only make its post-sale technical support services available when the end user (or the entity seeking assistance) can "trace" the bearings, in connection with which services are requested, back up the sales channel to SKF USA or its authorized distributors.¹⁶

¹⁶ See 6/13/03 SKF USA Resp. Br., at pp. 42, 45, 49, 59; 6/6/03 SKF USA Review Br., at pp. 53-54; Snyder Tr. 7034:10-22, 7035:22-7036:13, 7036:18-7040:21; Moore Tr. 891:4-21 (requests for technical support must come through an authorized distributor). See also Snyder Tr. 6973: 9-16 (SKF USA will provide failure analysis, on-site visits, and other technical support services

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Respondents argue that this requirement is an often insurmountable hurdle for bearing customers because it is often logistically difficult to determine where a particular bearing was originally sourced, as many distributors and downstream purchasers have multiple sources of supply. Moreover, the end user may not have any direct knowledge as to the source or the sales channel of the bearing at issue.

Respondents contend that complainant's assertion that its services are available with respect to an SKF bearing – regardless of its original U.S. source – if one traces the bearing up the chain of distribution to an authorized distributor demonstrates that complainant defines “authorized SKF bearings” in terms of channels of distribution – *i.e.*, as “bearings with respect to which complainant controls the immediate circumstances of sale,” rather than “bearings manufactured or imported by complainant.” Respondents contend that making the material differences comparison in terms of characteristics of authorized distributors does not comport with the law.

Respondents argue that the record demonstrates that tracing a bearing up the chain of distribution in order to obtain hotline services may not be easy. For instance, they note the ALJ's finding that [], an end user that had purchased an authorized bearing from a

only if SKF USA can verify that the bearing at issue was purchased through an authorized SKF USA channel), 7031:18-21 (an end user customer of an unauthorized bearing distributor must trace its bearing up the chain to an SKF USA authorized distributor before it is entitled to on-site technical support), 7033:20-22 (SKF USA will provide post-sale on-site services to an end user only if the end user can trace the bearing up the chain of sale to an SKF USA authorized distributor. Even then, the determination of whether that end user will be provided such services is determined by SKF USA on a “case by case” basis).

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nonauthorized distributor, was able to get hotline assistance. FF 484, citing Snyder Tr. 7007:24-7012:19, CX-2814C. Respondents note that Snyder testified as to a chain of events surrounding the hotline calls from []. Snyder Tr. 6964:5-6976:24, 7007:24-7012:21. Specifically, [], an employee of [], called the SKF USA hotline on a number of occasions for assistance, but was continuously refused services because [] was listed on the black list. Because [] continued to call and, in SKF USA's counsel's words, "pester" the hotline for support, several engineers approached Snyder inquiring what to do about []. Snyder testified that after many inquiries he eventually verified that [] indeed purchased from authorized distributor [], and thereafter instructed the hotline engineers to "go ahead and call him back and give him the response." (Snyder Tr. 7010:7-11.)

Respondents also contend that SKF USA does nothing to inform end users of the availability of the post-sale technical and engineering services, leaving it up to its distributors to decide whether to pass the information along about the post-sale services. Respondents maintain that end users are not made aware of SKF USA's on-site services and hotline, and argue that since end users are not aware of these services, the services cannot be deemed to have been passed on as an integral part of the bearing. Respondents point to evidence that the hotline number is not listed on SKF USA packaging.

Respondents also maintain that SKF USA and its distributors have discretion concerning whether they will provide services and what type of services they will provide, and often base

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their determination on whether to provide services on whether it is commercially worthwhile to provide services to a particular end user.¹⁷ Thus, even in instances where a downstream end user is aware of SKF USA's post-sale technical and engineering services, respondents argue that there is no guarantee that the end user will consistently and predictably receive post-sale technical support services in connection with its SKF bearing purchases.

Respondents assert that, unless sales to nonauthorized distributors, gray market distributors, the surplus market, and sales by RBC/Tyson are ignored, the post-sale services that SKF USA claims distinguish its products from those of the gray market cannot be considered integral to SKF USA's bearings. Respondents argue that in view of these sales, it is clear that the services offered by complainant and its distributors in fact do not run with the product, but rather are simply a feature of doing business with particular parties.

SKF USA maintains that the ALJ's findings support its position that all its post-sale

¹⁷ See, e.g., Snyder Tr. 7034 (end users who purchase from unauthorized distributors who purchase from authorized distributors are not automatically entitled to SKF USA's post-sale technical services; "it's a case by case thing."), 7036:7-13 ("if they were buying a million dollars worth of bearings a year and they call and have a problem, they would probably get some attention"), 7014:10-14 ("The level of support they get is based upon the volume of business, the commercial issues, it's part of the strategic strategy of sales and marketing, with the customer base they're in, within that region."), 7035:25-7036:13 (whether an end user would receive on-site training services would depend upon the significance of the end user, in terms of the amount and value of SKF bearings they buy per year), 7037:24-7038:12 (If an end user is unable to convince an authorized distributor to request post-sale technical services from SKF USA on the end user's behalf, SKF USA will take that into consideration and, depending upon the size of the end user and the nature of the service requested, will make a discretionary determination as to whether the end user will be provided any service.), 7039:1-7040:21 (the level of post-sale technical services that SKF USA will provide to any end user depends in part on commercial considerations such as volume of business).

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technical and engineering services are passed on to end users no matter what channel they go through to purchase the authorized bearing. SKF USA argues that RBC/Tyson sales should not be included in the material differences analysis because the license to RBC/Tyson was not a trademark license *per se*, but rather a license to RBC/Tyson to allow it to immediately use the machinery which it had purchased and to retool gradually. It explains that the production line it sold to RBC/Tyson was tooled to manufacture bearings which were marked "SKF." SKF USA states that the license agreement [

], RX-0541 at ¶ 4. SKF USA asserts that it retained sufficient oversight authority to ensure that there was no damage to the goodwill of the "SKF" mark as a result of RBC/Tyson activities. Moreover, it states that RBC/Tyson provides its own post-sale services to its customers, FF 530.

We reject SKF USA's contention that RBC/Tyson bearings should be ignored. The RBC/Tyson bearings are etched with the SKF mark and are authorized by SKF USA to carry that mark. Because the RBC/Tyson bearings carry the SKF mark, consumers could rightfully expect that the RBC/Tyson bearings carried with them the full panoply of services that accompany authorized SKF USA bearings, whether or not they were aware that RBC/Tyson was the manufacturer. We find SKF USA's argument that RBC/Tyson provided equivalent post-sale services to those of SKF USA somewhat disingenuous in the face of SKF USA's stated position that no respondent can provide equivalent services to those of SKF USA because SKF USA's services are *per se* superior to any services that others could provide. Accordingly, we include

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the RBC/Tyson sales in our analysis.

SKF USA and the IA are of the view that it does not matter whether end users are aware of SKF USA's post-sale technical and engineering services or whether they in fact use the services because the mere availability of the post-sale technical services in connection with authorized bearings constitutes a material difference between the authorized and gray market bearings. They also argue that consumers have different expectations for bearings they buy on the surplus market and from RBC/Tyson than they have for other SKF-marked bearings, and that buyers in the VSM market expect to take their vehicle to a garage to be serviced and do not expect on-site services. However, no record evidence supports these arguments.

SKF USA and the IA argue that the volume of bearings that is not indisputably entitled to post-sale services is *de minimis*, and therefore can be ignored by the Commission. They cite *Warner Lambert* for the proposition that a trademark owner's non-adherence to its policies or practices does not defeat a claim of infringement if those non-conforming sales are insignificant. SKF USA argues that the small volume of bearings that are not accompanied by SKF USA post-sale technical and engineering services does not affect consumer expectations.

In making our determination on post-sale technical and engineering services, we are guided by the fact that the trademark holder has the burden of proving, by a preponderance of the evidence, that identified differences are "material" ones in that "consumers would be likely to consider the differences between the foreign and domestic products to be significant when purchasing the product, for such differences would suffice to erode the goodwill of the domestic

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source.” *Gamut*, 200 F.3d at 779. Thus, respondents do not bear the consequences of any failure to carry the burden of proof on the material differences issue. Moreover, SKF USA, as the proponent of an agency order has the burden of proof on all issues unless otherwise provided by law. 5 U.S.C. § 556(d). Under Commission rule 210.37, 19 C.F.R. § 210.37, the proponent of any factual proposition has the burden of proof with respect to that proposition.

It is undisputed that the channels of distribution in the bearing market are complex. The parties did not challenge the ALJ’s findings that SKF USA and its authorized distributors both sell into and buy from the surplus market, that SKF USA and its authorized distributors have purchased gray market bearings, including bearings from respondents, and that gray market distributors, including respondents, have purchased bearings from SKF USA and its authorized distributors. ID at 66. Thus, in considering the asserted material difference of quality control, the ALJ stated that:

SKF USA knowingly channels SKF bearings to end users via authorized distributors and unauthorized distributors. In this way, SKF USA knowingly bypassed its quality controls in order to maximize sales of SKF bearings. As a result, there is no difference due to post-manufacturing quality control between SKF bearings sold through SKF USA authorized distributors and unauthorized distributors because in both cases SKF bearings are not subject to SKF USA quality controls throughout the distribution chain. Moreover, SKF USA provided no evidence that Respondents’ sales of SKF bearings reduces the value of the SKF trademarks beyond the diminution resulting from SKF USA’s non-conforming sales. In the absence of material differences based on quality controls, there is no likelihood of confusion for that stated reason between SKF bearings sold by SKF USA authorized and unauthorized distributors. Accordingly, SKF failed to establish any trademark violation based on quality control differences.

ID at 70 (emphasis in original). The ALJ found that by knowingly channeling SKF bearings to

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end users via authorized distributors and unauthorized distributors, SKF USA undermines its own quality control. ID at 70. By the same token, we find that SKF USA fails to provide the same level of post-sale technical and engineering support to all authorized bearings because it sells some of its bearings into alternate channels of distribution in which the bearings are not consistently and predictably accompanied by post-sale technical and engineering services.

Thus, the evidence shows that on-site technical services do not predictably and consistently accompany the sales made by Chicago Rawhide (\$[] in sales), sales to gray market distributors (\$[]), sales by RBC/Tyson's (\$[]), and an indeterminate volume of sales in the surplus market conservatively estimated at \$[],¹⁸ for a total of \$[] or [] percent of SKF USA's total sales. We also draw the inference that on-site technical assistance by industry specialists does not predictably and consistently accompany an indeterminate number of bearings that are sold to end users in industries for which SKF USA does not employ industry specialists.

In addition, at least \$[] in bearings sales were made to nonauthorized distributors during the period of investigation by SKF USA or its authorized distributors. We find that those sales were not predictably accompanied by on-site technical services because such services cannot be obtained unless the bearing is "traced up the chain of distribution." The Commission has held that a material difference is an integral difference, *Tractors*, Commission Opinion at 9,

¹⁸ SKF USA has the burden of proof on all factual issues, and so the failure to obtain evidence to address a question asked by the Commission on remand cannot be laid at respondents' feet, barring discovery abuse, which has not been alleged.

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and in our view, requiring the purchaser to trace the bearings “up the chain of distribution” in order to obtain post-sale technical and engineering services indicates that these services are not integral to the product. The ALJ found, and SKF USA does not dispute, that SKF USA does not prohibit its authorized distributors from selling bearings to unauthorized distributors, but does discourage them from doing so. ID at 69; FF 55. Consequently, we believe it is fair to draw the inference that an end user who purchased a bearing from a nonauthorized distributor would encounter resistance if he tried to “follow the bearing up the chain of sales” to obtain post-sale technical and engineering services from SKF USA. Authorized distributors would be understandably reluctant to disclose to SKF USA that they had sold bearings to nonauthorized distributors, given that SKF USA discourages them from doing so. Moreover, as respondents point out, there are logistical problems in “tracing the bearing up the chain of sales” because bearing distributors do not segregate their bearings according to the source from which they were procured.

We do not adopt FF 531 because it is not supported by any relevant evidence. The ALJ’s supports FF 531 with other findings of fact that concern volume of sales, warranty, and recall services, but do not concern post-sale technical and engineering services. We modify FF 478 and FF 479 to conform to the evidence that post-sale technical services are passed on to end users who purchase bearings from nonauthorized distributors only if they can “follow the bearing up the chain of sale” to an authorized distributor, and therefore such services do not predictably

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accompany these sales.¹⁹ Accordingly, we find that post-sale on-site technical services do not predictably accompany an additional \$[] in sales of SKF bearings during the period of investigation ([] percent of total sales). This brings the total volume of bearing sales that are not predictably accompanied by post-sale on-site technical services to \$[], or [] percent of SKF USA's total sales, even without knowing the full extent of the presence of authorized SKF bearings in the surplus market. We find that there is no basis for excluding sales of this magnitude from the material differences analysis, and therefore find that there is no material difference based on post-sale on-site technical services between SKF USA's authorized bearings and respondents' bearings because such services do not consistently and predictably accompany the sale of authorized SKF bearings.

We must also consider whether hotline services constitute a material difference; the evidence indicates that Chicago Rawhide's sales are predictably accompanied by hotline services. FF 500-505. Accordingly, we must determine whether the sales of authorized SKF USA bearings that are not predictably accompanied by hotline technical services can be ignored as *de minimis*. These sales include sales of originally authorized bearings by black list companies, surplus distributors, non authorized distributors, and sales by RBC/Tyson.

SKF USA and the IA do not contend that originally authorized bearings that are sold by gray marketers, on the surplus market, or by RBC/Tyson, are entitled to SKF USA's hotline service. These sales account for approximately \$[] or [] percent of SKF USA's sales in

¹⁹ Any other ALJ findings of fact that may be inconsistent with our determination are also not adopted.

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the five years preceding the filing of the complaint. By way of comparison, the four respondents had total sales during the period of investigation of \$[].²⁰ Moreover, it is not disputed that the SKF hotline is designed to serve only customers of SKF USA authorized distributors. ID at 79; See Worden, Tr. 448:9-449:14; CX-848; FF 101. Thus, sales of originally authorized bearings by nonauthorized distributors to end users may or may not be accompanied by hotline services depending on whether the buyer can obtain a customer number by tracing the bearing up the chain of sales to an authorized distributor. We thus find that these sales are not consistently and predictably accompanied by technical hotline services. Such sales account for an additional \$[], for a total of [] or [] percent of total SKF USA sales. The parties have made arguments as to whether sales of this magnitude can defeat SKF USA's infringement claims. Those arguments are discussed in the following section of this Opinion.

Both SKF USA and respondents made various arguments concerning expectations of the end users concerning post-sale technical and engineering services. For example, SKF USA argues that buyers on the surplus market and buyers of bearings manufactured by RBC/Tyson do not expect SKF USA to provide any post-sale services, including warranty, product recall, and technical services. Respondents argue that because SKF USA does not put information concerning its post-sale services on its product packaging or otherwise inform consumers about the services, consumers do not know about and therefore do not expect post-sale services. In

²⁰ According to complainant's expert on injury, during the period 1997-2002, respondents had the following sales of SKF product: Bearings Limited - \$[] (1/97-4/02); CST - \$[] (1/98-6/02); McGuire - \$[] (1/98-4/02); and Bohls - \$[] (1/00-3/02), for a total of \$[]. (CX-2468C, Table 2; Kaplan Tr. 1816:11-1818:5.)

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Gamut, the Federal Circuit indicated that findings on consumer expectations must be based on substantial evidence. *Gamut*, 200 F.3d at 781. In this case, the parties' arguments on consumer expectations are based on scant evidence and are little more than attorney argument.²¹

In *Gamut*, the Federal Circuit court held that the threshold for materiality was low, defining a material difference as "a difference that consumers are likely to find significant when purchasing the product because such differences would suffice to erode the goodwill of the domestic source." *Gamut*, 200 F.3d at 779. We do not interpret the *Gamut* decision to require that actual consumer expectations be taken into account when determining whether material differences exist between the authorized good and the gray market good. Rather, the material

²¹ The ALJ made no findings concerning customer expectations regarding the bearings sold in the channels of distribution that were relevant to the remand. The ALJ made one finding, however, concerning consumer expectations regarding sales by authorized distributors. FF 489 states:

Mr. Acuna confirmed via the video that he took that SKF's technical support was available on authorized sales and that "everybody knows" about the SKF 800 number. Acuna, Tr. at 7821:4-8, 7824:9-12 ("If you buy legit from an authorized distributor, you will get that [bundle of services]. If you're buying from a distributor that's not authorized, SKF is not going to support that.") (from Acuna video CPX-315C).

This finding is based on the transcript of a video that was taken by [], Mr. Ron Acuna, while the investigation was under review by the Commission. The video was placed in evidence by SKF USA. The video contains Acuna's interviews with unknown persons. One such person states in response to Acuna's question about technical support "Yeah, the 800 number to SKF, you just ask for technical support." Tr. 7821:7-8. Another unknown person states on the video, "[t]o the point, yeah, if you buy legit from an authorized distributor, you will get that. If you're buying from a distributor that not authorized, SKF is not going to support that." Tr. 7824. We reject FF 489 as not supported by reliable evidence. The identities of the interviewees are unknown, their statements were not under oath, and there is no foundation for their comments.

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differences analysis in *Gamut* is based on whether material differences actually exist between the authorized product and gray market product, and whether those differences are likely to be significant to purchasers. *Gamut*, 200 F. 2d at 779. Accordingly, and because the record contains little probative evidence on consumer expectations, we do not base our decision on consumer expectations.

ii. **Whether Substantially All of Complainant's Bearings Must Be Accompanied by Post-Sale Services in Order to Demonstrate a Material Difference.**

SKF USA argues that in order for it to prevail the law does not require that its bundle of services accompany all sales of authorized bearings. While SKF USA does not cite case law specifically concerning post-sale technical and engineering services, it argues that there is analogous precedent involving variations in the mark holder's adherence to quality control standards. SKF USA submits that a trademark owner's non-adherence to its policies or practices with respect to some of its sales does not defeat a claim of infringement if those "non-conforming" sales are insignificant, citing *Warner-Lambert*, 86 F.3d at 7 (2d Cir. 1996) ("[t]he purposes of the Lanham Act would not be fulfilled by requiring trademark holders to establish quality control procedures that prevent virtually all departures from established norms before affording relief against sellers who fail to abide by those norms").

SKF USA explains that in *Warner-Lambert* a preliminary injunction was issued despite the fact that some of plaintiff's HALLS® cough drops did not comply with the freshness date standard that was alleged to be violated by the infringing goods. 86 F.3d at 7-8. At the district court, evidence was presented that 6 of 18 locations had non-conforming goods, a circumstance

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which caused the district court to deny plaintiff's claim for a preliminary injunction. The Second Circuit rejected the methodology by which the 6 of 18 locations were determined because the method failed to take into account how much non-conforming product was found at each location, reasoning that a concentration of stale cough drops in one area may do more damage to the trademark than if the same number of stale cough drops were widely distributed. Therefore, the appellate court relied on a different analysis which measured the quantity of the trademark holder's non-conforming product to be 4.4 percent.

SKF USA argues that the issuance of a preliminary injunction in *Warner-Lambert*, even though 4.4 percent of the trademark holders goods were found to be nonconforming, is an indication that the court recognized that a *de minimis* level of nonconforming goods should not preclude relief. SKF USA also argues that 4.4 percent should not be treated as a ceiling on nonconforming goods because the *Warner Lambert* court did not specify the level of nonconformance that would defeat the plaintiff's claim for a preliminary injunction. SKF USA argues that an even higher level of nonconforming goods should not preclude relief.

The IA also relies on *Warner-Lambert* to argue that the sale of products not subject to the trademark holder's quality control procedures is infringing if: (i) the trademark holder "has established legitimate, substantial, and nonpretextual quality control procedures, (ii) it abides by these procedures, and (iii) the non-conforming sales will diminish the value of the mark." *Warner-Lambert Co.*, 86 F.3d at 6. He acknowledges that this test is directed toward quality control, but submits there is precedent indicating that it may be applicable in situations involving

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the failure of the alleged infringer to offer technical services, citing *Goldie Elec., Inc.*, 2000 WL 1880327, at *6 (applying the *Warner-Lambert* factors based on differences in “warranty, repair, or maintenance services”); cf. *Softman Prods. Co. v. Adobe Sys. Inc.*, 171 F. Supp.2d 1075, 1092-93 (C.D. Cal. 2001) (applying *Warner Lambert* factors based on differences in ability to register products and receive technical support).

The IA argues that SKF USA has a policy of providing technical support for its authorized products, that SKF USA abides by those procedures in that its post-sale technical support is actually made available in connection with its authorized bearings and is provided to any customers who request it. He maintains that, because the gray market sales are equal in volume to the sales on the surplus market and RBC/Tyson (the only sales that he acknowledges may not be accompanied by post-sale services), they necessarily damage SKF USA’s trademark by doubling the amount of non-conforming product on the market.

Respondents argue that complainant must meet a high standard with respect to proof of the bundle of characteristics that are associated by consumers with its products, citing *Martin’s Herend Imports, Inc. v. Diamond & Gem Trading USA*, 112 F.3d 1296 (5th Cir. 1997), a case that concerns gray market goods. In *Martin’s Herend*, the U.S. trademark owner sought to prevent the defendant from importing decorative porcelain objects from the foreign manufacturer of the trademarked goods. The Fifth Circuit held that the trademark owner could not prevent the defendant from importing and selling “goods of the same quality from the same product line” of trademarked pieces of porcelain from any of the Herend product lines that had *ever* been

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approved for sale in the U.S. by the trademark holder, *i.e.*, was previously imported, offered for sale, or sold by the trademark holder. The court reasoned that the Lanham Act protects the trademark, but not the distributorship *per se*. *Martin's Herend*, 112 F.3d 1296, 1304. Thus, under *Martin's Herend*, if the gray market goods are of the same quality as those put in the marketplace by the trademark holder, the trademark is not damaged and the consumer is not confused as to source.

Respondents submit that the *Warner-Lambert* court indicated that the question of further damage/devaluation of a mark was highly fact specific and was not driven by particular numbers or percentages. *Warner-Lambert* at 7 n.1 (noting that the plaintiff had commissioned a study showing that only 4.4 percent of its product was stale, but indicating that other facts – including the location and concentration of retail outlets– should be evaluated.). Respondents contend that SKF USA has not demonstrated that respondents' sales have damaged the SKF trademark, as *Warner Lambert* requires in cases where the trademark holder sells nonconforming goods.

Respondents assert that the record in this investigation reflects [] of dollars in sales of originally authorized SKF-marked bearings that are not covered by SKF USA's bundle of services. They contend that, because authorized SKF bearings are routinely sold without the services that SKF USA claims as material differences and because respondents' bearings are physically identical to those bearings, respondents should be permitted to continue to import and sell SKF marked bearings that are just like [] of SKF USA authorized bearings.

Respondents thus argue that *Martin's Herend* requires SKF USA to show that "substantially all,"

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and arguably *all* of its authorized bearings are accompanied by each of the characteristics that it claims are material differences from the bearings imported and sold by respondents. They contend that, since all of the SKF USA-authorized bearings are not accompanied by post-sale technical and engineering services, their bearings are identical to some of the bearings that SKF USA has approved for sale and therefore should not be found to be infringing.

SKF USA and the IA respond that *Martin's Herend* should not be followed here because the case concerned physical differences, and did not concern complex channels of distribution. They do not, however, present a legal or policy basis to lower the threshold for material differences in the case of non-physical differences. Respondents acknowledge that *Martin's Herend* involved alleged physical differences in porcelain decorative pieces, but submit that there is no legal or policy basis to lower the threshold for complainant to establish what constitutes the authorized trademarked product in the case of non-physical differences, *i.e.*, what services are integral to and bundled with the product. Respondents argue that the Commission should proceed with even more caution when non-physical differences are involved because of the risk that complainants seeking to invoke the powers of the Commission to limit or eliminate competition would adopt and rely on pretextual services and procedures.

It is true that *Warner-Lambert* held that even if some nonconforming goods "survive" a mark holder's quality control procedures and enter the marketplace, the sale of additional nonconforming product can further devalue the trademark. *Warner-Lambert*, 86 F.3d at 7. However, we do not interpret the case to hold, as SKF USA and the IA argue, that a trademark

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owner's non-conforming goods can be ignored if they are of *de minimis* amounts. The *Warner-Lambert* court stated:

This is not to say that the effectiveness of a trademark holder's quality control procedures is irrelevant to the availability of relief. A company that avails itself of wholly effective procedures will generally be entitled to relief against any measurable sales of non-conforming goods. Sales of non-conforming goods will in those circumstances place poor quality goods where none were before and necessarily devalue the mark associated with them. A company with less effective quality control that predictably result in some sales of non-conforming goods will have a mark that reflects a value based on the presence in the marketplace of those goods. To be entitled to relief against a later seller of non-conforming goods, such a trademark holder must show that the later sales measurably diminish the value of an already partially devalued mark. *Id.*

* * *

Quality King argues that its intended sales cannot devalue Warner-Lambert's mark because they add only a fraction to the already stale HALLS cough drops already in the market. [footnote omitted]. We believe this issue is a fair ground for litigation at trial.

Id. Thus, *Warner-Lambert* stands for the proposition that, in order to be entitled to relief against a later seller of nonconforming goods, a trademark holder who sells nonconforming goods must show that the later sales measurably diminish the value of an already partially devalued mark. *Id.* The level of nonconforming goods is certainly relevant to this analysis, but the *Warner-Lambert* decision to issue a preliminary injunction was not based on a determination that the trademark owner's non-conforming sales were *de minimis*. While the court found that the issue was likely to be decided against the defendant, it reserved for trial the issue of whether the defendant's goods had devalued the HALLS® trademark. *Id.* In the court's view, the decisive issue in deciding to issue the preliminary injunction was the irreparable harm that Warner-Lambert was likely to suffer due to the sale of defendant's stale cough drops in comparison to the little harm

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that defendant would incur if it did not sell its inventory. *Warner-Lambert*, 86 F.3d at 8

In this case, the ALJ found that “SKF USA provided no evidence that Respondents’ sales of SKF bearings reduces the value of the SKF trademarks beyond the diminution resulting from SKF USA’s non-conforming sales” in the section of his ID concerning quality control. ID at 70. Moreover, in the section of the ID finding no trademark dilution, the ALJ found “there is no empirical evidence in the record that consumers think any less of the SKF trademarks or that SKF trademarks suffer any negative associations because of Respondents’ unauthorized sales.” ID at 162.²² SKF USA has provided no basis for overturning those findings, and we therefore affirm them. Consequently, SKF USA cannot prevail under *Warner-Lambert* because that case requires that SKF USA prove that its trademark has been further devalued by respondents’ sales, and SKF USA has failed to make this proof.

Furthermore, because SKF USA has authorized the sale of SKF USA marked bearings by nonauthorized distributors, gray market distributors (including respondents), surplus distributors, and RBC/Tyson which we find are not predictably and consistently accompanied by post-sale technical and engineering services, SKF USA’s bearings do not differ materially from respondents’ bearings on that basis. *Martin's Herend*, 112 F.3d at 1304 (no material difference found where defendants sell products that are the same as products previously approved for sale in this country by the trademark owner.) Accordingly, we reverse the ALJ’s finding of a material difference based on post-sale technical and engineering services.

²² The ALJ’s determination that SKF USA did not establish trademark dilution was not reviewed by the Commission, and has become the Commission’s final determination.

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6. Whether There Are Material Differences in the Warranties Offered by SKF USA and Respondents

a. The ID and Remand Findings

The ALJ found no material difference between SKF USA's warranties and respondents' warranties based on his finding that SKF USA had not established that any differences in warranties are "material," *i.e.*, that the differences enhance or diminish the SKF USA's marks in the eyes of the relevant purchaser. ID at 102. The ALJ found that warranty service essentially amounts to replacing defective bearings or issuing credits. ID at 101. FF 167, FF 184, FF 192, FF 198. He rejected SKF USA's argument that a failure analysis that it sometimes performs on returned bearings to determine the cause of the failure is a part of SKF USA's warranty. Rather, he found that the failure analysis was a separate service for which SKF USA charged a fee. ID at 101; FF 181. We affirm this finding.

The ALJ found that respondents BL and McGuire offer a written warranty and that respondents CST and Bohls do not have a written warranty. ID at 95. However, the ALJ found that the differences were not material differences for the purposes of trademark infringement because the Uniform Commercial Code (UCC), which has been adopted in the states where respondents are located, provides warranties of merchantability and fitness that are generally applicable to the bearings sold both by SKF USA and by respondents. ID 95-96. He found that under the UCC the provisions of the warranty would be passed down to the end user through the chain of distribution. ID at 96. Accordingly, the ALJ found no real differences between the warranties offered by complainant and respondents. ID at 95-98. He

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also found that any differences in warranty are not material because “subtle differences in warranties are not likely to confuse a sophisticated purchaser into thinking that an unauthorized SKF-brand bearing is in fact an authorized one.” ID at 100.

The ALJ also relied on *Montblanc-Simplo GmbH v. Staples, Inc.*, 172 F. Supp.2d 231, *vacated on other grounds*, 175 F. Supp.2d 95 (D.Mass. 2001). In that case, the manufacturer and trademark holder of high quality and highly priced pens argued that there was a material difference between its authorized pens, which came with a service manual and a two-year warranty certificate, and the unauthorized pens of the defendant retailer who removed the manual and certificate and replaced them with its own allegedly “inferior” warranty. Despite these alleged differences, the court rejected the trademark holder’s infringement claim on the ground that there was “no evidence demonstrating substantive inferiority in the [defendant’s] warranty.” *Montblanc*, 172 F. Supp.2d at 240 and 241 n.10. Here, as in *Montblanc*, the ALJ found no evidence demonstrating that respondents’ warranties are inferior to the SKF USA warranty. He also found no evidence to substantiate SKF USA’s claim that respondents’ warranties, both express and implied, diminish the reputation of the SKF USA trademarks and are therefore “material” differences. ID at 102. The ALJ concluded that, because SKF USA bears the burden of proving that the differences in warranty policies that it has identified are “material,” the lack of evidence as to whether these differences enhance or diminish the SKF marks in the eyes of the relevant purchaser precludes a finding of gray market trademark infringement on the part of respondents. ID at 102.

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The ALJ distinguished *Osawa*, relied on by SKF USA and the IA, by noting that in *Osawa* the court's findings were predicated on the nature of the product at issue, sophisticated camera equipment for which buyers expected warranty repair by the manufacturer, and on the defendants' deceptive conduct in leading customers to believe that the trademark owner would provide free warranty service. In addition, the ALJ noted that there was undisputed evidence of actual confusion based on warranty in *Osawa*. He found none of those circumstances present here. ID at 101.

The ALJ also distinguished *Fender Musical Instruments Corp. v. Unlimited Music Center Inc.*, 35 USPQ2d 1053 (D. Conn. 1995), where infringement was found based, *inter alia*, on the grounds that the gray market importer of the trademark holder's imported Japanese electric guitars represented untruthfully to its customers that the trademark holder offered its warranty to the gray market guitars. ID at 101-102, citing *Fender*, 35 USPQ 2d at 1056. Here, the ALJ found that respondents do not untruthfully represent to their customers that SKF USA warrants the bearings that respondents sell. Instead, he found that respondents each offer their own warranties. He found no evidence that respondents engage in deliberate misrepresentation as a way to trick even sophisticated customers into buying something that they would otherwise avoid buying. ID at 102.

On remand, the ALJ examined additional evidence concerning the warranties offered by SKF USA. He found that different warranty provisions are found in contracts and order forms used by SKF USA for its sales to distributors. FF 436. Notably, the Chicago Rawhide warranty

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disclaimed “fitness for ordinary purposes.” FF 443. The ALJ found that different warranty terms and conditions also appear in the warranty provisions posted on SKF USA’s online store, <http://www.ptplace.com>. FF436. He found that the SKF USA warranty provisions appear in the Industrial Distributor Agreement, FF 432, FF 433, FF 434, but are not printed on the bearing box or other materials that accompany the bearing at the point of sale, FF 437, and thus are not communicated to the end user.

The ALJ found that, notwithstanding the differing verbiage, all of SKF USA’s warranties are applied by SKF USA in the same way to run for 12 months from the date of purchase by each intermediate sale to distributors, and restarting the 12-month period again when it reaches the end user. FF 438. He found that in order for an end user to return an authorized bearing under the SKF USA warranty that it had purchased from an intermediate reseller, the warranty claim must be sent “back up the chain of distribution” to show that the bearing was originally sold by an SKF USA-authorized distributor. FF 440. He found that an end user with a warranty claim would be instructed to trace the bearing back to the point at which it was sold by a direct customer of SKF USA, and have that entity call SKF USA to obtain authorization for the warranty claim. FF 441. The only other means of obtaining warranty service would be if SKF USA’s customer service department made the discretionary decision that it is commercially expedient to honor that warranty claim “outside the system.” FF 441. The ALJ found that during the period of January 1, 1997, to June 30, 2003, a period in which SKF USA sold \$[] in bearings to its authorized distributors, SKF USA was able to point to only one instance

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in which a warranty claim was raised and resolved in this manner regarding an end user who had purchased an SKF USA authorized bearing from an intermediate reseller who was not authorized by SKF USA. FF 442. In that instance, the authorized distributor did not consider the matter to be a “warranty” claim at all, but rather a matter of “customer service” designed to keep the customer satisfied. FF 442.

The ALJ’s remand findings indicate that RBC/Tyson warranty is substantially different from the SKF USA Industrial Distributor’s warranty in that the former runs only 90 days from shipment. FF 445. He found that RBC/Tyson does not offer or pass on the SKF USA warranty to purchasers of SKF-marked bearings FF 446. In fact, the RBC/Tyson License Agreement [

] FF 446.

The ALJ found that, unless a surplus bearing can be traced back to an authorized distributor, SKF USA generally does not provide a warranty to SKF USA bearings obtained on the surplus market. FF 462. He also found that surplus bearings generally cannot be tracked. FF 461.

b. Analysis

After the ALJ issued his additional findings on remand, concluding that there are variations in the written warranties passed on to end users in various categories of sales by SKF USA, SKF USA no longer pressed its earlier arguments that the warranties of respondents CST

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and Bohls were materially different because they were not written and express. SKF USA also no longer argued that the written warranties of BL and McGuire differed from the UCC warranty because they had disclaimed “fitness for ordinary purposes” in their written warranties in the face of the ALJ’s finding that Chicago Rawhide has similarly disclaimed “fitness for an ordinary purpose” in its warranty. In comments filed in response to the ALJ’s remand findings, SKF USA argues that “the SKF warranty is, at bottom, a promise – a promise to every purchaser of authorized SKF bearings that if the purchaser has a problem with the bearing, SKF USA will replace the bearing, or refund the purchase price. The warranty is not a piece of paper.” SKF USA’s Comments on Additional Findings, p. 26, n.20. The IA also acknowledges that “[i]n sum the key difference between the SKF warranty and the warranties offered by respondents is who stands behind it.” IA’s Comments on Additional Findings at 31.

Respondents argue that there is no basis for finding a *per se* difference in warranties based on the fact that the trademark holder offers the warranty. They argue that adopting this view would mean that any U.S. trademark owner could establish a material difference in warranties merely by offering any warranty. Likewise, they argue that it cannot be assumed that there are material differences in warranty merely because one warranty is written and another is not. Respondents submit that whether there are material differences based on warranties here should be determined based on whether the terms of respondents warranties are substantially equivalent to SKF USA’s warranty, citing *Montblanc-Simplo GmbH v. Staples, Inc.*, 172 F. Supp. 2d 231, 240-241, and noting that the ALJ found respondents’ warranties to be substantially

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the same as the warranties of SKF USA. ID at 102. Respondents submit that their warranties also run to the end user and point out that there is no evidence that any respondent has ever refused a warranty claim presented by an end user on an SKF-marked bearing.

On review, we affirm the ALJ's finding that there are no material differences between the warranties offered by SKF USA and the warranties offered by respondents. The remand findings clarify that the warranties of both complainant and respondents are essentially a promise to either replace the bearing, or to issue a credit if the customer is dissatisfied with a bearing.

Complainant has the burden of proving material differences, *Gamut*, 200 F.3d at 779 (a trademark holder has the burden of proving, by a preponderance of the evidence, that identified differences are "material" ones, in that "consumers would be likely to consider the differences between the foreign and domestic products to be significant when purchasing the product, for such differences would suffice to erode the goodwill of the domestic source."). In this case, complainant has come forward with no evidence that any respondent has failed to provide satisfactory warranty service in regard to any SKF-marked bearing that it has sold to any customer.

In our view, the ALJ correctly relied on *Montblanc* for the proposition that no material difference in warranty will be found if the warranties are substantially the same. As the ALJ's remand findings demonstrate, the warranties of both complainant and respondents are essentially a promise to replace or issue a refund for any defective bearing. The ALJ fully and adequately addressed the arguments of the IA and SKF USA that *Osawa* and *Fender* compel a finding of

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material differences here by correctly distinguishing those cases on the ground that the defendants in those cases had misrepresented that the trademark owner's warranty applied.

As in the case of post-sale technical and engineering services, we determine that requiring the bearing end user to trace the bearing up the chain of distribution until he reaches an authorized distributor that is willing to take the warranty claim to SKF USA demonstrates that the warranty is not an integral characteristic of the bearing. In this regard, we note the remand findings, discussed above, which indicate that [] of dollars worth of bearings that were originally authorized by SKF USA were sold through nonauthorized channels during the period of investigation, yet SKF USA was able to point to only one instance where the end user "followed the bearing up the chain" to an authorized distributor. Moreover, the ALJ found that the authorized distributor who eventually satisfied the end user's claim did not consider it to be a warranty claim. Rather, the distributor considered satisfying the claim to be good customer service. FF 442. The ALJ found that SKF USA does not prohibit its authorized distributors from selling to distributors that are not authorized, but does discourage them from doing so. ID at 69. Consequently, we draw the inference that an end user who had purchased a bearing from a nonauthorized distributor might encounter resistance if he tried to "follow the bearing up the chain of sales" to obtain warranty service from SKF USA through an authorized distributor.

7. **Whether There Are Material Differences Between Complainant's and Respondents' Products Based on Product Recall**

a. **The ID and Remand Findings**

The ALJ did not find a material difference between the authorized bearings and the gray

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market bearings based on product recall because he found no evidence that SKF USA's authorized distributors follow any standardized or written recall procedure of their own. ID at 107. Thus, the ALJ found that purchasers face the same situation regardless of whether an SKF-brand bearing is purchased from an authorized distributor or from an unauthorized distributor, *i.e.*, the purchaser does not hear about a recall unless the distributor informs the purchaser about it and SKF USA's own authorized distributors did not predictably follow recall procedures. ID at 108. The ALJ found that SKF USA's procedures fail at the critical point in the distribution chain – the authorized distributor. ID at 109. He found there was no evidence that any authorized distributor follows any standardized or written recall procedure of its own. Thus, he found that when it comes to recalls, the relevant purchaser in the industrial aftermarket faces the same situation irrespective of whether an SKF-brand bearing is purchased from an authorized distributor or a gray market distributor, *i.e.*, the purchaser does not hear about a recall unless the distributor informs the customer about it. ID at 108.

The ALJ found no record evidence that SKF USA's authorized distributors have informed their customers of recalls of SKF bearings more so than have unauthorized distributors. Nor did he find any record evidence to support a conclusion that the authorized distributors would be more likely to do so. ID at 108. Indeed, the ALJ found that, despite evidence introduced by SKF USA indicating that there have been [] recalls of SKF bearings between 1998 and 2001,[], one of SKF USA's authorized distributors, testified that he knew of only one recall. ID at 108, citing [] Tr. 2335:24-

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2336:21; FF 233. The manager of the Philadelphia branch of AIT, one of the three major SKF USA authorized distributors, could not remember any SKF recalls during that time period. ID at 108, citing Callahan, Tr. 4778:12-4779:5; FF 234.

The ALJ explained that the case law does not support the notion that recall procedures are “material differences” in and of themselves. ID at 108. Rather, he found that the cases relied on by complainant indicate that the issue of recall in gray market cases is not the actual occurrence or frequency of recalls, but rather “the right to control the quality” of the trademarked product that is protected by the Lanham Act. ID at 108, citing *Davidoff & Cie SA v. PLD International Corp.*, 56 U.S.P.Q.2d 1753, 1757 (S.D. Fla. 2000), *aff’d*, 263 F.3d 1297 (11th Cir. 2001); *John Paul Mitchell Systems v. Pete-N-Larry’s Inc.*, 862 F.Supp. 1020, 1026 (W.D.N.Y. 1994); *Montblanc-Simplo GmbH v. Staples, Inc.*, 172 F. Supp. 2d 231, 239-40, *vacated on other grounds*, 175 F. Supp. 2d 95 (D.Mass. 2001). He found that in the cases cited by complainant, the material difference at issue was not the recall procedure that the trademark holder followed, but rather the infringer’s obliteration of the product code on the gray good that potentially interfered with the trademark holder’s ability to conduct product recalls. The ALJ found no suggestion in the record that respondents have obliterated product or date codes on any of the SKF-brand bearings that they sell. As a result, he found that the cases cited by complainant do not stand for the proposition advanced by SKF USA and the IA, *viz.*, that an internal procedure followed by SKF USA’s quality control staff in conducting recalls is a difference that a relevant purchaser in the industrial aftermarket would be likely to consider significant when purchasing

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the product. ID at 108.

On remand, the Commission asked the ALJ to take evidence and make findings on whether recall procedures were in place concerning SKF-marked bearings that were sold through the alternate channels of distribution that were the subject of the remand. The remand findings do not impact the ALJ's original finding that there is no proof that SKF USA's own authorized distributors have informed their customers of recalls of SKF bearings any more so than have respondents, or that they would be more likely to do so. The findings do, however, illustrate that SKF USA's recall procedures do not extend to the categories of bearings sales that were at issue in the remand.

Thus, the ALJ found that it was SKF USA's policy to notify its direct customers of a recall, regardless of whether they are authorized or nonauthorized distributors. FF 464. He found it is SKF USA's policy, where possible, to notify some customers of its direct customers of a product recall. FF 465. He found, however, that SKF USA has records only of sales that it makes to its direct customers, and that it cannot trace bearings that have been delivered to its customers' customers. FF 466. SKF USA relies on its direct customers for information concerning the volume of recalled bearings that have been sold by its direct customers to nonauthorized distributors. FF 466.

The ALJ found that during the period from January 1, 1997, to June 30, 2003, during which SKF USA sold \$[] worth of bearings to its authorized distributors and during which SKF USA initiated [] bearing recalls, SKF USA was unable to prove one instance when

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an end user customer or reseller customer of an authorized distributor was aware of such a recall. FF 468. He also found no evidence that the SKF USA Bearings Unit has sold any recalled product to any reseller customer. FF 467.

The ALJ found that during the period from 1997 to the present Chicago Rawhide, a division of SKF USA, had one instance of a recall involving a bearing that was not an SKF marked bearing, but was packaged in a "bubble box" marked "SKF." FF 469. In that instance, Chicago Rawhide placed notices of the recall to the general public on its website and sent recall notices via direct mailings to its direct customers as well as to the customers of their customers. FF 470. The ALJ also found that MRC, a division of SKF USA, has policies and procedures concerning SKF-marked bearings that are the same as SKF USA's procedures. FF 471. The ALJ found that SKF USA division MRC has never had to recall an SKF-marked bearing. FF 472.

The ALJ found that the "big three" authorized SKF USA distributors-- Kaman, Motion and AIT-- have written product recall procedures of their own which they follow in regard to all brands of bearings that they sell. FF 473. They do not follow SKF USA procedures. FF 473. Motion treats bearing recall notices from all manufacturers, including SKF USA, the same way. FF 475. The ALJ found that RBC/Tyson follows its own recall procedures, not those of SKF USA. FF 476.

The ALJ found that unless a bearing can be traced to the surplus house, SKF USA generally cannot implement a product recall on bearings sold into surplus. FF 477. He further

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found that SKF USA cannot generally trace a bearing once it has been sold into surplus. FF 461.

b. Analysis

Despite maintaining during the initial phase of the investigation that its recall procedures were materially different from those of respondents, SKF USA now argues that the recall procedures passed on to the various categories of sales of interest in the remand proceedings are not important. Rather, it argues that the focus should be on the notice received by the customer. SKF USA maintains that the evidence adduced at the hearing demonstrates that its customers and its customers' customers, including end users, receive notification of product recalls. The IA asserts that substantially all of the SKF USA's authorized products are covered by SKF's recall system. He submits that the only exceptions are the bearings sold by RBC/Tyson and the surplus bearings, which he argues account together for [] percent of the authorized SKF bearings, and can be ignored as *de minimis*. Both SKF USA and the IA argue that SKF USA's recall procedures are a material difference under *Warner-Lambert Co.*, 86 F.3d at 6, which held that a trademark holder can prove infringement based on quality control where: (i) the trademark holder "has established legitimate, substantial, and nonpretextual procedures, (ii) it abides by these procedures, and (iii) the non-conforming sales will diminish the value of the mark." *Warner-Lambert*, 86 F.3d at 6.

Respondents argue that the ALJ's remand findings confirm the ID's findings that SKF USA's recall procedures are not predictably passed down to downstream end users. They submit that the remand findings also establish that SKF USA does not have the ability to track sales such

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that the end users of a bearing subject to a recall will be predictably notified of the recall. They point to FF 466, which states that “SKF USA has records only of sales that it makes to its direct customers and SKF USA cannot trace bearings that have been delivered to its customers’ customers.” They also point out that the ALJ found no evidence that a recall has ever been carried out in this manner, FF 468, and maintain that ultimately SKF USA’s recall procedure amounts to nothing more than a hope that its reseller customers will voluntarily implement adequate recall procedures on their own. Respondents also maintain that the global SKF Group requires its subsidiaries to comply with its policy of notifying purchasers of bearing recalls, Clark Tr. 4594:21-4596:2. They argue that no evidence indicates that foreign SKF MUs do not follow this policy, and therefore contend that they are as capable as SKF USA or its authorized distributors of notifying consumers of a recall.

Upon review, we affirm the ALJ’s finding that, despite SKF USA’s asserted procedures, there is no material difference between the recall notice given to end users of bearings who purchase bearings from SKF USA and its distributors and the recall notice given to end users of bearings purchased from respondents. In each case, as the ALJ found, purchasers are not likely to be given notice of bearing recalls. The remand findings do not contradict this conclusion, but instead demonstrate that SKF USA has no particular recall procedure in place as to sales made by nonauthorized downstream distributors, sales on the surplus market, or sales by RBC/Tyson. The remand findings also show that, despite the [] recalls of SKF bearings between 1998 and 2003, no bearings were recalled from the alternate distribution channels that were the subject of

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the Commission's remand. FF 468. Complainant and the IA argue that, under *Warner-Lambert*, product recall constitutes a material difference here. This argument fails because the ALJ correctly found, in our view, that SKF USA's authorized distributors do not abide by SKF USA's recall procedures, and thus do not meet the second prong of the *Warner-Lambert* test.

Accordingly, we find that SKF USA has not established a material difference based on recall, and affirm the ALJ's determination on this issue.

8. Whether There Are Material Differences in Post-Manufacturing Quality Control by Complainant and Respondents

a. The ID

The ALJ rejected SKF USA's argument that there were material differences in quality control between SKF USA's bearings and the gray market bearings because SKF USA did not show that its quality control procedures were consistently followed by its own authorized distributors. FF 52. Moreover, he found that SKF USA's authorized distributors also purchased bearings from the surplus market and the gray market for resale, and that such bearings were not subject to SKF USA's quality control procedures. ID at 67, FF 35, 36, 37, FF 39, FF 40, FF 41, FF 42, FF 43, FF 44, FF 45, FF 46. Accordingly, the ALJ found that SKF USA failed to establish any material differences based on quality control differences because SKF USA's quality controls were not consistently applied by all its distributors. ID at 70.

In addition, the ALJ also found that SKF USA undermines its quality controls by selling SKF bearings to: (1) unauthorized distributors through its Chicago Rawhide division; (2) unauthorized distributors through SKF USA authorized distributors; and (3) unauthorized

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distributors directly, including sales to respondents. The ALJ explained that SKF USA knowingly channels SKF bearings to end users via authorized distributors *and* unauthorized distributors, and thereby by passes its own quality controls in order to maximize sales of SKF bearings. As a result, the ALJ found that there is no material difference due to quality control between SKF bearings sold through SKF USA authorized distributors and unauthorized distributors and those sold by respondents because in both cases end users purchase SKF bearings that were not subject to SKF USA quality controls throughout the distribution chain. ID at 70.

b. Analysis

Complainant SKF USA petitioned for review of the ALJ's determination to treat shelf life as a quality control issue rather than a physical difference and argued that the evidence did not support the ALJ's finding that it had established no material differences in shelf life. The IA and respondents submit that the ALJ properly considered the issue of quality control, including shelf life standards, ID at 65; FF 26, 52, and concluded that SKF USA had not demonstrated material differences based on post-manufacturing quality control. ID at 64-70; FF 25-60. The IA and respondents submit that the ALJ's findings on the issue of shelf life and quality control standards are fully supported by the evidence.

As discussed above, we reject SKF USA's contention that shelf life is to be considered a physical attribute of the bearings at issue. SKF USA also has not demonstrated that the ALJ's finding that its authorized distributors were indifferent to concerns about shelf life and quality

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control standards is unsupported by the evidence. SKF USA has raised no other issue in regard to the ALJ's determination on quality control. Accordingly, we affirm the ALJ's determination that there is no material difference between complainant's and respondents' bearings based on post-manufacturing quality control.

9. **Whether There Are Material Differences in the Pre-Sale Technical and Engineering Support Offered by SKF USA and Respondents.**

a. **The ID**

The ALJ found that SKF USA failed to support its claim that *pre-sale* technical services are important to bearings consumers. He also found that SKF USA failed to meet its burden of proving that SKF USA authorized distributors provide such services at the point of sale while respondents do not, and hence he found that *pre-sale* services do not constitute a material difference between authorized and unauthorized bearings. ID at 77. He found that SKF USA produced evidence that is equivocal at best that its authorized distributors routinely provide *pre-sale* services to its customers, whereas the record contained anecdotal evidence that SKF USA authorized distributors routinely sell SKF bearings without inquiring about the bearings' application. ID at 76, FF 78.

The ALJ rejected SKF USA's contention that its manufacturing capacity, research and technical staff, and proprietary computer systems make authorized SKF bearings materially different from unauthorized SKF bearings because he found that whatever benefits are gained by those features are passed on to buyers of gray market bearings as well as purchasers of authorized bearings. ID at 76. He found that application-specific *pre-sale* services, *i.e.*, services specific to

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a particular bearing purchase, are rarely, if ever, used, and that SKF authorized distributors routinely sell SKF bearings without providing any such service. ID at 76. He further found that application-specific pre-sale services are only available through SKF USA application engineers and field sales representatives, and then only to large customers and OEMs. ID at 76. Although he found that application-specific pre-sale services are important to consumers, and hence are “material,” he found that SKF USA failed to meet its burden of proving that SKF USA authorized distributors provide such services at the point of sale while respondents do not. ID at 77.

b. Analysis

Although complainant filed a lengthy contingent petition for review of this issue, it failed to rebut the ALJ’s dispositive findings that the benefits of pre-sale engineering services are available to all purchasers of SKF bearings, whether the bearings are authorized or gray market. In regard to the ALJ’s finding that application-specific pre-sale services were not predictably available to purchasers of authorized SKF-marked bearings, SKF USA conceded the point, but argued that, even if it were true that its authorized distributors do not reliably provide pre-sale technical assistance, the evidence was clear that SKF USA does provide such assistance, and that respondents do not.

The IA and respondents argue that SKF USA has demonstrated no error in the ALJ’s finding that there are no material differences based on pre-sale services between the bearings of SKF USA and the bearings of respondents. They submit that SKF USA has not presented any

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compelling arguments as to why pre-sale services, which by definition are supplied before the sale of the bearing, are services that purchasers will be disappointed to learn that they did not receive after they purchase the bearing. In other words, a buyer cannot be confused about the availability of pre-sale services because he knows when he purchases the bearing whether or not he has received pre-sale services. The IA argues that the ALJ's decision is supported by *H.L. Hayden Co. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1023-24 (2d Cir. 1989)(no trademark infringement when there is no deception as to what installation services are included in purchase of dental equipment).

We determine that complainant has demonstrated no error in the ALJ's determination that there are no material differences based on pre-sale services between the authorized bearings and the gray market bearings of respondents. In our view, the ALJ correctly held that pre-sale engineering services benefit all purchasers of SKF bearings, and his finding that application-specific pre-sale services are rarely used is supported by the record. We find that the evidence does not support SKF USA's claim that pre-sale services predictably accompany the purchases bearings from authorized distributors. Moreover, because a purchaser knows at the time of purchase whether he has received pre-sale application-specific services, it is not likely that he will be confused as to whether he is entitled to pre-sale services. Accordingly, we affirm the ALJ's initial determination on this issue.

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10. Actual Confusion

A trademark holder “need only show that a likelihood of confusion is in prospect; a showing of actual confusion is not required.” *Nestle*, 982 F.2d at 640. Nevertheless, “[c]onvincing evidence of significant actual confusion occurring under actual marketplace conditions is the best evidence of a likelihood of confusion.” 3 J. T. McCarthy, *McCarthy on Trademarks and Unfair Competition* § 23:13 (2001).

The ALJ found evidence of actual confusion based on assured access to SKF USA’s technical support hotline. He found that “the evidence shows that attempts at such access by unauthorized bearing purchasers are made but, because of SKF USA’s blacklist, they are not successful.” ID at 134, citing FF 75; FF 76; FF 77; FF 343. We reject this finding because it is not supported by the evidence. The sole evidentiary support for FF 75, FF 76, FF 77, and FF 343 is the testimony of an SKF USA employee, Charles Worden.²³ Worden, however, did not testify

²³ FF. 75. Charles Worden testified that the SKF hotline receives roughly [] calls a day, [] % of which are from end users. See Worden, Tr. 449:22-450:20.

FF 76 Worden testified that some of those calls are from “potential customers, customers that have been purchasing from our competitors or have been instructed to call us by one of our competitors.” See Worden, Tr. 454:5-16.

FF 77 Worden testified that these calls are “not very common” and “very infrequent.” See Worden, Tr. 454:18.

FF 343 Calls to SKF USA’s hotline from end-users have been refused if they purchased SKF bearings from unauthorized distributors listed on a “blacklist” provided to SKF USA’s technical support personnel by SKF USA’s lawyers. Worden, Tr.

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that purchasers of gray market bearings had called the hotline or had been refused service. Rather, Worden testified that the hotline technicians had been directed to refuse to give advice to anyone who calls that is on the black list or states that he is a customers of a distributor on the blacklist. Tr. 497. Worden also testified that [] percent of the [] daily calls to the hotline were made by end users (relevant persons in the material differences analysis), but that he had no knowledge concerning whether end users who had purchased bearings from the distributors on the black list had called the hotline. Tr. 498. He testified that the hotline dispenses advice to anyone who does not identify himself as “someone from the gray market.” Tr. 498. Worden testified that it was “difficult for us to differentiate” between gray market and authorized customers. Tr. 492. He also testified that even someone who had purchased an authorized bearing would be denied services if he identified himself as having purchased the bearing from a black listed distributor. Tr. 501-502.

There does not appear to be any evidence in the record concerning how many, if any, end users were turned away because they had purchased bearings from a gray marketer. As the [] incident discussed above illustrates, there is evidence that a hotline caller was refused help even when it had purchased an authorized bearing. Thus, any persons who may have been refused hotline services due to implementation of the black list may have been purchasers of originally authorized bearings. Accordingly, we find that the evidence does not support the ALJ’s finding of actual confusion in regard to the hotline.

491:19-492:11, 496:15-497:25.

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The ALJ found that other anecdotal evidence relied upon by SKF USA to show actual customer confusion between its authorized SKF bearings and respondents' unauthorized gray-market bearings was devoid of probative value. ID at 134. This evidence concerned various complaints about respondents' service. The ALJ found that SKF USA's evidence in this regard was not evidence of actual customer confusion concerning the source of gray market bearings because the evidence did not show that the complaining customers believed that SKF USA was affiliated with the problems that they had with respondents' service. ID at 133-134. For instance, one customer complained that respondent McGuire had supplied him with a bearing that was not manufactured in the USA, contrary to the customer's wishes. ID at 133. Another complained that respondent BL's engineering group support had provided poor service. ID at 132-133. Neither customer blamed SKF USA for the deficiencies. The ALJ also found that complainant had not established that actual confusion exists in the marketplace on a broader scale due to the sale of SKF branded products by nonauthorized entities. ID at 147. He found that the survey evidence submitted by SKF USA to prove this allegation was seriously flawed. ID at 147.

We find no error in the ALJ's findings concerning actual confusion other than the hotline finding discussed above. We therefore affirm the ALJ's findings on actual confusion, except for those relating to the hotline.

11. Miscellaneous Issues

The ALJ found that SKF USA had not established any material differences between its

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SKF marked bearings and those of respondents based on packaging and labeling standards, marketing materials, or the issuance of certificates of origin and other certifications. ID at 109-123. We find no error in the ALJ's findings on these issues, and we therefore affirm the ALJ's findings on these issues.


The ALJ determined, and the parties agreed, that a claim of false representation of source under the Lanham Act, 15 U.S.C. § 1125(a)(1)(A), is based on the same material differences test used for trademark infringement in the gray market context. Accordingly, the ALJ's determination that there has been a violation of section 337 on the basis of a false representation of source, ID at 151, is reversed on the same ground that his findings of statutory and common law gray market infringement are reversed.

CONCLUSION

Our decisions (1) to reverse the ALJ's determination that a material difference exists between the products of complainant and respondents based on post-sale technical and engineering services, and (2) to affirm his determinations that there are no other material differences, result in a finding of no violation of section 337 in this investigation. Because we determine that section 337 has not been violated, we do not reach the issue of whether laches should apply to prevent the issuance of a remedy in whole or in part, and we vacate the ALJ's ID on that issue.

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached COMMISSION OPINION, was served upon the following parties via first class mail and air mail where necessary on June 30, 2004.



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INC.:**



PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN BEARINGS AND
PACKAGING THEREOF**

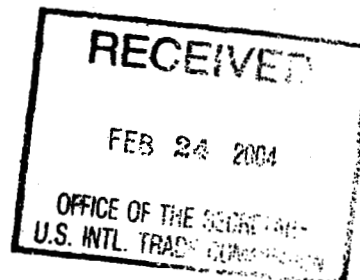
**Inv. No. 337-TA-469
(Remand)**

**ORDER NO. 140: ADDITIONAL FINDINGS OF FACT PURSUANT TO THE
COMMISSION'S REMAND ORDER**

(December 30, 2003)

In a Remand Order dated August 6, 2003, the Commission directed the undersigned to make additional findings of fact in this investigation. See Commission Remand Order of August 6, 2003 at 2. Following a period of supplemental discovery, a hearing was held from December 10-12, 2003 concerning only those issues raised in the Remand Order. The respective parties submitted final proposed findings of fact on December 16, 2003 and replies thereto on December 17, 2003. Oral arguments were heard on December 18, 2003.

Herein, the additional findings of fact pursuant to the Remand Order conform to the categories of questions posed by the Commission. In addition, the undersigned incorporates by reference Joint Stipulations 19-23, see Appendix A attached hereto, which the parties entered into at his request.



- (a) The volume of sales made by complainant SKF USA, its divisions, and its authorized distributors to unauthorized bearings distributors, including sales on the surplus market, within the last five (5) years;¹

FF374. SKF USA defines “authorized distributor” to mean those companies that are authorized to sell SKF-brand bearings pursuant to a contract entitled “Industrial Distributor Agreement.” SKF USA contends that it uses the term “unauthorized distributor” to denote companies that are gray marketers, such as Respondents and others on SKF USA’s “blacklist” who are not otherwise authorized. Bowen, Tr. 6833:10-6834:18 (in addition to sales to OEMs and authorized distributors, SKF USA Bearings unit sells to other customers), 6835:2-14 (sales to OES customers for resale as replacement parts), 6844:12-21 (distinction between authorized distributors and specialty distributors), 6845:5-11 (SKF USA expects specialty distributors to resell bearings), 6846:18-25 (sales to exporters), 6848:9-6850:21 (sales to catalog houses), 6851:17-6852:19, 6854:13-16, 6856:2-11 (sales of SKF bearings by MRC to same types of customers), 6882:6-15 (92.6% of sales to entities other than OEMs, government, and authorized distributors are made pursuant to written contracts with those entities); [] Tr. 7634:3-7636:18 (specialty distributor [] has annual contract with SKF USA for purchase of bearings); CPX-303C (annual charts of sales by SKF USA Bearings unit; note that the numeric data has been updated through the sales data stipulations); CX-2743C (sample OEM/OES contract); CX-2740C (sample contract for specialty distributor); CX-2746C (sample contracts with exporters).

FF375. Respondents define “unauthorized distributor” to mean an entity that (a) buys and resells bearings as part of their business, and thus are bearing distributors, and (b) does not have a SKF USA Industrial Distributor Agreement, and is therefore not an “authorized distributor.” Jt. Stip. 22 ¶ 5 & Table 9 at pp. 165-73 (SKF USA sales to “Resellers” and “OE Service” categories); RX-9021C at pp. 4-6 (same); RX-9071C at SKFR 200500, 200503-04, 200506-07 (same); CPX-304C at last p. (values of SKF bearings sold to customers other than OEMs and authorized distributors); CPX-304C (quantities of same); Bowen, Tr. 6833:22-6834:18 (“Other” sales category on CPX-303C), 6844:12-6845 (specialty distributors), 6846:4-13 (OES category), 6847:1-9 (exporters), 6848:9-21 (catalog houses), 6849:13-6851:5 (all in “Other” sales category are resellers except rebuilders), 6862:24-6863:5 (OES category includes specialty distributors), 6864:20-24 (all OES customers are resellers), 6865:25-6870:12 (exporters); [] Tr. 7671:11-14 (sale to []); Jt. Stip. 8 ¶ 4 (Gulf not authorized); [] Tr. 7794:11-7795:13 (sales to [] companies); 7799:19-24 (volume of such sales), 7832:8-22; Clark, Tr. 1285:19-23, 1287:19-1288:3; Jones, Tr. 5615:11-18, 5624:22-5626:11.

¹ There having arisen a dispute as to the meaning of “last five (5) years” – specifically whether five years is subtracted from the date of the Commission’s Remand Order or the date of the Complaint – the undersigned has made findings of fact using both metrics. Moreover, Joint Stipulations 19-23 include data for both time periods.

FF376. SKF USA's Bearings unit sells SKF-brand bearings (and non-SKF brand bearings in so-called SKF service boxes) to several types of companies that are, as defined by SKF USA, neither "authorized distributors" nor "unauthorized distributors." Instead, they are customers of SKF USA that are conditionally permitted to resell bearings to certain types of customers. These include OES (original equipment service) customers and "resellers." OES customers of SKF USA resell bearings and typically have resale agreements with SKF USA, which are not industrial distributor agreements. Rather, OES customers are typically a business unit of an OEM (original equipment manufacturer) that is involved in servicing or repairing the entity's own equipment in the aftermarket. Rebuilder customers of SKF USA typically do not resell bearings; instead, they use bearings in rebuilding equipment. The Reseller ("R") category, found on SKFR 200500 - SKFR 200510, is a catch-all category. Those entities that could not be categorized in the Authorized Distributor ("D"), OE Service ("OE"), or Rebuilder ("B") categories were initially classified as a Reseller. Bowen, Tr. 6833:10-14 (in addition to sales to OEMs and authorized distributors, SKF USA Bearings unit sells to other customers), 6835:2-15 (sales to OES customers for resale as replacement parts), 6844:12-21 (distinction between authorized distributors and specialty distributors), 6845:5-11 (SKF USA expects specialty distributors to resell bearings), 6846:18-25 (sales to exporters), 6848:9-6850:21 (sales to catalog houses), 6850:25-6851:16 (sales to rebuilders), 6882 (92.6% of sales to entities other than OEMs, government, and authorized distributors are made pursuant to written contracts with those entities); [] Tr. 7634:3-7636:18 (specialty distributor [] has annual contract with SKF USA for purchase of bearings); CPX-303C (annual charts of sales by SKF USA Bearings unit); CX-2743C (sample OEM/OES contract); CX-2740C (sample contract for specialty distributor); CX-2746C (sample contracts with exporters).

FF377. The Reseller category at SKFR 200500 - SKFR 200510 includes specialty distributors, export accounts, distributors of product not branded SKF made by SKF under subcontract for other bearing manufacturers, and catalogue houses. CX-2733C at SKFR 200500 - SKFR 200510. The specialty distributor subcategory includes companies who have entered into agreements with SKF USA to sell SKF bearings to a particular industry. Export accounts are entities that have contracts with SKF USA which stipulate that resales by these entities are for export outside the United States, and that selling the bearings back into the domestic market would violate the agreement, subjecting the entity to termination. Product not branded SKF, but made by SKF under subcontract for other bearing manufacturers, represents a category of entities to which SKF USA, at some point, sold bearings that were marked with the customer's respective name and not marked SKF. The catalogue house category includes those entities that sell bearings as well as other industrial products through catalogues, and are permitted by SKF USA to resell as such. The entities falling in the aforementioned subcategories can be found at SKFR 210267 - SKFR 210270. CX-2733C at SKFR 210267 - SKFR 210270. Once sales to these various authorized

entities are properly considered, the remaining sales to unauthorized distributors, as defined by SKF USA, are []. Bowen, Tr. 6833:10-6834:18 (in addition to sales to OEMs and authorized distributors, SKF USA Bearings unit sells to other customers), 6835:2-14 (sales to OES customers for resale as replacement parts), 6844:12-21 (distinction between authorized distributors and specialty distributors), 6845:5-11 (SKF USA expects specialty distributors to resell bearings), 6846:18-25 (sales to exporters), 6848:9-6850:21 (sales to catalog houses), 6851:17-6852:19, 6854:13-16, 6856:2-11 (sales of SKF bearings by MRC to same types of customers), 6882:6-15 (92.6% of sales to entities other than OEMs, government, and authorized distributors are made pursuant to written contracts with those entities); [] Tr. 7634:3-7636:18 (specialty distributor [] has annual contract with SKF USA for purchase of bearings); CPX-303C (annual charts of sales by SKF USA Bearings unit; note that the numeric data has been updated through the sales data stipulations); CX-2743C (sample OEM/OES contract); CX-2740C (sample contract for specialty distributor); CX-2746C (sample contracts with exporters).

FF378. From July 1998 to June 2003, SKF USA sold more than [] in additional SKF bearings to customers it classifies as OE Service customers. Such customers do not have SKF USA Industrial Distributor Agreements, but do purchase bearings from SKF for resale. RX-9071C- SKFR at 200500; Bowen, Tr. 6846:4-13 (OES category), 6849:13-6851:5 (all in “Other” sales category are resellers except rebuilders), 6860:3-6861:1 ([] is a specialty distributor listed in OES category), 6862:24-6863:5 (OES category includes specialty distributors), 6864:20-24 (all OES customers are resellers), 6865:10-12. Respondents provide figures for the period they contend relevant. Jt. Stip. 22 ¶ 5 & Table 9 at pp. 165 (stipulated values of SKF USA sales to “OE Service” category – Respondents’ asserted period of 3/10/97-3/10/02: [] see also Complainant’s asserted period of 7/98-6/03: [] see also Table 9 at pp. 166, 169-71, 172-73 (backup and customer list for each of two databases used).

Sales by SKF USA Bearings Unit

FF379. Over a 6½-year period between January 1, 1997 and June 30, 2003, SKF sold [] of bearings to its authorized industrial distributors, or an average of approximately [] per year. Jt. Stip. 22, Table 3.

FF380. Assuming that the term “unauthorized distributor” refers to OES customers and all types of resellers (except subcontractors), then SKF sold approximately [] of bearings to unauthorized distributors over a 6½-year period between January 1, 1997 and June 30, 2003, or an average of approximately [] per year. Jt. Stip. 22, Table 9.

- FF381.** Assuming that the term “unauthorized distributor” refers to all non-OES resellers (including exporters, but excluding subcontractors), then SKF sold approximately [] of bearings to unauthorized distributors over a 6½-year period between January 1, 1997 and June 30, 2003, or an average of approximately [] per year. Jt. Stip. 22, Table 9.
- FF382.** Assuming that the term “unauthorized distributor” refers to all non-OES resellers other than exporters and subcontractors, then SKF sold approximately [] to unauthorized distributors over a 6½-year period between January 1, 1997 and June 30, 2003, or an average of approximately [] per year. Jt. Stip. 22, Table 9.
- FF383.** Assuming that the term “unauthorized distributor” refers to resellers that are currently on SKF’s blacklist, the SKF has sold approximately [] in bearings to unauthorized distributors over a 6½-year period between January 1, 1997 and June 30, 2003, or an average of approximately [] per year. Jt. Stip. 22, Table 11.
- FF384.** Assuming that the term “unauthorized distributor” refers to resellers which, at the time of the sale, SKF did not regard as part of its authorized distribution chain, then SKF has sold approximately [] to unauthorized distributors over a 6½-year period from 1997 to June 2003, or an average of approximately [] per year. RX-9197C; Jt. Stip. 22, Table 10.
- FF385.** In 1998, the SKF USA Bearings unit made a sale of domestically-manufactured SKF-brand bearings, in the amount of [] At the time, SKF USA did not consider [] to be an authorized SKF distributor, nor did SKF USA have a distribution agreement with []. Clark, Tr. 1226:2-1227:20.
- FF386.** SKF USA sold SKF bearings to unauthorized distributors on its so-called “blacklist.” CX-2113C (blacklist); Jt. Stip. 22, Table 11 at pp. 177-78 (sales to companies on CX-2113C from each of two databases used); RX-7005C at [] 001002-03 ([]), 01007 ([]), 01012 ([]); DeBorde, Tr. 3833:17-3835:21, 3836:1-3837:6 (sales to Respondent BDI); Acuna Tr. 7794:11-7795:13 (sales to Acuna companies including Larokka); Jt. Stip. 3, ¶ 8 (Ritbearing); RX-3172C ([]); RX-0493 (Gulf United); Morrison, Tr. 4149:16-4151:5 (Gulf United); Clark Tr. 1176:19-21, 1226:4-6, 1227:1-14, 1312:10-1313:12; Bowen Tr. 6865:24-6870:12, 6873:25-6879:25.
- FF387.** SKF USA has also sold SKF Bearings to Unauthorized Distributors operated by [] Jt. Stip. 22, Table 9 at pp. 167 (sales to [] under “Reseller”/“Non-Exporter” category, Table 11 at p. 177 (sales to []); [], Tr. 7792:22-7793:6, 7794:11-7795:7.

FF388. See Jt. Stip. 22.

Sales by SKF USA Divisions

FF389. Chicago Rawhide (“CR”) is a business unit of SKF USA separate from the SKF USA Bearings unit. Diggory, Tr. 4623:3-10; Jt. Stip. 4, ¶ 1. With the exception of some incidental sales, with respect to bearings, Chicago Rawhide operates in the Vehicle Service Market (“VSM”), a unique market distinct from the bearing industrial aftermarket. Clark, Tr. 4601:2-9. As such, Chicago Rawhide has its own network of customers and resellers. Diggory, Tr. 7166:22-7169:4.

FF390. Almost all sales by SKF USA’s Chicago Rawhide division are to customers that resell the bearings and very few of these customers have Industrial Distributor Agreements with SKF USA. Jt. Stip. 19 ¶ 9 & Table 4, ¶ 10 & Table 5, Table 7 at pp. 2-3; Diggory, Tr. 7166:23-7168:1, 7168:22-7169:1, 7169:11-19.

FF391. The vast majority of Chicago Rawhide’s customers are authorized distributors in the sense that Chicago Rawhide authorizes them to resell product, but are “unauthorized distributors” in the sense that they do not have industrial distributor agreements with SKF USA. Diggory, Tr. 7166:22-7170:6.

FF392. CR’s sales to its customers contemplate either a two-step or three-step distribution chain. Diggory, Tr. 7166:22-25. In the two-step distribution chain, the bearing is sold by CR to a pre-approved distributor, who then sells to the end user. Diggory, Tr. 7167:1-6, 23-7168:6. This is the chain for CR’s sales to its heavy-duty customers, OE service accounts, and transit accounts (as well as for CR’s incidental courtesy sales to industrial aftermarket accounts). Diggory, Tr. 7167:1-8 (as a courtesy, CR incidentally sells bearings to industrial customers). In the three-step distribution chain, the bearing is sold by CR to a pre-approved wholesale distributor, who sells to a jobber (e.g., a parts store), who resells to the dealer or end user (e.g., a garage mechanic or do-it-yourselfer). Diggory, Tr. 7167:7-18. The three-step process is the chain contemplated for CR’s automotive aftermarket sales, except for sales to Pep Boys, since some Pep Boys locations also do repairs, which would involve only a two-step process (sales by CR to NAPA are automotive aftermarket sales and involve a three-step chain). Diggory, Tr. 7167:25-7168:6.

FF393. See Jt. Stip. 19.

FF394. MRC, a separate sub-unit within the SKF USA Bearings unit, has its own network of authorized MRC distributors and/or customers. The only SKF-marked bearings that are sold by MRC are spherical plain bearings (“SPBs”). These SPBs are sold in an MRC box, which nowhere states the name “SKF.” MRC’s total sales volume, by quantity and value, of SKF-marked SPBs for the relevant period are as follows:

MRC Sales of SKF-Marked SPBs (1997 - October 2003)		
Year	Quantity	Value (\$)
1997	[]	[]
1998	[]	[]
1999	[]	[]
2000	[]	[]
2001	[]	[]
2002	[]	[]
through Oct. 2003	[]	[]

All sales were made to authorized distributors, authorized export distributors, or authorized OES accounts of MRC (as identified at SKFR 210227 - SKFR 210232). As such, MRC made no sales to unauthorized distributors, as defined by SKF USA, including sales on the surplus market, within the last five (5) years. Bowen, Tr. 6851:17-6852:15, 6854:13-16, 6856:2-11; Jt. Stip. 23, ¶¶ 1-2; CX-2744C (chart of sales of SKF marked spherical plain bearings by MRC).

FF395. The document at SKFR 210227-SKFR 210232 (CX-2744C) is a spreadsheet showing sales by MRC of SKF-marked spherical roller plain bearings. Bowen, Tr. 6885:24-6886:6. All spherical plain bearings sold by MRC were SKF marked bearings. Jt. Stip. 23 & attached table. Many of the customers are identified as distributors, but are not SKF USA authorized distributors, such as [] Jt. Stip. 22, Table 5 at pp. 13-39; CX-644; Jt. Stip. 23.

FF396. MRC's sales of SKF marked bearings average approximately [] per year. CX-2744C; Jt. Stip. No. 23.

FF397. All of MRC's sales to distributors are to authorized MRC distributors, OES customers, or to exporters. CX-2744C; Bowen, Tr. 6851:17-6852:15, 6854:13-14, 6856:2-11; Jt. Stip. 23.

FF398. See Jt. Stip. 23

Sales by SKF USA Authorized Distributors

FF399. The following entities are authorized distributors and have been since 1997. Many of them have multiple branch locations, the number of which is indicated in parentheses after the name of the distributor:

Motion Industries	(about 450)
Applied Industrial Technologies	(about 350)
Kaman Industrial Technologies	(about 160)
Precision Industries	(about 125)
Gipson Bearing	(3)
Bearings & Drives	(about 25)

Chaney, Tr. 7064:3-8 (In the past two years, Motion Industries has contracted from 550 to approximately 450 branches); Circo, Tr. 2300:13-16 (Precision Industries has "75 branches and about 50 integrated supply sites. We have about 125 total locations"); Gipson, Tr. 7213:22-25 (Gipson Bearing); Moore, Tr. 753:2-754:4, 5858:6-20 (Motion Industries, Applied Industrial Technologies, Kaman Industrial Technologies, and Bearings & Drives).

FF400. SKF Bearings unit's sales to the authorized distributors who have provided information that is included in Jt. Stip. No. 20 represent approximately [] of the SKF Bearings unit's sales to all authorized distributors during the July 1998 to June 2003 time period. Jt. Stip. 22 [] (for July 1998-June 2003 time period).

FF401. One SKF USA authorized distributor ([]) searched for sales to unauthorized distributors by SIC code. Chaney, Tr. 7104:16-18, 7105:7-21, 7108:14-20.

FF402. [] branch locations have sold SKF bearings to other distributors who are not authorized SKF industrial distributors. Chaney, Tr. 7064:15-24. [] sales of SKF bearings to these distributors are reflected in Joint Stip. No. 20, ¶24(a) and Table 1. Such sales account for [] of [] total purchases of SKF bearings from SKF USA in any given year. Chaney, Tr. 7064:22-24; Jt. Stips. 20 (¶ 24(a) and Table 1) and 22 (Table 8) []

FF403. [] has sold SKF bearings to other distributors who are not authorized SKF industrial distributors. [] sales of SKF bearings to these distributors are reflected in Table 1. Jt. Stip. 20, ¶ 14.

FF404. [] branch locations have sold SKF bearings to other distributors who are not authorized SKF industrial distributors. Mayer, Tr. 7464:20-24. [] sales of SKF bearings to these distributors are reflected in Joint Stip. 20, ¶ 19(a) and Table 1. Such sales account for [] of [] total purchases of SKF bearings from SKF USA between July 1998 and June 2003. Jt. Stips. 20 (¶ 19(a) and Table 1) and 22 (Table 8) ([]).

- FF405.** [] has sold SKF bearings to other distributors who are not authorized SKF industrial distributors. Jt. Stips. 20 (¶ 18(a) and Table 1) and 22 (Table 8) ([] sales of SKF bearings to these distributors are reflected in Joint Stip. 20, ¶ 18(a) and Table 1.
- FF406.** [] total sales of SKF bearings to distributors who are not authorized SKF industrial distributors from July 1998 through June 2003 was []. Jt. Stip. 20, ¶ 18(a) and Table 1.
- FF407.** [] total sales of SKF bearings to distributors who are not authorized SKF industrial distributors from July 1998 through June 2003 was [] Jt. Stip. 20 (¶ 13(a) and Table 1). Such sales account for less than 5% of [] total purchases of SKF bearings from SKF USA during this period. Jt. Stips. 20 (¶ 13(a) and Table 1) and 22 (Table 8) ([]).
- FF408.** [] total sales of SKF bearings to distributors who are not authorized SKF industrial distributors from July 1998 through June 2003 was []. Jt. Stip. 20 (¶ 15(a) and Table 1). Such sales account for [] of [] total purchases of SKF bearings from SKF USA during this period. Jt. Stips. 20 (¶ 15(a) and Table 1) and 22 (Table 8) ([]).
- FF409.** [] total sales of SKF bearings to distributors who are not authorized SKF industrial distributors from July 1998 through June 2003 was [] Jt. Stips. 20 (¶ 4(a) and Table 1). Such sales account for [] of [] total purchases of SKF bearings from SKF USA during this period. Jt. Stips. 20 (¶ 4(a) and Table 1) and 22 (Table 8) ([]).
- FF410.** [] sold [] of SKF bearings to unauthorized distributor customers for the time period in question (July 1998-June 2003). Jt. Stips. 20, ¶ 31(a) and Table 1. On an annual basis, [] of SKF bearings sold by [] are sales to other distributors. MacPherson, Tr. 7630.
- FF411.** [] is an authorized SKF industrial distributor. Jt. Stip. 20 (¶ 21(a) and Table 1). Between July 1998 and June 2003, [] has not sold any SKF bearings to unauthorized distributors for resale in the United States. Jt. Stip. 20 (¶ 21(a) and Table 1).
- FF412.** [] sells naked SKF bearings as replacement parts for *pre-existing* [] customers. Snyder, Tr. 7052:4-14.
- FF413.** The extent of sales of SKF bearings by authorized distributors to unauthorized distributors is also illustrated by evidence from a number of unauthorized distributors as to their purchases. The unauthorized [] has produced records (RX-7005C) reflecting purchases of SKF bearings from the following SKF USA distributors:

[

]

Jt. Stip. 22, Table 5, pp. 13-39 (listing authorized distributors).

- FF414.** Sales from one distributor to another occur in a number of circumstances, including where the purchasing distributor seeks to fill a particular customer need and where the purchasing distributor seeks to have ongoing access to a brand (such as SKF) for which it may not be authorized. It is also common for distributors to have reciprocal arrangements to provide each other with brands for which each is authorized. Gipson, Tr. 7215:19-25; Weinstock, Tr. 7401:23-7403:11; Mayer, Tr. 7464:13-7465:14; Morrison, Tr. 4180:7-20, 7674:21-7675:6, 7678:5-21; Gelke, Tr. 5155:22-5156:5; Baker Tr. 4292:13-4293:12; Chaney, Tr. 7064:15-7065:7, 7104:6-7107:15; RX-9063C ([]), RX-9013C ([]); Jt. Stip. 20 ¶ 24 (stipulated Motion sales figures); MacPherson, Tr. 7615:10-13, 7618:25-7619:4; Jt. Stip. 20 ¶ 31; Clark, Tr. 1566:22-1568:3, 1733:16-1735:5, 1743:6-25 (no SKF USA policy precluding such sales).
- FF415.** Under a signed Agricultural Wholesaler Agreement with SKF USA beginning in 1998, [] has sold SKF bearings since 1998. [] Tr. 7636:10-15 ([] has Agricultural Wholesaler Agreement, not an Industrial Distributor Agreement); RX-9155C & CX-2740C ([]); Jt. Stip. 22, Table 9 at pp. 169, 173 (showing sales to [] under OES category from 1998 to present).
- FF416.** Baker Bearing is a surplus house. Baker, Tr. 4288:17-25.
- FF417.** Baker Bearing has made purchases from the following authorized distributors. Baker, Tr. 4292:16-4293:12; RX-9124C at Baker Dep. Exh. 13, 16; CX-2429C ([] sale):

[

]

FF418. The only specific purchase data produced by Baker are a series of invoices. Among the invoices recording purchases of SKF product produced by Baker Bearing in discovery, the following authorized distributors can be found: [] RX-9124C at Baker Dep. Exh. 13, 16 ([] sales to Baker); CX-2429C ([] sale to Baker).

FF419. United Bearing is a surplus house. Morrison, Tr. 7670:22-24.

FF420. The following surplus houses compete with United: [] Tr. 7679:12-19.

FF421. In the five year period between March 10, 1997 and March 10, 2002, United reported purchases of SKF product from SKF authorized distributors of [] RX-9053C.

FF422. In the five-year period from July 1998 to June 2003, United reported purchases of SKF product from SKF authorized distributors of [] RX-9053C.

FF423. Between January 1, 1997 and the present, SKF authorized distributors [] have all sold SKF bearings to [] companies that buy and resell SKF bearings that are owned by or that employ [] Tr. 7792:22-25, 7794:22-7795:20, 7799:9-18.

FF424. [] has produced spreadsheets and invoices of its purchases of SKF products from January 1998 through April 30, 2003, compiled from records maintained in the ordinary course of business, indicating that [] purchased [] worth of SKF bearings from the following SKF USA authorized distributors:

[

]

RX-9049C, RX-9050C; [] Tr. 7496:20-7497:3, 7498:9-13, 7533:9-11, 7574:15-24, 7607:3-6; [] Tr. 7324:17-22, 7325:2-9, 7326:16-7327:15, 7359:18-7360:18, 7390:21-7395:16.)

FF425. [] also purchased and resold [] mounted bearings from [] (an asserted SKF USA OES customer) that contained an SKF bearing valued at []; and from 1998 to 2002, [] purchased and resold [] mounted bearings that contained an SKF bearing, which were valued at a total of \$1,332,333.93, from []. RX-2070C, RX-2072C, RX-9045C, RX-9050C, RPX-9001C, RPX-9016C, [] Tr. 7496:20-7497:3, 7498:9-13, 7533:9-11, 7574:15-24, 7607:3-13; [] Tr. 7325:2-9, 7327:20-7328:23, 7329:7-10, 7329:14-7330:7.

FF426. Two [] spreadsheets reflecting purchases of SKF product made by [] of SKF product from sources in the United States and received into [] inventory between January 1, 1997 and September 18, 2003 include purchases from SKF USA authorized distributors, including:

[

]

RPX-9006C RX-9200C, RX-9201C; [] Tr. 7671:6-17, 7673:17-7674:20; RX-9053C at p. [] 501108 (totals), [] 501109-22 (authorized distributor breakdown); Button Tr. 7701:22-7704:6.

FF427. [] has made multiple purchases of SKF bearings from each of [] in every calendar year from 1998-present. RX-9200C, RX-

9201C; [], Tr. 4180:7-20, 4181:1-4190:14, 7671:6-17, 7673:17-7674:20; RX-9053C; Button, Tr. 7701:22-7704:6.

FF428. See Jt. Stip. 20.

- (b) **The volume of sales of SKF-marked bearings under the Roller Bearing Company/Tyson Bearing Company License Agreement;**

FF429. Roller Bearing Company of America, Inc., through its Tyson Bearings Company subsidiary ("RBC/Tyson"), purchased SKF USA's tapered roller bearing line in Glasgow, KY in 1999, and entered into a [] trademark license agreement with SKF USA. Under the license agreement, RBC/Tyson was permitted to [

]. Jt. Stip. 21 ¶ 1; RX-0541C; Clark Tr. 5579:3-22, 5580:17-22; Gostomski Tr. 7154:8-21, 7155:14-7156:9, 7158:8-7159:17, 7164:14-18.) RBC/Tyson did in fact

[]. Jt. Stip. 21 ¶ 2-3; Gostomski Tr. 7154:8-21, 7155:14-7156:9, 7158:8-7159:17, 7164:14-18; RX-9111C; [] Tr. 7325:2-4, 7331:16-20, 7336:4-19.)

FF430. Since the termination of the license agreement, RBC has continued to manufacture tapered roller bearings, both for sale to the SKF USA Bearings unit, Chicago Rawhide, and other SKF entities, and for sale to RBC's customers. The bearings that are sold to RBC's own customers are etched with the Tyson mark; the bearings that are to be sold to the SKF USA Bearings unit, Chicago Rawhide, or another SKF entity, are etched with the SKF mark. Gostomski, Tr. 7164:19-7165:3.

FF431. See Jt. Stip. 21.

- (c) **The warranties, product recall procedures, and post-sale technical services that are passed on to the end user along with sales listed in (a) and (b) above.**

1. Warranties

Warranties Passed On By SKF USA Bearings Unit to Unauthorized Distributors and End-user Customers

FF432. The written warranty that SKF USA provides to its authorized distributors in Section 7 of the 2002 version of the Industrial Distributor Agreement begins as follows:

7. Warranty

7.1 Limited Warranty. Distributor's rights as buyer shall be subject to the following limited warranty (the "Limited Warranty"):

SKF warrants to the buyer that products sold by SKF (the "Products"), when properly installed, will be free from defects in material and workmanship and shall be fit for the ordinary purposes for which such Products are designed. SKF's sole obligation for any claim of any kind for Product defects under this limited warranty, and the buyer's sole and exclusive remedy for such claim, shall be limited to furnishing without additional charge to the buyer, including transportation, a replacement for any of the Products found by SKF to be defective contrary to this limited warranty or, at SKF's sole option, to credit or refund to the buyer the purchase price paid therefore by the buyer.

CX-1064 at SKF 017642.

FF433. This limited warranty further states, inter alia, that it is subject to the following conditions:

The foregoing obligations of SKF shall be conditioned upon (i) buyer's notifying SKF in writing of the defect within 30 days of the discovery thereof and within one year from the date of sale of the Product to the buyer, (ii) the prompt forwarding of the affected Product to SKF's designated facility (freight prepaid), and (iii) SKF's laboratory examination of the returned Product and determination regarding the existence of any defect contrary to this limited warranty.

CX-1064 at SKF 017642-43.

FF434. The limited warranty provision of the 2002 Industrial Distributor Agreement also provides, in relevant part, as follows:

7.2 Limited Warranty on Sales to Customers. Distributor shall offer to sell, and will sell and distribute the Products with end-user agreements and instructions, if any, intact as shipped by SKF and subject to then current version of the Limited Warranty. In all events the foregoing Limited Warranty shall be deemed made to any and all persons or entities by SKF with respect to the Products.

CX-1064 at SKF 017643.

- FF435.** Different language is used in warranty provisions of other contracts and order forms used by SKF USA for its sales of SKF-brand bearings to distributors and end-users. See Scheib, Tr. 6932:7-6933:3, 6933:13-15; 6933:24-6935:12; CX-2740 at SKFR 209944 (specialty distributor contract); CX-2743C (OEM/OES contract); CX-2770 at SKF 123140 (SKF USA Terms and Conditions); CX-2773 at SKFR 207555 (SKF USA Order Acknowledgment); CX-2746 (exporter contracts).
- FF436.** Different language also appears in the warranty provisions of the terms and conditions that are posted on SKF USA's online store, <http://www.ptplace.com>. Scheib, Tr. 6902:2-15; CX-2915.
- FF437.** Neither the SKF USA warranty nor any warranty related information is printed on or found inside the SKF bearing box or any packaging materials. Circo, Tr. 2330:20-2331:1; Leggett, Tr. 7652:17-7653:18; Acuna, Tr. 7801:24-7802:3.
- FF438.** Notwithstanding different verbiage in each of the foregoing forms of SKF USA's written warranty terms, all of SKF USA's warranties are applied by SKF USA in the same way to run for 12 months from the date of the last purchase, to extend to the end-user of the bearing, and to re-start the running of the 12-month period with each sale. Scheib, Tr. 6902:2-15, 6907:16-6908:11, 6935:5-9, 6945:8-6946:2, 6960:22-25.
- FF439.** An end user may return an authorized SKF bearing to SKF USA under the SKF USA Bearings unit warranty even if the end user purchases the authorized SKF bearing from an intermediate reseller that is not authorized by SKF USA. Such an end user, as well as any intermediate reseller of the authorized SKF bearing, is entitled to the full range of SKF USA's warranty services. D. Scheib, Tr. 6907:24-6908:6, 6940:18-6941:4, 6945:8-20 (end user and intermediate reseller), 6960:22-25, 6962:15-6963:14 (end user); CX-1064C (SKF USA Industrial Distributor Agreement); [], Tr. 7216:20-24 ([] sales to other distributors), 7226:7-14 (warranty claim from end user who purchased bearing from intermediate distributor); CX-2894C (warranty claim paperwork).
- FF440.** In order for an end user to return an authorized SKF bearing to SKF USA under the SKF USA Bearings unit warranty that was purchased from an intermediate reseller who is not authorized by SKF USA, the warranty claim must be sent back up the chain of distribution so as to show that the bearing was originally sold by an SKF USA-authorized distributor. Scheib, Tr. 6907:24-6908:6, 6912:1-10, 6928:1-4, 6940:19-6941:4.
- FF441.** An end-user who called SKF USA with a warranty claim would be instructed that SKF USA could not assist him unless he first traced the bearing back to the point at which it was sold by a direct customer of SKF USA and had that entity (either the unauthorized distributor to which the SKF USA Bearings Unit directly sold the bearing or the SKF USA authorized distributor who originally sold the bearing) call

SKF USA to obtain authorization for the warranty claim. The only other means by which such an end-user could obtain warranty services would be if SKF USA customer service, in conjunction with SKF USA sales, made the discretionary decision that it is commercially expedient to honor that warranty claim "outside the system." Scheib Tr. 6912:2-10, 6925:1-6, 6939:8-6942:10, 6953:9-6954:9.

- FF442.** During the period from January 1, 1997 to June 30, 2003, during which SKF USA sold [] worth of bearings to its authorized distributors, SKF USA was able to point to only one instance in which a warranty claim was raised and resolved regarding an end user. In that instance, the authorized distributor did not even consider the matter to be a "warranty" claim at all, but rather a matter of "customer service" designed to keep the customer satisfied. [], Tr. 7249:18-7251:8 (see further below); [], Tr. 7401:3-12, 7404:4-10, 7405:2-10 (never advised of SKF USA warranty when an SKF-USA-authorized distributor prior to June 2000); [], Tr. 7643:10-13, 7650:16-18 (SKF USA-authorized distributor never experienced a warranty issue).

Warranties Passed On By SKF USA "Divisions"

By Chicago Rawhide to Unauthorized Distributors and End-user Customers

- FF443.** Chicago Rawhide's limited warranty can be found on its websites and in its catalog, and reads in relevant part as follows:

CR warrants that products sold by it, when properly installed, will be free from defects in material and workmanship to the first user/purchaser. CR's sole obligation for any claim of any kind for product defects under this limited warranty, and purchaser's sole and exclusive remedy for such claim, shall be limited to furnishing without additional charge to purchaser, including transportation, a replacement for any of the products sold by CR, which are returned to the warehouse designated by CR within one year of delivery by CR and are found by CR to be defective under this limited warranty, or, at CR's option, to credit purchaser the purchase price paid therefore. There are no other warranties, express or implied, made by CR hereunder, and CR neither assumes nor authorizes any person to assume for CR any other obligations regarding products sold by CR beyond the terms of this express, limited warranty.

RX-2418 at SKF 135019.

- FF444.** The CR warranty extends to the "first user/purchaser," which is the person that actually installs the bearing in a vehicle or a pump or a machine. Diggory, Tr. 5727:18-24, 5730:4-6; RX-2418 at SKF 135019.

FF445. For an end-user to make a claim under the CR warranty, that person must go back through the channel of distribution from the repair shop to the part store to the distributor. The credit or replacement part then goes back down to the person who actually installed the part. Diggory, Tr. 5731:21-5732:8.

FF446. Notwithstanding language in the written warranty extending the warranty period only from the date of delivery by CR, CR honors its warranty for a period of one year after the installation of the bearing into a vehicle or pump or machine by the first user/purchaser. Diggory, Tr. 5727:21-24.

By MRC to Unauthorized Distributors and End-user Customers

FF447. MRC's limited warranty can be found in its Distributor Agreement, and reads in relevant part as follows:

7. Warranty.

7.1 Limited Warranty. Distributor's rights as buyer shall be subject to the following limited warranty (the "Limited Warranty"):

MRC warrants to the buyer that products sold by MRC (the "Products"), when properly installed, will be free from defects in material and workmanship and shall be fit for the ordinary purposes for which such Products are designed. MRC's sole obligation for any claim of any kind for Product defects under this limited warranty, and the buyer's sole and exclusive remedy for such claim, shall be limited to furnishing without additional charge to the buyer, including transportation, a replacement for any of the Products found by MRC to be defective contrary to this limited warranty or, at MRC's sole option, to credit or refund to the buyer the purchase price paid therefore by the buyer.

CX-2745C at SKFR 210236.

FF448. The MRC limited warranty further states, inter alia, that it is subject to the following conditions:

The foregoing obligations of MRC shall be conditioned upon (i) buyer's notifying MRC in writing of the defect within 30 days of the discovery thereof and within one year from the date of sale of the Product to the buyer, (ii) the prompt forwarding of the affected Product to MRC's designated facility (freight prepaid), and (iii) MRC's laboratory examination of the returned Product and determination regarding the existence of any defect contrary to this limited warranty.

CX-2745C at SKFR 210236.

FF449. The MRC limited warranty also provides, in relevant part, as follows:

7.2 Limited Warranty on Sales to Customers. Distributor shall offer to sell, and will sell and distribute the Products with end-user agreements and instructions, if any, intact as shipped by MRC and subject to then current version of the Limited Warranty. In all events the foregoing Limited Warranty shall be deemed made to any and all persons or entities by MRC with respect to the Products.

CX-2745C at SKFR 210237.

FF450. Warranty claims for MRC, a part of SKF USA, are handled in the same manner as SKF USA warranty claims. Scheib, Tr. 6892:1-5.

FF451. MRC has never received a warranty claim on an SKF-marked spherical plain bearing sold by MRC. Bowen, Dep. Tr. 170 (November 7, 2003).

By RBC/Tyson to Unauthorized Distributors and End-user Customers

FF452. During the term of the license agreement, RBC provided a manufacturer's warranty on the tapered roller bearings it sold to its own customers (bearings which were etched with the SKF mark). Gostomski, Tr. 7133:15-23, 7136:17-7139:12; CX-2893 (RBC/Tyson warranty). The RBC warranty is displayed in its catalogs. Gostomski, Tr. 7136:23-7138:7; CX-2893. The RBC warranty extends downstream, both to distributor customers and to the subsequent end user. Gostomski, Tr. 7138:19-7139:12, 7151:2-7152:10, 7161:24-7162:7 (90-day period waived for bearing defects).

FF453. During the term of the license agreement, the tapered roller bearings manufactured by RBC and sold to the SKF USA Bearings unit and Chicago Rawhide were covered by the warranties provided by the SKF USA Bearings unit and Chicago Rawhide. Gostomski, Tr. 7136:6-16 (for bearings sold by RBC/Tyson to SKF USA, or other SKF entities, SKF USA or other SKF entity, not RBC, provides the warranty running from SKF USA or other SKF entity to its customer); CX-2893 (RBC/Tyson warranty).

FF454. Since the termination of the license agreement, the tapered roller bearings manufactured by RBC and sold to the SKF USA Bearings unit and Chicago Rawhide for resale have been covered by the warranties provided by the SKF USA Bearings unit and Chicago Rawhide. Gostomski, Tr. 7136:6-16 (for bearings sold by RBC/Tyson to SKF USA, or other SKF entities, SKF USA or other SKF entity, not

RBC, provides the warranty running from SKF USA or other SKF entity to its customer).

FF455. The warranty offered with the sale of SKF-marked bearings by RBC/Tyson is an RBC warranty that states as follows: "RBC warrants products for material and workmanship for a period not to exceed 90 days from shipment and for a value not to exceed purchase price. No other warranty is in effect." Gostomski, Tr. 7136:17-22, 7138:19-22, 7147:8-11, 7148:14-7149:7, 7150:20-22, 7151:2-10, 7152:10-7153:4, 7159:20-24; RX-0541C; CX-2893; RX-9111C.

FF456. RBC/Tyson does not offer or pass on to its customers for SKF-marked bearings the SKF USA warranty; the RBC/Tyson License Agreement does not require RBC to offer purchasers of SKF-marked bearings any warranty; and RBC does not require its distributor customers to provide any information to their customers about the RBC/Tyson warranty. Gostomski Tr. 7136:17-22, 7138:19-22, 7148:14-7149:7, 7150:11-22, 7153:19-23; RX-0541C; CX-2893; RX-9111C (RBC/Tyson Invoice with warranty terms).

By Authorized Distributors to Unauthorized Distributors and End-user Customers

FF457. Authorized industrial distributors are entitled to submit warranty claims on behalf of their end users to SKF USA under the SKF USA Bearings unit warranty. Scheib, Tr. 6943:14-6945:6. An end user can also submit a claim to an intermediate reseller, who then can submit the claim to the authorized distributor, who in turn submits the claim to SKF USA. Scheib, Tr. 6907:24-6908:6, 6912:1-10, 6928:1-4, 6940:15-6941:4, 6945:8-20 (warranty via reseller); [], Tr. 7217:14-7218:2 ([] sales to other distributors); [], Tr. 7216:6-13, 7226:7-14 (warranty claim from end user who purchased bearing from intermediate distributor); CX-2894C (warranty claim paperwork).

FF458. On or about January 2001, [], an authorized SKF USA distributor, presented a warranty claim to SKF USA on behalf of an end user who had purchased an SKF bearing from [], who had purchased the bearing from []. [] is not an authorized SKF industrial distributor. The end user returned the bearing to Bearing Headquarters, who returned it to []. [] returned the bearing to SKF USA for failure analysis. SKF USA accepted the return and the request for failure analysis on the same basis that it accepts all returns from its authorized distributors: it notified [] that if the failure analysis indicated that the problem was not with the bearing, but instead with the installation, lubrication, or maintenance of the bearing, that there would be a \$400 charge to [] for the failure analysis. If the failure analysis revealed that there was a problem with the bearing, then there would be no charge to []. SKF USA conducted the failure analysis, determined that the problem was in the installation or lubrication of the bearing, prepared a written report of its findings, and provided that

report to []. [], in turn, provided the report to [], so that [] could provide it to the end user. [] Tr. at 7216:6-13, 7226:7-14, 7229:18-7230:9, 7234:5-23; CX-2894C.

FF459. [] does not consider the [] matter to be a “warranty” claim, but rather as a matter of “customer service.” This matter, like all similar matters, is a case of a customer needing attention in the form of a bearing failure analysis that the customer is willing to pay for if the failure was his fault, and that would result in the customer’s receipt of a free bearing and no charge for the failure analysis if it was not his fault. [], Tr. 7249:18-7251:8.

FF460. Notwithstanding SKF USA’s warranty policy, there is no assurance that an unauthorized distributor or end-user will receive notice of an SKF USA warranty for an SKF-brand bearing that is purchased from an authorized distributor. As a case in point, [] purchased SKF-brand bearings from SKF USA-authorized distributor [] and received only a [] 60-day, “as-is” warranty notice, not a notice of an SKF USA warranty. [], Tr. 7335:14-7336:3; RX-9164C.

The Surplus Market

FF461. Bearings sold into surplus generally cannot be tracked. Dowley, Tr. 7748:1-19.

FF462. Purchases on the surplus market are generally made “as is.” Morrison, Tr. 7677:25-7678:10; Dowley, Tr. 7748:1-10.

FF463. Unless the bearing can be traced back to an authorized distributor, SKF USA generally does not provide a warranty on bearings sold into surplus. Morrison, Tr. 7682:18-23.

2. Product Recall Procedures

By SKF USA Bearings Unit to Unauthorized Distributors and End-user Customers

FF464. It is SKF USA’s policy to notify its direct customers of product recalls, regardless of whether they are resellers or end-users, or whether they are authorized or unauthorized distributors. Snyder, Tr. 6996:1-18, 6997:4-13.

FF465. It is SKF USA’s policy, where possible, to notify some customers of its direct customers of a product recall. Snyder, Tr. 6996:20-6997:3.

FF466. SKF USA has records only of sales that it makes to its direct customers (that is, unauthorized distributors to whom the Bearings Unit directly sells SKF bearings and SKF USA authorized distributors) and SKF USA cannot trace bearings that have

been delivered to its customers' customers. SKF USA relies on its direct customers for information concerning the volume of recalled bearings that have been sold by its direct customers to unauthorized distributors. Wilson, Tr. 2002:17-2003:21, 2013:15-17, Dowley, Tr. 7742:18-7743:5.

FF467. There is no evidence that the SKF USA Bearings unit has sold any recalled product to any reseller customer. Snyder, Tr. 6993:1-20.

FF468. During the period from January 1, 1997 to June 30, 2003, during which SKF USA sold [] worth of bearings to its authorized distributors and during which SKF USA initiated 18 bearing recalls, SKF USA was unable to prove one instance when an end-user customer or reseller customer of an authorized distributor was aware of such a recall. See, e.g., Gelke, Tr. 7356:2-12; [], Tr. 7410:16-19.

By SKF USA "Divisions"

By Chicago Rawhide to Unauthorized Distributors and End-user Customers

FF469. During the period from 1997 to the present, CR has had one instance of a recall involving a bearing sold by CR, which was not an SKF bearing but was packaged in a "bubble box" marked "SKF." Diggory, Tr. 7170:14-7172:21; CX-2855 at SKFR 200527; CX-2856 at SKFR 200529; CX-2857 at SKFR 20031; CX-2858 at SKFR 200533; CX-2859 at SKFR 200536; CX-2860 at SKFR 200538; CX-2861 at SKFR 200540; and CX-2901 at SKFR 210273.

FF470. In the single instance of a recall, CR generated notices of the recall that it distributed to the general public on CR's website and that it sent via direct mailings to its direct customers as well as to the customers of their customers. Diggory, Tr. 7172:22-7173:3.

By MRC to Unauthorized Distributors and End-user Customers

FF471. MRC has policies and procedures in place in the event that a recall of an SKF-marked spherical plain bearing is necessary, and those procedures are the same as SKF USA's procedures. Snyder, Tr. 6991:16-23; Kornblet, Tr. 7293:23-7294:7.

FF472. There has never been an MRC recall with respect to the SKF-marked spherical plain bearing that MRC sells. Snyder, Tr. 6992:3-5; Kornblet, Tr. 7293:23-7294:3.

By Authorized Distributors to Unauthorized Distributors and End-user Customers

FF473. The "big three" authorized distributors, Kaman, Motion and Applied, have written product recall procedures of their own that they follow as part of their quality

manuals, not an SKF procedure. Chaney, Tr. 7073:8-10, 7079:23-7080:8; CX-2889C (Motion); Kornblet, Tr. 7306:2-12.

FF474. On a number of occasions, SKF USA has recalled SKF bearings that included bearings sold to Motion Industries. Chaney, Tr. 7073:8-23. Motion has established procedures for handling product recalls, which procedures include notifying every Motion branch that has purchased a bearing subject to the recall. Chaney, Tr. 7073:8-23, 7077:3-7080:8; CX-2889C.

FF475. Motion's product recall procedures are entirely its own; it does not follow any SKF USA procedure; it treats bearing recall notices from all manufacturers, including SKF USA, the same way. Chaney, Tr. 7078:8-25, 7077:3-7078:16, 7086:2-20, 7101:13-7102:14; CX-2889C.

Sales of SKF-marked Bearings Under the RBC/Tyson License Agreement

FF476. If a bearing were made by RBC/Tyson, it would follow its own recall procedures, not those of SKF. Gostomski, Tr. 7147:8-11.

Surplus Market Sales

FF477. Unless the bearing can be traced to the surplus house, SKF generally cannot implement a product recall on bearings sold into surplus. Morrison, Tr. 7682:24-7683:3.

3. Post-Sale Technical Support

By SKF USA Bearings Unit

FF478. SKF USA's SKF Bearings unit provides technical and engineering support to end users that purchase authorized SKF bearings from SKF USA's Bearings unit, or from unauthorized distributor customers (including those in the surplus market) who have purchased a bearing initially placed into the stream of commerce by SKF USA. Further, the same technical support is provided by SKF USA for SKF and non-SKF bearings that it sells. Snyder, Tr. 6966:7-6968:5, 7007:24-7012:19, 7013-25, 7050-57.

FF479. SKF USA provides technical support free of charge with sales of SKF bearings (and non-SKF bearings). Support is provided in connection with all sales, including sales to authorized resellers, unauthorized resellers and authorized distributors, who then sell to end users. Snyder, Tr. 6970:16-6971:1, 6988:3-11, 7030:6-7031:5, 7033:16-7034:9; CPX-315C.

- FF480.** There is no direct evidence that SKF USA ever refused technical support to an unauthorized distributor (or to a subsequent end-user purchaser) who purchased an SKF bearing from an authorized industrial distributor or any other authorized reseller. See Respondents' Objections to Complainant SKF USA Inc.'s Final Proposed Findings of Fact on Remand at 82.
- FF481.** The technical support hotline, which is a service provided free of charge by the SKF USA Bearings unit, has its number posted on the SKF USA website and is available to end users who have purchased from SKF USA customers, whether that customer is an authorized distributor or not. The hotline is also available to end users who purchase through intermediate resellers, if the bearing was originally sold by SKF USA or one of its authorized distributors or customers. The evidence demonstrates that OES accounts, reseller customers and end users use the hotline and receive technical support from SKF USA. Snyder, Tr. 6966:-6988:5, 7030:6-7031:5, 7033:16-7034:9 CX-2781C; CX-2814C; CPX-315C.
- FF482.** "On site failure analysis" conducted by SKF USA industry specialists is distinct from the failure analysis offered by SKF USA for a \$400 fee, which is refunded only if SKF USA is found to be at fault. Snyder, Tr. 6970:6-6971:1.
- FF483.** [] of [], a specialty distributor, is aware of SKF's technical support and assumes that it would be available if needed, but has never used SKF's technical support. [], Tr. 7656:21-7657:10.
- FF484.** SKF USA has provided technical hotline assistance to entities that are not authorized industrial distributors but have been identified as reseller customers. These entities were making inquiries to the hotline on behalf of end users. The entities include distributor customers of authorized distributors and reseller customers of the SKF USA Bearings unit; specific names include the following: []. [], Tr. 1118:22-1119:19; Snyder, Tr. 7007:24-7012:19, CX-2814C.
- FF485.** SKF has provided technical support to [], a pillow block manufacturer that Respondents contend to be an unauthorized distributor. Snyder, Tr. 6988:15-6989:25.
- FF486.** [], an unauthorized distributor, was able to get technical assistance from SKF on behalf of [], a customer. [], Tr. 7603:16-7606:6.
- FF487.** Although [] testified that the bearings for which he got assistance were not SKF bearings and that he did not reveal his customer's name to SKF, the papers forwarded by [] to [] indicate that the bearings at issue were SKF bearings, and that [] did disclose [] name to SKF. RX-2116C; [], Tr. 1387:2-17 (stating that [] sent three SKF bearings to Jim Senkel of SKF for analysis: one directly, and two through []).

- FF488.** Mr. Acuna of Larokka, which was registered as an OE account of SKF, testified that he had never received a request for technical services for any of the SKF bearings that he had re-sold. Acuna, Tr. 7803:2-5.
- FF489.** Mr. Acuna confirmed via the video that he took that SKF's technical support was available on authorized sales and that "everybody knows" about the SKF 800 number. Acuna, Tr. at 7821:4-8, 7824:9-12 ("If you buy legit from an authorized distributor, you will get that [bundle of services]. If you're buying from a distributor that's not authorized, SKF is not going to support that.") (from Acuna video CPX-315C).
- FF490.** On-site technical support and literature is available to end users of direct SKF Bearings unit customers and of end-user customers of intermediate resellers. Snyder, Tr. 6967:3-14, 7038:13-25, 7053:12-7054:4; CPX-315C.
- FF491.** SKF USA personnel would make a post-sale customer visit for several reasons, including applications assistance, joint calls between SKF salespersons and SKF application engineers, or to assist with a performance problem. Bloch, Tr. 2651-52; Kellom, Tr. 1363:12-1364:19; Headrick, Tr. 5532:7-5533:9; Snyder, Tr. 184:6-185:1.
- FF492.** SKF USA application engineers would also visit an unauthorized distributor, intermediate reseller, or their end-user customers. Snyder, Tr. 6967:5-9, 18-21 7038:10-25.
- FF493.** SKF USA's industry specialists have not denied an end user a customer visit because the end user purchased through alternative channels. Snyder, Tr. 6968:6-6969:10.
- FF494.** SKF USA's training is also available to all companies in the chain of authorized sales. Snyder, Tr. 6969:7-8.
- FF495.** Unless the bearing can be traced back to an authorized distributor, SKF does not generally provide technical support to bearings sold into surplus. Snyder, Tr. 6973:6-16 (stating that if SKF can verify that the bearing was purchased through authorized channels, all of SKF's technical support would be provided), 7013:20-7014:3 (stating that hotline services would be provided only to customers and those who buy through authorized distributors).
- FF496.** Although anyone can call the SKF hotline, any caller is not ipso facto entitled to receive technical assistance. Snyder, Tr. 7017:8-7019:12.
- FF497.** Mr. McGuire conceded that while his "knowledge of the whole customer base is greater" than Jim Senkel of SKF USA, a paper mill industry specialist, Mr. Senkel's

knowledge of paper mills is greater because “the paper mill industry . . . that’s been his whole life, is paper mill support.” McGuire 7607:18-7608:6. Mr McGuire also conceded that it is his opinion “that there’s not a lot of technical support from SKF, other than the ones where they have industry specialists.” McGuire, Tr. 7608:8-10.

By SKF USA Divisions

- FF498.** For all bearings that it sells (SKF and non-SKF), CR provides a variety of post-sale technical support for no fee to its customers, to its customers’ customers, and to end users. Diggory, Tr. 5708:17-5709:7 (CR trains its customers on the use of published materials and the CR hotline), 5714:17-5716:5 (CR’s customers and end users have received technical support from CR), at 7181 (CR self-study guide (CX-2877) provided to the public free of charge); Hogan, Tr. 7265:18-7266:8, 7271:8-10 (CR’s training and/or on-site visits to customer and end users), Hogan, Tr. 7266:9-7271:17, 7273:3-7274:16 (CR hotline).
- FF499.** In the majority of cases, CR’s decision whether to provide on-site technical visits to its customers depends on the size of the customer or whether a customer has had multiple problems. Diggory, Tr. 7186:19-7187:6.
- FF500.** CR offers technical hotline advice to its distributor customers (who call in on behalf of their customers), and to end users, regarding all products sold by CR, including SKF bearings and non-SKF bearings. Diggory, Tr. 5714:14-17, 7185:18-24 (CR hotline); Hogan, Tr. 7266:9-7271:17, 7273:3-7274:16 (distributor and end user calls); CX-2874C at SKFR 204017, 204092 (CR hotline call logs indicate end user calls).
- FF501.** The CR technical hotline, which receives numerous calls a day, has a staff of technically trained product managers. Diggory, Tr. 7187:8-10; Hogan, Tr. 7266:9-7271:17, 7273:3-7274:16 (call examples); CX-2874C (hotline call log).
- FF502.** The CR technical hotline is accessed through a referral from the customer service toll-free number, which handles “catalog” type questions itself, but transfers “technical” calls to the product managers. Diggory, Tr. 7208:8-22; Hogan, Tr. 7272:10-7273:1, 7275:1-12 (screening).
- FF503.** The toll-free number is set forth on CR’s website, is listed in CR’s catalogs, and is otherwise included in CR’s advertising and promotional materials. Diggory, Tr. 7187:11-16, 7210:9-15; Hogan, Tr. 7274:21-7275:6.
- FF504.** When necessary, CR will call and use the SKF USA Bearings unit technical hotline to better service inquiries from CR customers and end users. Hogan, Tr. 7271:11-17, 7275:13-25 (CR calls to SKF hotline).

- FF505.** SKF has identified numerous instances of distributors and end-users utilizing Chicago Rawhide's technical hotline. Hogan, Tr. 7266:-7271:17; CX-2874C; Diggory, Tr. 7179:4-8.
- FF506.** Chicago Rawhide personnel have conducted on-site technical support. Hogan, Tr. 7266:9-7271:17.
- FF507.** CR also has access to all other technical resources (including human resources) of the SKF Group, in order to better service CR's customers and end users. Diggory, Tr. 5715:14-5716:5 (CR technical support personnel have access to all of SKF's technical support, including access to all SKF proprietary data of the SKF Group companies), 7209:19-25 (CR uses SKF USA's training capabilities).
- FF508.** The CR catalogs exist in both hard copy and electronic versions and are available at end user points of purchase. Diggory, Tr. 7191:8.
- FF509.** The CR website contains more than one thousand pages of information. Diggory, Tr. 4760:8-19 (CR's website is about 1000 pages and contains installation and technical information on all products, including bearings); RX-2152.
- FF510.** The website address is shown on CR's packaging for bearings, as well as various advertising/promotional materials that CR publishes and makes available. Diggory, Tr. 7210:9-15; RPX-2016.
- FF511.** CR provides bearing training to its customers, their customers, and end users. Hogan, Tr. 7265:18-7266:11, 7271:18-24 (training and/or on-site visits).
- FF512.** CR bearing training includes: a free, 80-page self-study guide with a test sent into CR for grading and a certificate of completion (available to and used by end users, jobbers and distributors) Diggory, Tr. 5715:5-13, 7179:23-7181:11 (study guide available to the public); CX-2877 (study guide); and either individual or group "on-site" training. Hogan, Tr. 7266, 7271 (on-site training); CX-2877 (study guide), CR's Roller & Ball Bearing Self-Study Program Catalog is available to non-customers of CR, free of charge. Diggory Tr. 7178:23-7179:3, 7188:2-9; CX-2877.
- FF513.** CR has made wide use of SKF USA's training capabilities. Diggory, Tr. 7209:19-25.
- FF514.** The MRC application engineering group provides technical support to customers. Snyder, Tr. 6965:4-16, 6971-73.
- FF515.** MRC provides on-site technical support to MRC customers. Snyder, Tr. 6971:2-6.

FF516. MRC does not require its authorized distributors to provide their customers with information about MRC's hotline. McGuire, Tr. 7538:9-7539:15; Gelke, Tr. 7356:22-7358:3, 7358:20-7359:12 (no communications on the topic or requirements passed down).

FF517. The Precision subunit of SKF USA has access to the SKF Bearings unit's technical expertise. Snyder, Tr. at 6965:20-6966:6.

By Authorized Distributors to Unauthorized Distributors and End User Customers

FF518. Although [] has never asked an SKF representative or field engineer to visit one of its customers, [] testified that he knows that SKF USA has industry specialists and that those industry specialists provided technical support for [] and its customers many times. [], Tr. 7236:15-25-7237:16.

FF519. Kaman provides technical support to all of its customers. Distributor customers who seek technical assistance (either for themselves or on behalf of one of their own customers) are treated the same way as end user customers. Mayer, Tr. 7468:2-7473:18 (availability of technical services).

FF520. With respect to the provision of technical support, Motion treats all of its customers equally. Distributor customers who seek technical assistance (either for themselves or on behalf of one of their own customers) are treated the same way as end user customers. Motion will make use of the SKF USA hotline to answer questions for distributor customers (including questions being presented on behalf of the distributor's customer). Chaney, Tr. 7070:13-7072:1.

FF521. Precision Industries is familiar with SKF USA's post-sale technical support that it offers for its bearings. Circo, Tr. 2352:11-15.

FF522. SKF USA provides technical support to Emerson Power Transmission, including application and engineering assistance. Snyder, Tr. 6989:17-25.

FF523. [] of [] testified at the original hearing that he, as a distributor customer of authorized distributors, had received technical assistance from authorized distributors. [], Tr. 1153:10-1154:1 (unauthorized distributor [] received technical support from SKF USA through the authorized distributor that sold the product to []).

Through RBC/Tyson Bearing Company License Agreement and Passed on to End User Customers

- FF524.** The post-sale technical support provided by RBC includes technical information on bearings at the customer's request, which assistance covered fields like the review of bearing design for an application, and advice as to which bearings should be used for an application. Gostomski, Tr. 7131:1-6, 7139:16-22, 7146:9-18, 7159:20-7160:3.
- FF525.** RBC's post-sale technical support is provided by trained engineers, through telephone, e-mail, or correspondence. Gostomski, Tr. 7140:14-7141:3.
- FF526.** RBC makes this technical support directly available to end users. Gostomski, Tr. 7140:16-7141:3.
- FF527.** RBC has received calls from OEMs that purchased bearings of a particular size, posing questions about how to improve the performance and/or life of the bearings. Gostomski, Tr. 7140:2-10, 7141:4-22.
- FF528.** RBC/Tyson's license agreement with SKF USA [
]. RX-0541C; McGuire, Tr. 7536:21-7537:1, 7560:24-7561:3, 7589:25-7590:4; Gelke, Tr. 7356:22-7358:3, 7358:20-7359:12 (no communications on the topic or requirements passed down).
- FF529.** SKF did not provide technical support with respect to sales of SKF-marked bearings to Tyson customers. Gostomski, Tr. 7159:20-24.
- FF530.** RBC/Tyson provided technical support to the customers of SKF with respect to the SKF-marked bearings it sells to SKF. Gostomski, Tr. 7159:25-7160:3.
- FF531.** Particularly with respect to on-site post-sale technical support and the SKF hotline, SKF USA has demonstrated that post-sale technical support was either accorded to or knowingly available to end user customers who purchased SKF bearings from unauthorized distributors who in turn acquired SKF bearings through authorized channels. See FF. 425, FF. 428, FF. 431, FF. 432, FF. 433, FF. 434, FF. 435, FF. 436, FF. 460, FF. 461, FF. 464, FF. 465, FF. 466, FF. 468, FF. 469.


* * *

Pursuant to 19 C.F.R. § 210.38(d), the record in this Remand Proceeding is hereby CERTIFIED to the Commission. The final Remand exhibit lists of the parties are appended hereto as Appendix B.

Within seven days of the date of this document, each party shall submit to the office of the Administrative Law Judge a statement as to whether or not it seeks to have any portion of this document deleted from the public version. The parties' submissions may be made by facsimile and/or hard copy by the aforementioned date.

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

SO ORDERED


Delbert R. Terrill, Jr.
Administrative Law Judge

APPENDIX A
JOINT STIPULATIONS 19-23