

In the Matter of

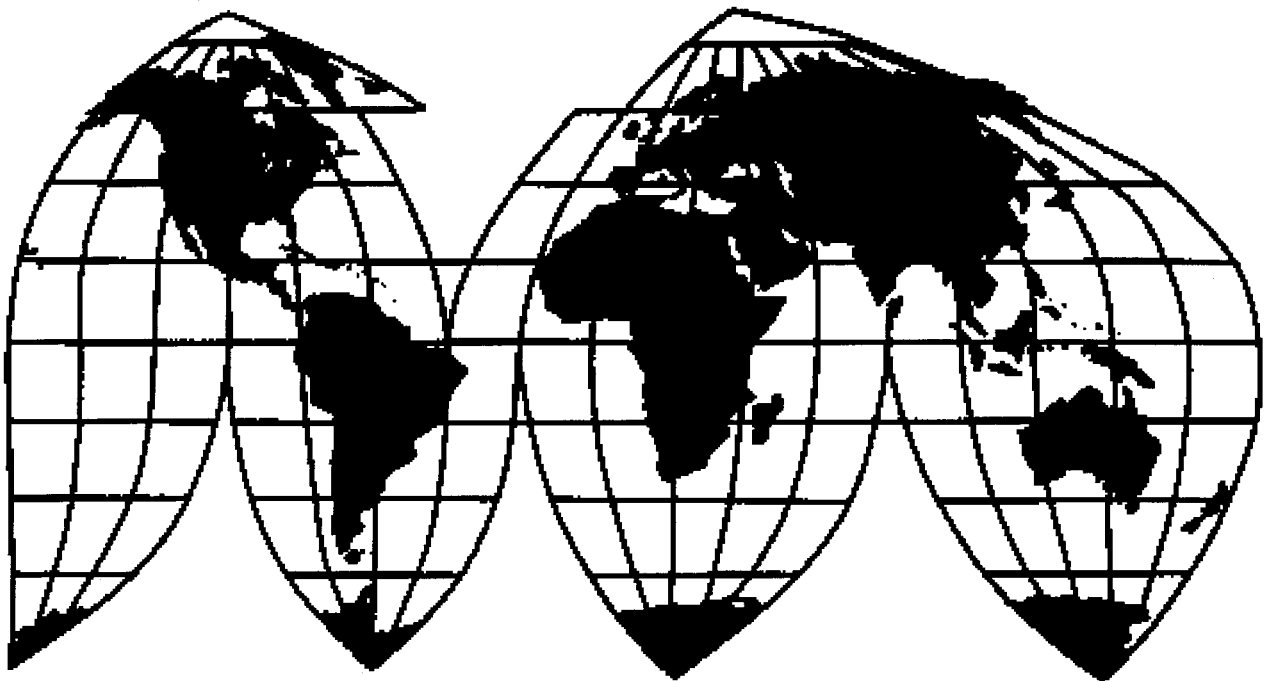
**Certain Agricultural
Tractors, Lawn Tractors,
Riding Lawnmowers,
and Components Thereof**

Investigation No. 337-TA-486

Publication 3625

August 2003

U.S. International Trade Commission



U.S. International Trade Commission

COMMISSIONERS

Deanna Tanner Okun, Chairman
Jennifer A. Hillman, Vice Chairman
Marcia E. Miller
Stephen Koplan

**Address all communications to
Secretary to the Commission
United States International Trade Commission
Washington, DC 20436**

U.S. International Trade Commission

Washington, DC 20436

In the Matter of

Certain Agricultural Tractors, Lawn Tractors, Riding Lawnmowers, and Components Thereof



Publication 3625

August 2003

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

RECEIVED
OFFICE OF THE SECRETARY
U.S. INTERNATIONAL TRADE COMMISSION
03 JUL -2 10:52

In the Matter of)
)
)

CERTAIN AGRICULTURAL TRACTORS,)
LAWN TRACTORS, RIDING LAWNMOWERS,)
AND COMPONENTS THEREOF)

Inv. No. 337-PA-486

NOTICE OF COMMISSION ISSUANCE OF LIMITED EXCLUSION ORDER AND
TERMINATION OF INVESTIGATION

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has issued a limited exclusion order and terminated the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Clara Kuehn, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3012. Copies of the ALJ's 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 February 10, 2003, based on a complaint and motion for temporary relief filed by New Holland North America, Inc. ("complainant") of New Holland, PA. 68 *Fed. Reg.* 6772 (Feb. 10, 2003). The complaint 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 tractors and components thereof by reason of infringement of New Holland's trade dress. The notice of investigation identified three respondents: Beiqi Futian Automobile Co., Ltd. ("Futian") of Beijing, China; Cove Equipment, Inc. ("Cove") of Conyers Georgia; and Northwest Products, Inc. ("Northwest") of Auburn, Washington. *Id.* On March 19, 2003, the presiding administrative

law judge (“ALJ”) issued an initial determination (“ID”) (Order No. 6) finding respondent Futian in default. On March 31, 2003, the ALJ issued an ID (Order No. 8) amending the complaint and notice of investigation to clarify the identity of Cove and to add Brian Navalinsky of Conyers, Georgia as an additional respondent. On April 1, 2003, the ALJ issued an ID (Order No. 9) terminating respondents Cove and Navalinsky on the basis of a consent order. Those IDs were not reviewed by the Commission.

On April 2, 2003, complainant filed a declaration pursuant to section 337(g)(1) and Commission rule 210.16(c)(1) seeking immediate entry of permanent default relief against respondent Futian. In the declaration, complainant stated that it sought a limited exclusion order directed to all accused agricultural tractors, lawn tractors, and riding lawn mowers and components thereof made or imported into the United States by or for respondent Futian or any affiliated company, and that it also sought a cease and desist order directed to respondent Futian and its U.S. affiliates or agents. Complainant further stated that it did not seek a general exclusion order.

On April 8, 2003, the ALJ issued an ID (Order No. 10) terminating the investigation as to respondent Northwest based on a consent order. In his ID, the ALJ noted that all respondents in the investigation had been found to be in default or had reached settlements with complainant. He stated that “[i]f the Commission adopts [the ID] or otherwise terminates the investigation as to Northwest and also terminates the investigation as to the other respondents, no respondent will remain in this investigation. Therefore, any outstanding motions (including Complainant’s Motion for temporary relief) will be moot, and this investigation will be terminated in its entirety.” Order No. 10 at 5. No petitions for review of the ID were filed. On May 2, 2003, the Commission issued a notice stating that the Commission had determined not to review the ALJ’s ID and requesting briefing on the issues of remedy, the public interest, and bonding. 68 *Fed. Reg.* 23,497.

On May 16, 2003, the Commission investigative attorney (“IA”) submitted his brief on remedy, the public interest, and bonding. On the same day, complainant requested that the Commission consider complainant’s April 2, 2003, declaration seeking immediate entry of default relief as complainant’s submission on the issues of remedy, the public interest, and bonding. On May 23, 2003, complainant and the IA filed reply briefs. On May 27, 2003, complainant filed a motion for leave to file a sur-reply in response to the IA’s reply submission. On May 29, 2003, the IA filed a motion for leave to comment on complainant’s reply submission. No briefs were filed by any other person or government agency.

The Commission determined to grant the motions for leave. The Commission found that each of the statutory requirements of section 337(g)(1)(A)–(E), 19 U.S.C. § 1337(g)(1)(A)–(E), has been met with respect to defaulting respondent Futian. Accordingly, pursuant to section 337(g)(1), 19 U.S.C. § 1337(g)(1), and Commission rule 210.16(c), 19 C.F.R. § 210.16(c), the Commission presumed the facts alleged in the complaint to be true. The Commission determined that the appropriate form of relief in this investigation is a limited exclusion order prohibiting the unlicensed entry of agricultural tractors, lawn tractors, riding lawnmowers, and components thereof that infringe New Holland's trade dress as described in the complaint that are manufactured abroad by or on behalf of, or imported by or on behalf of, Futian. The Commission declined to infer that the defaulting foreign respondent Futian maintains commercially significant inventory in the United States and, consequently, determined not to issue a cease and desist order. The Commission further determined that the public interest factors enumerated in section 337(g)(1), 19 U.S.C. § 1337(g)(1), do not preclude issuance of the limited exclusion order. Finally, the Commission determined that the bond under the limited exclusion order during the Presidential review period shall be in the amount of 100 percent of the entered value of the imported articles.

This action is taken under the authority of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, and section 210.16(c) of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.16(c).

By order of the Commission.


Marilyn R. Abbott
Secretary to the Commission

Issued: July 1, 2003

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN AGRICULTURAL
TRACTORS, LAWN TRACTORS,
RIDING LAWNMOWERS, AND
COMPONENTS THEREOF**

Inv. No. 337-TA-486

LIMITED EXCLUSION ORDER

The Commission instituted this investigation on February 10, 2003, based on a complaint filed on December 27, 2002, by complainant New Holland North America, Inc. ("New Holland") of New Holland, Pennsylvania, against respondents Beiqi Futian Automobile Co., Ltd. ("Futian"), Northwest Products, Inc., and Cove Equipment. 68 *Fed. Reg.* 6772 (Feb. 10, 2003). The complaint was subsequently amended to substitute "Cove Communications, Inc. d/b/a Cove Equipment, Inc." for "Cove Equipment," and to add as an additional respondent Brian Navalinsky. The complaint alleged violations of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain agricultural tractors, lawn tractors, riding lawnmowers, and components thereof by reason of infringement of New Holland's trade dress. New Holland alleged in its complaint that the elements of its asserted trade dress include use of the color —

blue, use of the colors white and black, the particular placement and juxtaposition of the blue, white and black colors on the tractors and their wheels, the placement of all lettering and numbering in white against a black background in the same location on the side of the hood, and design features, namely, the silhouette, or profile, of the hood, and horizontal curved flares on the sides of the hood.

Complaint, ¶ 8.

On March 5, 2003, complainant moved pursuant to section 337(g) and Commission rule 210.16 for issuance of an order directing respondent Futian to show cause why it should not be found in default. On March 7, 2003, the presiding administrative law judge ("ALJ") issued Order No. 4, which ordered Futian to show cause by March 14, 2003, why it should not be found in default. Order No. 4 noted Futian's failure to respond to the complaint and notice of investigation or otherwise to acknowledge the existence of this proceeding. Futian did not respond to the order to show cause. On March 19, 2003, the ALJ issued an initial determination ("ID") (Order No. 6) finding Futian in default, and the Commission determined not to review that ID.

On April 1, 2003, the ALJ issued an ID (Order No. 9) terminating respondents Cove and Navalinsky on the basis of a consent order. The ID was not reviewed by the Commission.

On April 2, 2003, complainant filed a declaration pursuant to section 337(g)(1) and Commission rule 210.16(c)(1) seeking the immediate entry of permanent default relief against respondent Futian.

On April 8, 2003, the ALJ issued an ID (Order No. 10) terminating the investigation as to respondent Northwest based on a consent order. In his ID, the ALJ noted that all respondents in the investigation had been found to be in default or had reached settlements with complainant. He stated that “[i]f the Commission adopts [the ID] or otherwise terminates the investigation as to Northwest and also terminates the investigation as to the other respondents, no respondent will remain in this investigation. Therefore, any outstanding motions (including Complainant’s Motion for temporary relief) will be moot, and this investigation will be terminated in its entirety.” Order No. 10 at 5. No petitions for review of the ID were filed.

On May 2, 2003, the Commission issued a notice stating that it had determined not to review the ALJ’s ID, and requested briefing on the issues of remedy, the public interest, and bonding. 68 *Fed. Reg.* 23,497.

On May 16, 2003, the Commission investigative attorney (“IA”) submitted his briefing on remedy, the public interest, and bonding. On the same day, complainant requested that the Commission consider complainant’s April 2, 2003, declaration seeking immediate entry of default relief as its submission on the issues of remedy, the public interest, and bonding. On May 23, 2003, complainant and the IA filed reply submissions. On May 27, 2003, complainant filed a motion for leave to file a sur-reply in response to the IA’s reply submission. On May 29, 2003, the IA filed a motion for leave to comment on complainant’s reply submission. No briefs were filed by any other person or government agency. The Commission has determined to grant the motions for leave.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission found that each of the statutory requirements of section 337(g)(1)(A)–(E), 19 U.S.C. § 1337(g)(1)(A)–(E), has been met with respect to defaulting respondent Futian. Accordingly, pursuant to section 337(g)(1), 19 U.S.C. § 1337(g)(1), and Commission rule 210.16(c), 19 C.F.R. § 210.16(c), the Commission presumes the facts alleged in the complaint to be true.

The Commission has determined that the appropriate form of relief in this investigation is a limited exclusion order prohibiting the unlicensed entry of agricultural tractors, lawn tractors, riding lawnmowers, and components thereof that infringe New Holland’s trade dress as described in the complaint that are manufactured abroad by or on behalf of, or imported by or on behalf of, Futian. The Commission has declined to infer that the defaulting foreign

respondent Futian maintains commercially significant inventory in the United States and, consequently, has determined not to issue a cease and desist order.

The Commission has further determined that the public interest factors enumerated in section 337(g)(1), 19 U.S.C. § 1337(g)(1), do not preclude issuance of the limited exclusion order, and that the bond during the Presidential review period shall be in the amount of 100 percent of the entered value of agricultural tractors, lawn tractors, riding lawnmowers, and components thereof that are subject to this Order.

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

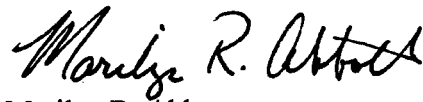
1. Complainant's motion for leave to file a sur-reply and the IA's motion for leave to comment are granted.
2. Agricultural tractors, lawn tractors, riding lawnmowers, (collectively "tractors") and components thereof that infringe New Holland's trade dress that are manufactured abroad by or on behalf of, or imported by or on behalf of, Beiqi Futian Automobile Co., Ltd., or any of its affiliated companies, parents, subsidiaries, contractors, licensees, or other related business entities, or their successors or assigns, whether assembled or unassembled, are excluded from entry for consumption into the United States, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, except under license of the trade dress owner or as provided by law.
3. For the purpose of assisting the Bureau of Customs and Border Protection in the enforcement of this Order, and without in any way limiting the scope of the Order, the Commission has attached to this Order a color copy of the photographs provided by New Holland in its complaint which depict New Holland tractors incorporating the asserted trade dress described above.
4. Agricultural tractors, lawn tractors, riding lawnmowers, and components thereof that are excluded by paragraph 1 of this Order are entitled to entry for consumption into the United States, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, under bond in the amount of 100 percent of entered value pursuant to subsection (j) of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337(j), from the day after this Order is received by the President until such time as the President notifies the Commission that he approves or disapproves this action but, in any event, not later than 60 days after the date of receipt of this action.
5. In accordance with 19 U.S.C. § 1337(1), the provisions of this Order shall not apply to agricultural tractors, lawn tractors, riding lawnmowers, and components thereof that are imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.

6. The Commission may modify this Order in accordance with the procedures described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

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

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

By Order of the Commission.

A handwritten signature in cursive script that reads "Marilyn R. Abbott".

Marilyn R. Abbott
Secretary to the Commission

Issued: July 2, 2003



NEW HOLLAND TL70



NEW HOLLAND TS90



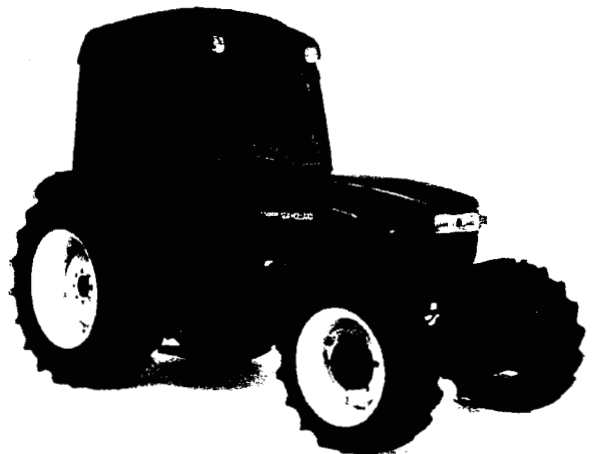
NEW HOLLAND LS55



NEW HOLLAND TJ450



NEW HOLLAND TC33D



NEW HOLLAND TN95F

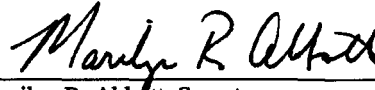
Examples of New Holland Trade Dress Tractors

**CERTAIN AGRICULTURAL TRACTORS, LAWN TRACTORS
RIDING LAWNMOWERS, AND COMPONENTS THEREOF**

337-TA-486

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF COMMISSION ISSUANCE OF LIMITED EXCLUSION ORDER AND TERMINATION OF INVESTIGATION** was served upon the following parties, via first class mail and air mail where necessary, on July 2, 2003.



Marilyn R. Abbott, Secretary
U.S. International Trade Commission
500 E. Street, SW - Room 112
Washington, DC 20436

**ON BEHALF OF NEW HOLLAND NORTH
AMERICA, INC.:**

Mark Boland, Esq.
Cynthia Clarke Weber, Esq.
Sughrue Mion, PLLC
2100 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20037

Sturgis M. Sobin, Esq.
Charles F.B. McAleer, Jr.
Miller and Chevalier Chartered
655 Fifteenth Street, NW
Suite 900
Washington, DC 20005-5701

ON BEHALF OF COMMISSION:

Clara Kuehn, Esq.
Advisory Attorney
Office of the General Counsel
500 E Street, NW - Suite 707-U
Washington, DC 20436

David H. Hollander, Jr., Esq.
Commission Investigative Attorney
Office of Unfair Import Investigations
500 E Street, SW - Room 401-K
Washington, DC 20436

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington D.C. 20436

In the Matter of)
)
)

CERTAIN AGRICULTURAL TRACTORS.)
LAWN TRACTORS, RIDING LAWNMOWERS,)
AND COMPONENTS THEREOF)
)

Inv. No. 337-TA-486

CONFIDENTIAL INFORMATION
DELETED

COMMISSION OPINION ON REMEDY, THE PUBLIC INTEREST, AND BONDING

PROCEDURAL BACKGROUND

The Commission instituted this investigation on February 10, 2003, based on a complaint and motion for temporary relief filed on behalf of New Holland North America, Inc. ("complainant") of New Holland, Pennsylvania. 68 *Fed. Reg.* 6772 (Feb. 10, 2003). The complaint 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 tractors and components thereof by reason of infringement of New Holland's trade dress. The notice of investigation identified three respondents: Beiqi Futian Automobile Co., Ltd. ("Futian") of Beijing, China; Cove Equipment, Inc. ("Cove") of Conyers Georgia; and Northwest Products, Inc. ("Northwest") of Auburn, Washington. *Id.*

On March 5, 2003, complainant moved pursuant to section 337(g) and Commission rule 210.16 for issuance of an order directing respondent Futian to show cause why it should not be found in default. On March 7, 2003, the presiding administrative law judge ("ALJ") issued Order

03
MAY 13 11:06
RECEIVED
OFFICE OF THE
US ITC

No. 4, which ordered Futian to show cause by March 14, 2003, why it should not be found in default. Order No. 4 noted Futian's failure to respond to the complaint and notice of investigation or otherwise to acknowledge the existence of this proceeding. Futian did not respond to the order to show cause. On March 19, 2003, the ALJ issued an initial determination ("ID") (Order No. 6) finding Futian in default pursuant to Commission rules 210.16(a) and (b), and ruling that it had waived its right to appear, to be served with documents, and to contest the allegations at issue in the investigation. On March 25, 2003, the Commission determined not to review that ID.

On March 31, 2003, the ALJ issued an ID (Order No. 8) amending the complaint and notice of investigation to clarify the identity of respondent Cove and to add Brian Navalinsky of Conyers, Georgia as an additional respondent. On April 1, 2003, the ALJ issued an ID (Order No. 9) terminating respondents Cove and Navalinsky on the basis of a consent order. Those IDs were not reviewed by the Commission.

On April 2, 2003, complainant filed a declaration¹ pursuant to section 337(g)(1) and Commission rule 210.16(c)(1) seeking the immediate entry of permanent default relief against respondent Futian. In the declaration, complainant stated that it sought a limited exclusion order directed toward all accused agricultural tractors, lawn tractors, and riding lawn mowers and components thereof made or imported into the United States by or for respondent Futian or any affiliated company, and that it also sought a cease and desist order directed to respondent Futian

¹The declaration, captioned "Complainant New Holland North America, Inc.'s Declaration Seeking Entry of Immediate Relief Against Respondent Beiqi Futian Automobile Co., Ltd., and for Expedited Consideration," was accompanied by a memorandum of law ("complainant's memorandum"), a proposed limited exclusion order, and a proposed cease and desist order.

and its U.S. affiliates or agents. Complainant further stated that it did not seek a general exclusion order. It requested that the Commission enter the permanent default relief sought by May 12, 2003, which is the date the Commission would have been statutorily required to have issued any temporary relief in this investigation.²

On April 8, 2003, the ALJ issued an ID (Order No. 10) terminating the investigation as to respondent Northwest based on a consent order. In his ID, the ALJ noted that all respondents in the investigation had been found to be in default or had reached settlements with complainant. He stated that “[i]f the Commission adopts [the ID] or otherwise terminates the investigation as to Northwest and also terminates the investigation as to the other respondents, no respondent will remain in this investigation. Therefore, any outstanding motions (including Complainant’s Motion for temporary relief) will be moot, and this investigation will be terminated in its entirety.” Order No. 10 at 5. No petitions for review of the ID were filed. On May 2, 2003, the Commission issued a notice stating that it had determined not to review the ALJ’s ID,³ and requested briefing on the issues of remedy, the public interest, and bonding. 68 *Fed. Reg.* 23,497.

On May 16, 2003, the Commission investigative attorney (“IA”) filed his submission on remedy, the public interest, and bonding. On the same day, complainant requested that the Commission consider complainant’s April 2, 2003, declaration seeking immediate entry of default relief as its submission on the issues of remedy, the public interest, and bonding. On May

²Complainant acknowledged that the time period provided in Commission rule 210.66 “applies only to motions for temporary relief.” Complainant’s declaration at 3.

³Given that the Commission did not review the ID, complainant’s characterization of its motion for temporary relief as “pending” is incorrect. *See* Complainant’s reply at 3; complainant’s sur-reply at 1 n1.

23. 2003. complainant and the IA filed reply submissions. On May 27, 2003, complainant filed a motion for leave to file a sur-reply in response to the IA's reply submission. On May 29, 2003, the IA filed a motion for leave to comment on complainant's reply submission. No briefs were filed by any other person or government agency.

DISCUSSION

A. Motions for Leave

Complainant and the IA request leave to make additional filings in order to address new issues raised in the reply submissions. Complainant characterizes the new issue as the IA's objection to language in complainant's proposed limited exclusion order as not typically included in such orders. The IA seeks to comment on changes that complainant made to complainant's proposed limited exclusion order in complainant's reply submission. We exercise our discretion and grant the motions for leave to respond.

B. Remedy

Section 337(g)(1) of the Tariff Act of 1930 provides that —

[i]f —

- (A) a complaint is filed against a person under [section 337];
- (B) the complaint and a notice of investigation are served on the person;
- (C) the person fails to respond to the complaint and notice or otherwise fails to appear to answer the complaint and notice;
- (D) the person fails to show good cause why the person should not be found in default; and
- (E) the complainant seeks relief limited solely to that person;

the Commission shall presume the facts alleged in the complaint to be true and shall, upon request, issue an exclusion from entry or a cease and desist order, or both, limited to that person unless, after considering the effect of such exclusion or order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the Commission finds that such exclusion or order should not be issued.

19 U.S.C. § 1337(g)(1). Each of the statutory prerequisites (A) through (E) to issuance of limited relief against respondent Futian have been met in this investigation.

Complainant acknowledges that "the Commission has broad discretion in selecting the form, scope, and extent of the remedy in a section 337 proceeding." Complainant's memorandum at 9 (citing *Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles*, Inv. No. 337-TA-337 (Remand), Commission Opinion (Sept. 1997) at 47; *Hyundai Electronics Industries, Co. v. U.S. Int'l Trade Comm'n.* 899 F.2d 1204 (Fed. Cir. 1990)). Although both complainant and the IA request that the Commission issue a limited exclusion order in this investigation, they disagree as to the scope of such an order. In addition, complainant requests issuance of a cease and desist order, but the IA opposes that request.

1. Limited Exclusion Order

Complainant and the IA disagree as to the scope of the limited exclusion order. Unlike complainant's proposed order, the IA's proposed limited exclusion order would not cover tractors manufactured abroad by Futian's contractors or licensees, or imported by them. Relying on *Certain Agricultural Tractors Under 50 Power Take-off Horsepower*, Inv. No. 337-TA-380, USITC Pub. No. 3026, Notice of Issuance of General Exclusion Order and Cease and Desist

Orders at 19 (March 1997), complainant contends that the limited exclusion order should apply to "Futian's affiliated companies, parents, subsidiaries, contractors, or other related business entities or their successors or assigns generally, and Futian's principals, stockholders, officers, directors, employees, agents, licensees, and distributors, insofar as they are involved with the manufacture, importation, offer for sale, or sale for importation of infringing tractors."

Complainant's memorandum at 9-10.

The IA notes that entities such as a respondent's "principals, stockholders, officers, directors, employees, agents, licensees, and distributors" are not typically included in Commission exclusion orders and that the exclusion order cited by complainant in support of its request does not extend to those entities. The IA's submissions do not address complainant's request that the limited exclusion order extend to Futian's "contractors."

In its sur-reply, complainant concedes that a respondent's "principals, stockholders, officers, directors, employees, agents, licensees, and distributors" are not typically included in Commission exclusion orders,⁴ but notes that they are "routinely included in Commission cease and desist orders." Complainant's sur-reply at 2. Relying on *Certain Integrated Repeaters, Switches, Transceivers and Products Containing Same*, Inv. No. 337-TA-435, USITC Pub. No. 3547, Commission Opinion on Remedy, the Public Interest, and Bonding (Oct. 2002), complainant urges inclusion of the broader language to prevent respondent Futian from using these entities to circumvent the exclusion order.

⁴Complainant notes that licensees were included in the exclusion order issued by the Commission in *Emulation Systems*, Inv. No. 337-TA-383, USITC Pub. No. 3089 (March 1998). Complainant's sur-reply at 2 n.3.

Complainant further argues that “the Commission has stated that ‘where practicable,’ [the Commission] ‘takes the desire of a section 337 complainant into account and tries to accommodate it because section 337 relief is for the benefit of the intellectual property owner.” Complainant’s sur-reply at 3 (quoting *Certain Integrated Repeaters, Switches, Transceivers and Products Containing Same*, Inv. No. 337-TA-435, USITC Pub. No. 3547, Commission Opinion on Remedy, the Public Interest, and Bonding (Oct. 2002)). Complainant contends that in *Integrated Repeaters*, the Commission found “no harm in including [respondent’s] ‘parent’ in the exclusion order because Commission [r]ule 210.76(a) (which allows for petitions to modify exclusion orders) provided an adequate safeguard in the event future developments demonstrated that inclusion of [respondent’s] ‘parent’ was somehow inappropriate or burdensome.”

Complainant’s sur-reply at 4. Complainant argues that —

[m]indful of the Commission’s position in *Integrated Repeaters* that the burden should be placed on a respondent to seek modification of an exclusion order, the Commission should issue a limited exclusion order that is made applicable to the extent requested by [complainant]. Thereafter, if defaulting respondent Futian, or any other person, believes the Commission’s order has been crafted too broadly, they may come before the Commission and seek modification of the order. Any alternative leaves [complainant] unprotected, and serves no purpose other than to reward a willful infringer.

Complainant’s sur-reply at 5.

We have issued limited exclusion orders that cover products manufactured abroad or imported by a respondents’ contractors or licensees, and see no reason not to do so here. *See, e.g., Certain Hardware Logic Emulation Systems and Components Thereof*, Inv. No. 337-TA-383, Limited Exclusion Order (Dec. 3, 1997); *Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles*, Inv. No. 337-TA-334 (Remand),

Order (Aug. 20, 1997); *Certain Variable Speed Wind Turbines and Components Thereof*. Inv. No. 337-TA-376. Order (Aug. 30, 1996); *Certain Woodworking Accessories*. Inv. No. 337-TA-333. Order (Jan. 4, 1993).

We are, however, not persuaded by complainant's argument that the exclusion order should be effective as to Futian's principals, stockholders, officers, directors, employees, agents, and distributors in order to prevent circumvention. First, complainant has identified no Commission precedent for issuing a limited exclusion order that excludes products manufactured abroad or imported by a respondent's principals, stockholders, officers, directors, employees, agents, or distributors, nor are we aware of any limited exclusion order that includes such language. Although complainant relies on the Commission's reasoning in *Integrated Repeaters* in support of its argument, the Commission did not include the specific language at issue here in the limited exclusion order issued in the *Integrated Repeaters* investigation.

Complainant's attempt to extend *Integrated Repeaters* is not persuasive. Complainant states that during the course of the *Integrated Repeaters* investigation, respondent Altima Communications was purchased by non-party Broadcom, and that "the Commission agreed that given the risk of circumvention, its limited exclusion order should be extended to include Altima's 'parent' Broadcom." Complainant's sur-reply at 3-4. However, in *Integrated Repeaters*, the Commission stated that "a danger of circumventing the exclusion order if 'parents' are not included as named parties in the exclusion order is immediately foreseeable, because only a short time would be needed to effectuate such circumvention." *Integrated Repeaters*, Commission Opinion on Remedy, the Public Interest, and Bonding at 25-26, USITC Pub. No. 3547 (Oct.

2002). In the instant investigation, unlike *Integrated Repeaters*, complainant has acknowledged that “it is impossible for New Holland to determine which of the additional listed entities might be in a position to readily circumvent the Commission’s order.” Complainant’s sur-reply at 4. In this situation, we do not find it appropriate to include complainant’s proposed expansion of the exclusion order to additional entities.

In its reply submission, complainant raises other objections to the IA’s proposed limited exclusion order, and attaches a revised proposed order (Attachment A to Complainant’s reply). Specifically, complainant argues that the limited exclusion order should “use the language and concept of infringement rather than misappropriation” because the basis for its request for relief is trade dress infringement, not misappropriation. Complainant’s reply at 4. Complainant states that it “does not object to including a definition of its trade dress in the Commission’s order, or dispute that the words in paragraph 8 of the complaint accurately describe its trade dress.” Complainant’s reply at 4. However, it asserts that a trade dress infringement analysis should compare the overall appearance of its tractors with the overall appearance of the infringing products, and that the comparison should not be a side-by-side or element-by-element comparison. Complainant argues that an “element-by-element definition [of its trade dress], standing alone, is likely to invite circumvention and misunderstandings by enforcement authorities.” Complainant’s reply at 4–5. It also argues that “because [the IA] has suggested that the exclusion order should also contain a few largely unexplained pictures of New Holland tractors, Customs might be inclined to simply engage in a side-by-side comparison of imported products, to determine whether a tractor sitting on the dock is identical to one of the six pictures

they have been given.” Complainant’s reply at 6. Complainant’s revised proposed limited exclusion order includes the language defining its trade dress, a larger collection of color photographs of its trade dress tractors (as an attachment to the revised proposed order) than the six photographs submitted by the IA, and an explanation (in paragraph 2 of the revised proposed order) of how the photographs should be used.⁵

In his comments on complainant’s revised proposed order, the IA states that he does not oppose the use of the term “infringe” as proposed by complainant. He further states that “[w]hile the additional photographs may well contain further example of New Holland’s trade dress, [he] has concerns as a matter of policy with incorporating into the Commission’s order photographs that were not part of the record before the judge.” IA’s comments at 2. The IA characterizes the

⁵Paragraph 2 of complainant’s revised proposed order reads as follows:

The elements of New Holland’s trade dress include the use of the color “blue, use of the colors white and black, the particular placement and juxtaposition of the blue, white and black colors on the tractors and their wheels, the placement of all lettering and numbering in white against a black background in the same location on the side of the hood, and design features, namely, the silhouette, or profile, of the hood, and horizontal curved flares on the sides of the hood.” Complaint, ¶ 8. For the purpose of assisting the Bureau of Customs and Border Protection in the enforcement of this order, and without in any way limiting the scope of the order, the Commission has attached to this order color copies of photographs provided by New Holland which depict New Holland tractors with the asserted trade dress. The Bureau of Customs and Border Protection need not engage in a side-by-side comparison of imported tractors or components to determine whether they are identical to any one photograph attached hereto, or find that each and every one of the preceding trade dress elements is present in an imported tractor or component. Imported Futian tractors and components thereof that infringe New Holland’s trade dress are those that, when viewed in their entirety, are confusingly similar to New Holland’s tractors in the New Holland trade dress as defined in this paragraph and cumulatively seen across all of the attached tractor photographs.

Complainant’s reply, Attachment A.

inclusion of “a description of the analysis to be conducted by the Bureau of Customs and Border Protection in determining whether an imported tractor infringes the asserted trade dress” as “a significant departure from past Commission practice.” IA’s comments at 2. He states that “[w]hile the Commission is tasked with fashioning appropriate relief in Section 337 investigations, Customs is charged with the day-to-day enforcement of Section 337 exclusion orders after issuance. In the past, the type of detailed instructions proposed by New Holland have not been included in Section 337 exclusion orders.” IA’s comments at 2.

Complainant’s argument for the inclusion of additional photographs in the limited exclusion order that were not before the ALJ is not compelling. Although the Commission has accepted information from the parties at the remedy stage in past investigations that was not first presented to the ALJ, we have cautioned that information concerning remedy “should, whenever possible, be presented to the ALJ, so that [the information’s] accuracy and probative value can be evaluated by the ALJ and other parties prior to its presentation to the Commission in the remedy phase of the investigation.” *Certain Agricultural Tractors Under 50 Power Take-off Horsepower*, Inv. No. 337-TA-380, Commission Opinion at 27 n.105, ITC Pub. No. 3026 (Mar. 1997) (accepting consumer survey, but “accord[ing] [material] little weight” given that “search of the literature reveals that [preparer of survey] is well known” for views relevant to proposed remedy and “inability of respondents, the ALJ, or the IA to test [preparer’s] conclusions through discovery or cross-examination”); *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 21, ITC Pub. No. 3046 (July 1997) (accepting declarations

from respondent's founder and president, but noting that Commission "view[ed] the . . . materials with considerable skepticism"). Because we agree with the IA that the enforcement of section 337 exclusion orders is the responsibility of Customs, we see no reason to depart from the Commission's usual practice of not including in a limited exclusion order the type of instructional language advocated by complainant.⁶

Although the IA and complainant agree that the limited exclusion order should cover "agricultural tractors . . . and components thereof," only complainant includes the phrase "whether assembled or unassembled."⁷ The parties, however, do not discuss this difference. In light of the Commission's inclusion of the phrase in previous limited exclusion orders, we see no reason not to include it here. See *Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, Limited Exclusion Order (June 2, 1997), USITC Pub. No. 3046 (July 1997); *Certain Erasable Programmable Read-Only Memories, Components Thereof, Products Containing Such Memories, and Processes for Making Such Memories*, Inv. No. 337-TA-276, Order (Mar. 16, 1989), USITC Pub. No. 2196 (May 1989).

2. Cease and Desist Order

Complainant seeks a cease and desist order directed to respondent Futian, Futian's U.S.

⁶Instructional language also appears in a footnote to the heading ("Examples of Agricultural Tractors, Lawn Tractors, and Riding Lawnmowers Which Have New Holland's Trade Dress") on the additional photographs submitted by complainant for inclusion in its proposed limited exclusion order.

⁷Complainant stated that it sought "only to exclude future importation of parts and components that are imported for assembly of infringing tractors." Complainant's memorandum at 12 n.3. The Commission's limited exclusion order does not extend to parts or components imported for use in non-infringing Futian tractors.

affiliates and related business entities, and Futian's principals, stockholders, officers, directors, employees, agents, licensees, and distributors. Complainant concedes that it "has been unable to determine whether Futian and Futian's related entities have commercially significant inventories in the United States." Complainant's memorandum at 14. Relying on *Certain Electrical Connectors and Products Containing Same*, Inv. No. 337-TA-374, USITC Pub. No. 2981, Recommended Determination at 7 (Feb. 9, 1996), complainant requests that the Commission infer commercially significant U.S. inventory from Futian's failure to answer complainant's discovery requests.

While recognizing that the Commission has not traditionally issued cease and desist orders directed to foreign respondents, complainant states that it is "not aware of any definitive Commission rule that cease and desist orders may *never* be directed to foreign respondents." Complainant's memorandum at 15 n.5 (emphasis in original). As to the potential difficulty of enforcing an *in personam* cease and desist order in a U.S. district court against a foreign entity, complainant asserts that "in a default context such as this, the burden should be shifted to the defaulting party to substantiate its contacts (or lack thereof) with the forum, should enforcement become an issue. This is especially true where, as here, the respondent has demonstrated knowledge of the proceeding and its implications, but has nevertheless made a calculated decision not to participate." Complainant's memorandum at 15 n.5.

Complainant notes that at least one ALJ has stated that the Commission has the authority to issue a default order to cease and desist to a foreign respondent so long as personal jurisdiction exists over the foreign respondent. Complainant's memorandum at 15 n.6 (citing *Certain Audible*

Alarm Devices for Divers, Inv. No. 337-TA-365, Order No. 2 (Aug. 4, 1994)). Complainant contends that, under *Certain Miniature Hacksaws*, Inv. No. 337-TA-237, USITC Pub. No. 1948 (Jan. 1987), the Commission may assert personal jurisdiction over respondent Futian as a sanction. It further argues that Futian's agreement with respondent Cove to export tractors to the United States and the subsequent shipment of tractors to Cove constitute sufficient "minimum contacts" necessary for the Commission to assert personal jurisdiction over Futian.

Complainant argues that, unlike the situation in *Certain Microsphere Adhesives, Process for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Commission Opinion (Jan. 16, 1996), Futian "engaged in an express agency agreement with at least one U.S. affiliate (Cove) in order to allow [Futian] to distribute [Futian's] products throughout the United States." Complainant's memorandum at 15. Relying on *Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-248, USITC Pub. No. 3046, Commission Opinion (June 2, 1997), and *Certain Video Graphics Display Controllers*, Inv. No. 337-TA-412, Recommended Determination (May 11, 1999), complainant argues that, if Futian had appeared, complainant could have identified each of Futian's U.S. agents during discovery and obtained cease and desist orders against each of those agents. Complainant asserts that Futian "has refused to respond to discovery requests seeking identification of any of its U.S. agents, affiliates, or operations such that [complainant] might seek cease and desist orders targeted to Futian, its agents, or affiliates directly." Complainant's memorandum at 15. Relying on *Certain Agricultural Tractors Under 50 Power Take-off Horsepower*, Inv. No. 337-TA-380, USITC Pub. No. 3026, Notice of Issuance of General

Exclusion Order and Cease and Desist Orders at 19 (March 1997). complainant argues that, given that the Commission may exert personal jurisdiction over Futian, the "Commission may thwart Futian's efforts to avoid justice by issuing the attached cease and desist order effective to Futian and, by extension, to all of its presently unknown agents within the United States."

Complainant's memorandum at 17. Relying on *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994), complainant argues that a Commission refusal to issue a cease and desist order would constitute an "arbitrar[y] curtail[ment] [of] its authority." and asserts that "a cease and desist order would be in keeping with the injunction practice of the federal courts, where foreign respondents may be enjoined from unfair conduct within a particular forum if it can be demonstrated that they have sufficient purposeful contacts with the forum, and that it does not offend concepts of fair play and substantial justice to hale them into court there."

Complainant's reply at 13.

The IA does not recommend issuance of a cease and desist order because (1) a limited exclusion order "will likely provide adequate relief." and (2) there is no evidence that Futian maintains a commercially significant inventory of infringing goods in the United States. IA's submission at 5-6. Relying on *Certain Abrasive Products Made Using a Process for Powder Preforms, and Products Containing Same*, Inv. No. 337-TA-449, USITC Pub. 3530, Comm'n Op. At 7 (Aug. 2002), the IA states that the Commission "normally issues cease and desist orders only against respondents that maintain commercially significant inventories of infringing goods in the United States, the sale of which could undercut the remedy provided by an exclusion order." IA's submission at 5. He further notes that, in *Abrasive Products*, the Commission issued

a cease and desist order against a foreign respondent only because the respondent's U.S. distributor maintained a commercially significant inventory of the product. He points out that, although the Commission has inferred that *domestic* defaulting respondents maintain commercially significant inventories, "the Commission has never drawn such an inference against a defaulting foreign respondent, such as Futian, presumably because the Commission does not normally issue cease and desist orders against foreign respondents." IA's submission at 5 (citing *Certain Video Game Systems, Accessories, and Components Thereof*, Inv. No. 337-TA-473, Commission Opinion at 2 (Dec. 24, 2002), and *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 25, USITC Pub. No. 3046 (July 1997)). The IA states that the Commission has "generally considered an exclusion order to be a sufficiently effective remedy" in investigations involving defaulting foreign respondents. IA's reply at 4. He further states that he "does not believe that the circumstances of this investigation warrant a departure from prior Commission practice." IA's reply at 4.

In response to the IA's objections regarding a cease and desist order, complainant generally reiterates its earlier arguments. It also argues that, contrary to the IA's position, a limited exclusion order will not provide adequate relief because such an order provides "no relief for infringing products under the control of Futian or its agents that are already located within the United States." Complainant's reply at 15. Complainant contends that "public importation data maintained by the Commission demonstrates that tractor imports from China generally surged during the first quarter of 2003, as compared to that same quarter in either 2002 or 2001. If even

a small percentage of these imports were of Futian tractors that now remain unsold under Futian's control, the consequences of permitting them to be distributed could be dire."

Complainant's reply at 15 (footnote omitted).

In a recent opinion, the Commission noted its "long-standing practice" of issuing cease and desist orders "only to entities with significant domestic operations or inventory."⁸ *Certain Lens-Fitted Film Packages*, Inv. No. 337-TA-406, Consolidated Enforcement and Advisory Opinion Proceedings, Commission Opinion at 15 (June 23, 2003). In *Certain Abrasive Products Made Using a Process for Making Powder Preforms and Products Containing Same*, Inv. No. 337-TA-449, we directed a cease and desist order to a foreign respondent who manufactured the products at issue, because the foreign manufacturer's non-respondent U.S. distributor "maintain[ed] a commercially significant inventory of infringing product in the United States." *Abrasive Products*, Commission Opinion on Remedy, the Public Interest, and Bonding at 7. We noted that the U.S. distributor acted as the agent of the foreign manufacturer and sold the products on consignment. *Id.* at 8 n.16. In this investigation, complainant concedes that it "has been unable to determine whether Futian and Futian's related entities have commercially significant inventories in the United States."⁹ Complainant's declaration at 14.

⁸See also *Certain Abrasive Products Made Using a Process for Making Powder Preforms and Products Containing Same*, Inv. No. 337-TA-449, Commission Opinion on Remedy, the Public Interest, and Bonding at 7 (July 26, 2002) ("the Commission generally issues a cease and desist order when there is a commercially significant amount of infringing, imported product in the United States that could be sold so as to undercut the remedy provided by an exclusion order").

⁹Although section 337(g)(1) provides that "the Commission shall presume the facts alleged in the complaint to be true." New Holland's complaint does not allege that Futian has any inventory in the United States.

**CONFIDENTIAL INFORMATION
DELETED**

The Commission has inferred that a defaulting *domestic* respondent maintains commercially significant inventory in the United States. *See, e.g., Certain Agricultural Tractors Under 50 Power Take-off Horsepower*, Inv. No. 337-TA-380, Commission Opinion at 32 n.124, USITC Pub. No. 3026 (Mar. 1997) (noting that a domestic respondent, “which the ALJ found to be in default pursuant to Commission rule 210.16, is not permitted to contest the allegation that it has violated section 337, which in our view includes the collateral presumption that [it] maintains significant inventories of infringing [products] *in the United States*”) (emphasis added). We are not aware of any investigation in which the Commission has drawn such an inference against a defaulting *foreign* respondent. It seems to us that where, as here, the products of a foreign manufacturer are imported, distributed, and offered for sale in the United States only through intermediaries located in the United States, no “collateral presumption” arises that the foreign manufacturer maintains ownership of significant inventories in the United States. The instant case is unlike *Abrasive Products* in that the products at issue there were sold by the U.S. distributor on consignment.¹⁰ In *Abrasive Products*, the foreign producer was the owner of known domestic inventory. The fact that, in this case, a domestic distributor (respondent Cove) maintains an inventory of the accused products in the United States¹¹ does not suggest that the

¹⁰Excerpts from a February 2003 deposition of Brian Navalinsky, a principal of respondent Cove, are attached to complainant’s April 2, 2003, declaration as Attachment E. [[

¹¹Complaint ¶ 22 (“Respondent Cove has at least three infringing Futian tractors on its premises”). [[

foreign manufacturer also maintains an inventory in the United States.¹²

Relying on *Certain Electrical Connectors and Products Containing Same*, Inv. No. 337-TA-374, Final Recommended Determination (Feb. 9, 1996), complainant urges the Commission to infer commercially significant inventories in the United States as a sanction, given respondent's failure to provide discovery. *Electrical Connectors* is inapposite. The respondent in that case was held in default for failing to comply with an ALJ order compelling discovery, not—as here—for failing to respond to the complaint and notice of investigation (ALJ Order No. 6).¹³ Unlike *Electrical Connectors*, no order compelling discovery from Futian ever issued in this investigation.¹⁴

Section 337(g)(1) provides that, when a respondent is found in default for failure to respond to the complaint and notice of investigation, “the Commission shall presume the facts alleged in the complaint to be true.” The statute is implemented in Commission rules 210.16(a)(1), (b)(1), and (c)(1), which generally track the quoted statutory language. The complaint at issue here does not contain an allegation that Futian maintains commercially significant inventory of the accused products in the United States, and the allegations in the

¹²Complainant has offered only speculation that Futian might control some percentage of unsold tractor imports from China. See Complainant's reply at 15.

¹³*Electrical Connectors*, Order No. 23 (Sept. 8, 1995) (unreviewed initial determination finding respondent in default); *Electrical Connectors*, Final Recommended Determination at 2 (Feb. 9, 1996) (noting that respondent filed an answer to the complaint).

¹⁴An order compelling discovery is a prerequisite to all sanctions under Commission rule 210.33, which include “[i]nfer[ring] that the admission, testimony, documents, or other evidence [withheld] would have been adverse to the party.” Commission rule 210.33(b)(1).

**CONFIDENTIAL INFORMATION
DELETED**

complaint do not support such an inference.¹⁵ The question, then, is whether an adverse inference of commercially significant inventory should be drawn against Futian. The statute and Commission rule 210.16(c)(1) are silent on this point.¹⁶ However, based on the default judgment practice in federal courts, we decline to draw an adverse inference against the defaulting respondent in this investigation.¹⁷

C. The Public Interest

Under section 337(g), in determining whether to impose a default remedy, the Commission must weigh the remedy sought against the effect such remedy would have on the following public interest factors: (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) the production of articles in the United States that are like or directly

¹⁵The additional information submitted by complainant in the course of its remedy briefing also does not support such an inference. [[

]]
¹⁶Although adverse inferences may be drawn pursuant to Commission rule 210.17, by its express terms, that rule does not apply in statutory default cases.

¹⁷In the district courts, a defendant's failure to "plead or otherwise defend" may result in a default judgment under Rule 55 of the Federal Rules of Civil Procedure. In reviewing a default judgment, the plaintiff's well-pleaded allegations of fact are assumed to be true, but the allegations must be sufficient to support the judgment. In other words, although a defaulter concedes the truth of the allegations, he may argue on appeal that the allegations do not state a claim for relief. *Cripps v. Life Insurance Co. of North America*, 980 F.2d 1261, 1267-68 (9th Cir. 1992); *Nishimatsu Construction Co. v. Houston National Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) (citing *Ohio Central Railroad Co. v. Central Trust Co. of New York*, 133 U.S. 83 (1889); *Thomson v. Wooster*, 114 U.S. 104 (1884)). Thus, a district court plaintiff cannot supplement the allegations in his complaint with adverse inferences drawn from the mere fact of the defendant's default, and we see no reason why the Commission should draw an adverse inference against the defaulting foreign respondent manufacturer in this investigation. (Of course, the complaint in every investigation at the Commission contains allegations of a violation of section 337, otherwise the Commission would not have instituted an investigation of the complaint.)

competitive with those subject to the investigation, and (4) U.S. consumers. 19 U.S.C.

§ 1337(g)(1).

Complainant submits that its proposed limited exclusion order and cease and desist order would not adversely impact, but would serve the public interest. It argues that: (1) the public interest favors the protection of U.S. intellectual property rights in order to avoid confusing United States consumers, (2) there are many directly competitive products available in the U.S. market from complainant and many other companies, and (3) tractors are not the type of products that have raised public interest concerns in the past.

The IA states that he is unaware of any public interest concerns that would preclude issuance of his proposed limited exclusion order. He reasons that (1) there is no reason to believe that other entities cannot meet the demand for the subject products, (2) the proposed limited exclusion order "does not foreclose Futian from importing functionally identical products that do not misappropriate [complainant's] trade dress," and (3) the public interest favors the protection of U.S. intellectual property rights. IA's submission at 6.

No public interest concerns have been raised in this investigation. We find that the statutory public interest factors do not preclude issuance of a limited exclusion order covering agricultural tractors, lawn tractors, riding lawnmowers, and components thereof that infringe New Holland's trade dress in this investigation.

D. Bonding

Section 337(j) provides for the entry of infringing articles during the 60-day Presidential review period upon the payment of a bond, and states that the bond is to be set at a level

“sufficient to protect the complainant from any injury” during the Presidential review period. 19 U.S.C. §1337(j); *see also* Commission rule 210.50(a)(3). 19 C.F.R. § 210.50(a)(3).

Complainant acknowledges that, where a defaulting respondent fails to provide pricing data, the Commission typically sets a bond of 100 percent of entered value. Relying on *Certain Hardware Logic Emulation Systems*, Inv. No. 337-TA-383, Commission Opinion (Oct. 15, 1996), complainant proposes a bond of 157 percent of entered value based upon a “good-faith estimate” of the bond needed to compensate for underselling (57 percent of entered value) combined with a bond of 100 percent of entered value to compensate for the “destruction of brand identification” and harm to complainant’s reputation from the “penetration of Futian’s cheap knock-offs into the United States market.” Complainant’s memorandum at 19–20. It argues that “[m]uch like the . . . potential injuries in *Emulation Systems*, the potential injuries to [complainant] do not end with price erosion or lost sales. The principal harm to [complainant] from [r]espondent Futian’s conduct is not necessarily underselling, but is instead the diminution of good will and destruction of brand identification in the eyes of consumers.” Complainant’s memorandum at 19. Complainant contends that “[w]hile a 100 [percent] bond may be adequate to protect the average complainant in a patent case from any injury, the average patent dispute does not involve the same degree of irreparable reputational injury present in a trade dress dispute such as this one.” Complainant’s reply at 2 n.1. Complainant notes that, should the Commission disagree with complainant’s approach of combining an amount for underselling with an amount for harm to reputation, “the uncertainties caused by Futian’s failure to provide discovery separately justify setting a bond of at least 100 [percent] of the entered value.”

Complainant's memorandum at 20 n.10.

The IA recommends a bond of 100 percent of entered value. He points out that "where it is difficult or impossible to calculate a bond based upon price differentials, and particularly where the absence of pertinent information is due to a respondent's failure to provide discovery, the Commission has set the bond at 100 percent of entered value." IA's submission at 7 (citing *Certain Oscillating Sprinklers, Sprinkler Components, and Nozzles*, Inv. No. 337-TA-448 at 4-5). He characterizes complainant's price differential calculations as "imprecise" and notes that "this is a case in which a bond based on price differential might in any event be inadequate." IA's submission at 7-8. The IA states that he "is unaware of any Commission precedent for arbitrarily increasing a computed bond by 100 percent based on the potential for reputational harm." IA's reply at 4-5. He characterizes the bond imposed in *Emulation Systems* as "combin[ing] a 25 percent price erosion calculation plus an additional 18 percent to compensate complainant for the impact of lost sales on its research and development budget." IA's reply at 5 n.7.

As pointed out by the IA, complainant has not identified any Commission precedent for arbitrarily increasing a computed bond by 100 percent based on the potential for reputational harm. In situations where it is difficult or impossible to calculate a bond based upon price differentials, the Commission has traditionally set the bond at 100 percent of entered value of the infringing imported product. Accordingly, we set the bond during Presidential review at 100 percent of entered value. *Certain Oscillating Sprinklers, Sprinkler Components, and Nozzles*, Inv. No. 337-TA-448, Limited Exclusion Order at 4 (Mar. 1, 2002), USITC Pub. No. 3498 (Mar.

2002); *Certain Lens-Fitted Film Packages*, Inv. No. 337-TA-406, Commission Opinion at 19 (June 28, 1999) (citing *Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing the Same*, 337-TA-372, Commission Opinion on Remedy, the Public Interest, and Bonding at 15 (Apr. 29, 1996), USITC Pub. No. 2964 (May 1996)).

E. Other Issues

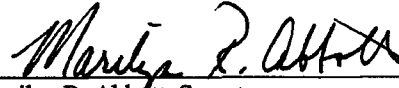
In a footnote to its April 2, 2003, declaration seeking immediate relief against respondent Futian, complainant stated that it may elect to seek a cease and desist order pursuant to Commission rule 210.76 if “additional evidence of Futian’s activities within the United States come to light.” Complainant’s memorandum at 17 n.8. Complainant asked that “the Commission declare in advance of any such proceeding that expedited relief under [Commission rule] 210.76 will be available to [complainant]” and declare that “in such a proceeding, assuming [complainant] makes a prima facie case that a cease and desist order is justified, the burden will then be on Futian or its U.S. affiliates to prove that they are not engaged in activities either in the United States or on behalf of Futian.” *Id.* We deny both requests as premature. Complainant is free, of course, to petition the Commission under rule 210.76.

**CERTAIN AGRICULTURAL TRACTORS, LAWN TRACTORS
RIDING LAWMOWERS, AND COMPONENTS THEREOF**

337-TA-486

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **COMMISSION OPINION ON REMEDY, THE PUBLIC INTEREST, AND BONDING PROCEDURAL BACKGROUND (CORRECTED SERVICE LIST)** was served upon the following parties, via first class mail and air mail where necessary, on August 19, 2003.



Marilyn R. Abbott, Secretary
U.S. International Trade Commission
500 E. Street, SW - Room 112
Washington, DC 20436

**ON BEHALF OF NEW HOLLAND NORTH
AMERICA, INC.:**

Mark Boland, Esq.
Cynthia Clarke Weber, Esq.
Sughrue Mion, PLLC
2100 Pennsylvania Avenue, NW
Suite 800
Washington, DC 20037

Sturgis M. Sobin, Esq.
Charles F.B. McAleer, Jr.
Miller and Chevalier Chartered
655 Fifteenth Street, NW
Suite 900
Washington, DC 20005-5701

ON BEHALF OF COMMISSION:

Clara Kuehn, Esq.
Advisory Attorney
Office of the General Counsel
500 E Street, NW - Suite 707-U
Washington, DC 20436

David H. Hollander, Jr., Esq.
Commission Investigative Attorney
Office of Unfair Import Investigations
500 E Street, SW - Room 401-K
Washington, DC 20436