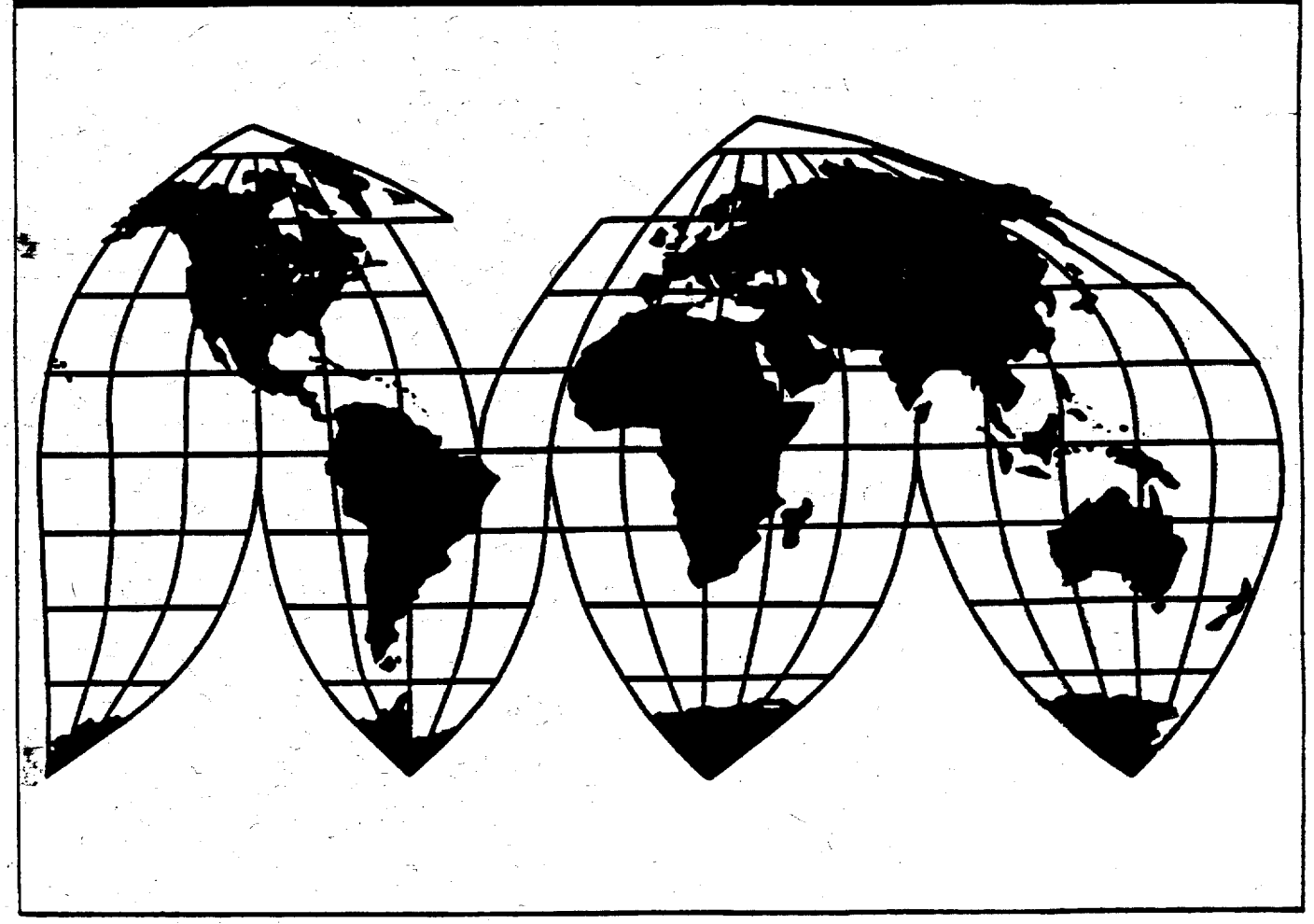
In the Matter of

Certain Agricultural Tractors Under 50 Power Take-off Horsepower

Investigation No. 337-TA-380

Publication 3026 **March 1997**

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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United States International Trade Commission
Washington, DC 20436

U.S. International Trade Commission

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

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In the Matter of CERTAIN AGRICULTURAL TRACTORS UNDER 50 POWER TAKE-OFF HORSEPOWER	)	Investigation No. 337-TA-380

NOTICE OF ISSUANCE OF GENERAL EXCLUSION ORDER AND CEASE AND DESIST ORDERS

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has issued a general exclusion order and eleven cease and desist orders in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Shara L. Aranoff, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-3090.

SUPPLEMENTARY INFORMATION: The authority for the Commission's determination is contained in Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.45 and 210.50 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.45 and 210.50).

This trademark-based section 337 investigation was instituted by the Commission on February 14, 1996, based on a complaint filed by Kubota Tractor Corporation ("KTC"), Kubota Manufacturing of America ("KMA"), and Kubota Corporation ("KBT") (collectively "complainants"). Complainants alleged unfair acts in violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation, sale for importation, and/or the sale within the United States after importation, of certain agricultural tractors under 50 power take-off horsepower, by reason of infringement of complainants' four registered trademarks, U.S. Reg. Nos. 922,330 ("KUBOTA" in block letters), 1,775,620 ("KUBOTA" stylized), 1,028,221 (Gear Design), and 1,874,414 (stylized "K"). The Commission's notice of investigation named 20 respondents: Eisho World Ltd., Nitto Trading Corporation, Nitto Trading Co. Ltd., Sanko Industries Co., Ltd., Sonica Trading, Inc., Suma Sangyo, Toyo Service Co., Ltd., Bay Implement Company, Casteel Farm Implement Co. of Monticello,

Arkansas, Casteel Farm Implement Co. of Pine Bluff, Arkansas, Casteel World Group, Inc., Gamut Trading Co., Gamut Imports, Lost Creek Tractor Sales, MGA, Inc. Auctioneers, Tom Yarbrough Equipment Rental and Sales, Inc., The Tractor Shop, Tractor Company, Wallace International Trading Co. and Wallace Import Marketing Co. Inc. 61 Fed. Reg. 6802 (Feb. 22, 1996).

On May 29, 1996, the Commission determined not to review an ID (Order No. 13) finding respondents Tractor Company, Sonica Trading, and Toyo Service in default pursuant to Commission rule 210.16 (19 C.F.R. § 201.16), and ruling that they had waived their respective rights to appear, to be served with documents, and to contest the allegations at issue in the investigation. On June 19, 1996, the notice of investigation was amended to add Fujisawa Trading Company as a respondent. On September 25, 1996, the Commission issued a consent order terminating the investigation as to respondent Nitto Trading Corporation. On September 30, 1996, the Commission issued a consent order terminating the investigation as to respondent Tom Yarbrough Equipment Rental and Sales, Inc.

On August 21, 1996, the Commission determined not to review an initial determination (ID) (Order No. 40) granting complainants' motion for summary determination that complainants' four trademarks are valid and that the "KUBOTA" (block letters) and Gear Design marks are incontestable. On September 6, 1996, the Commission determined not to review an ID (Order No. 47) granting complainants' motion for summary determination that a domestic industry exists with respect to the "KUBOTA" (block letters) and "KUBOTA" (stylized) trademarks.

The presiding administrative law judge (ALJ) held an evidentiary hearing on the merits between August 29 and September 7, 1996, and heard closing arguments on October 24, 1996. The ALJ issued his final ID finding a violation of section 337 on November 22, 1996. He found that there had been imports of the accused products; that 24 specific models of the accused tractors infringed the "KUBOTA" (block letters) trademark (U.S. Reg. No. 922,330); that one model of the accused tractors, the KBT L200, did not infringe the "KUBOTA" (block letters) trademark; that none of the 25 accused KBT models considered infringed the "KUBOTA" (stylized) trademark (U.S. Reg. No. 1,775,620); and that complainants were no longer asserting violations of section 337 based on infringement of the stylized "K" and "Gear Design" trademarks.

On January 9, 1997, the Commission determined to review (1) the finding of no infringement and no violation with respect to the KBT model L200 tractor; and (2) the decision to limit infringement analysis to 25 models of accused tractors rather than all models of KBT tractors as to which there is evidence of importation and sale in the United States. The Commission determined not to review the ID in all other respects. On review, the Commission requested that the parties address the following issues:

(1) whether the fact that gray market KBT model L200 tractors are imported and sold bearing Japanese-language labels constitutes a "material difference" from the

authorized KTC model L200 tractors sufficient to establish a likelihood of consumer confusion;

(2) whether evidence on the record in this investigation demonstrates that specific KBT models other than the 25 identified on [Staff Exhibit] SX-1 have been imported and sold in the United States; and, if so,

(3) whether evidence on the record in this investigation demonstrates that any specific KBT model identified in number (2) above was imported and sold in the United States bearing Japanese-language labels or is otherwise materially different than the closest corresponding KTC model with respect to any of the differences found to be "material" in the ID.

In addition, the Commission requested written submissions on the issues of remedy, the public interest, and bonding. 62 Fed. Reg. 2179 (Jan. 15, 1997).

Submissions and reply submissions on remedy, the public interest, and bonding and on the issues under review were received from complainants, respondents, and the Commission investigative attorney (IA). In addition, complainants filed a request for oral hearing pursuant to Commission rule 210.45, complainants filed a request to strike pages 4-20 of respondents' brief on review, respondents filed a request to strike certain consumer survey information submitted by complainants and to sanction complainants for submitting that information, complainants filed a motion for leave to file a surreply brief in response to the reply brief filed by the IA, and respondents filed an objection to complainants' surreply brief.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has determined (1) to reverse the ALJ's finding of no infringement and no violation by the KBT model L200 tractor; (2) to find a violation of section 337 with respect to 20 models of KBT tractors in addition to the 25 models considered by the ALJ; and (3) to deny complainants' request for oral hearing, both requests to strike, respondents' request for sanctions, and complainants' motion for leave to file a surreply brief. The Commission has further determined that the appropriate form of relief is a general exclusion order prohibiting the unlicensed entry for consumption of agricultural tractors under 50 power take-off horsepower manufactured by Kubota Corporation of Japan that infringe the federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) and eleven cease and desist orders directed to respondents Bay Implement Company, Casteel World Group, Inc. (and related entities), Gamut Trading Co. (and related entities), Lost Creek Tractor Sales, MGA, Inc. Auctioneers, The Tractor Shop, Tractor Company, and Wallace International Trading Co. prohibiting the importation, sale for importation, or sale in the United States after importation of agricultural tractors under 50 power take-off horsepower manufactured by Kubota Corporation of Japan that infringe the federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330).

The Commission has also determined that the public interest factors enumerated in subsections 1337(d) and (f) do not preclude the issuance of the general exclusion order and cease and desist orders, and that the bond during the Presidential review period shall be in the amount of 90 percent of the entered value of the articles in question.

Copies of the Commission's order, the public version of the Commission's opinion in support thereof, 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. Hearing impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal at 202-205-1810.

By order of the Commission.

Donna R. Koehnke

Donna R. Koehnke
Secretary

Issued: February 25, 1997

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of	)	
CERTAIN AGRICULTURAL TRACTORS UNDER 50 POWER TAKE-OFF HORSEPOWER	)	Investigation No. 337-TA-380

GENERAL EXCLUSION ORDER

This trademark-based section 337 investigation was instituted by the Commission on February 14, 1996, based on a complaint filed by Kubota Tractor Corporation ("KTC"), Kubota Manufacturing of America ("KMA"), and Kubota Corporation ("KBT") (collectively "complainants"). Complainants alleged unfair acts in violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation, sale for importation, and/or the sale within the United States after importation, of certain agricultural tractors under 50 power take-off horsepower, by reason of infringement of complainants' four registered trademarks, U.S. Reg. Nos. 922,330 ("KUBOTA" in block letters), 1,775,620 ("KUBOTA" stylized), 1,028,221 (Gear Design), and 1,874,414 (stylized "K"). The Commission's notice of investigation named 20 respondents: Eisho World Ltd., Nittō Trading Corporation, Nitto Trading Co. Ltd., Sanko Industries Co., Ltd., Sonica Trading, Inc., Suma Sangyo, Toyo Service Co., Ltd., Bay Implement Company, Casteel Farm Implement Co. of Monticello, Arkansas, Casteel Farm Implement Co. of Pine Bluff, Arkansas, Casteel World Group, Inc., Gamut Trading Co., Gamut Imports, Lost Creek Tractor Sales, MGA, Inc. Auctioneers, Tom Yarbrough Equipment Rental and Sales, Inc., The Tractor Shop, Tractor Company, Wallace International Trading Co. and Wallace Import Marketing Co. Inc.. 61 Fed. Reg. 6802 (Feb. 22, 1996).

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amended to add Fujisawa Trading Company as a respondent. On September 25, 1996, the Commission issued a consent order terminating the investigation as to respondent Nitto Trading Corporation. On September 30, 1996, the Commission issued a consent order terminating the investigation as to respondent Tom Yarbrough Equipment Rental and Sales, Inc.

On August 21, 1996, the Commission determined not to review an initial determination ("ID") (Order No. 40) granting complainants' motion for summary determination that complainants' four trademarks are valid and that the "KUBOTA" (block letters) and Gear Design marks are incontestable. On September 6, 1996, the Commission determined not to review an ID (Order No. 47) granting complainants' motion for summary determination that a domestic industry exists with respect to the "KUBOTA" (block letters) and "KUBOTA" (stylized) trademarks.

The presiding administrative law judge ("ALJ") held an evidentiary hearing on the merits between August 29 and September 7, 1996, and heard closing arguments on October 24, 1996. The ALJ issued his final ID finding a violation of section 337 on November 22, 1996. He found that there had been imports of the accused products; that 24 specific models of the accused tractors infringed the "KUBOTA" (block letters) trademark (U.S. Reg. No. 922,330); that one model of the accused tractors, the KBT model L200, did not infringe the "KUBOTA" (block letters) trademark; that none of the 25 KBT models examined infringed the "KUBOTA" (stylized) trademark (U.S. Reg. No. 1,775,620); and that complainants were no longer asserting violations of section 337 based on infringement of the stylized "K" and "Gear Design" trademarks.

On January 9, 1997, the Commission determined to review the ALJ's final ID with regard to (1) the finding of no infringement with respect to the KBT model L200 tractor; and (2) the decision to limit infringement analysis to 25 models of accused tractors rather than all models of KBT tractors as to which there is evidence of importation and sale in the United States. The Commission determined not to review the ID in all other respects. On review, the Commission requested that the parties address the following issues:

> (1) whether the fact that gray market KBT L200 tractors are imported and sold bearing Japanese-language labels constitutes a "material difference" from the authorized KTC model L200 tractors sufficient to establish a likelihood of consumer confusion;
>
> (2) whether evidence on the record in this investigation demonstrates that specific KBT models other than the 25 identified on [Staff Exhibit] SX-1 have been imported and sold in the United States; and, if

so,

> (3) whether evidence on the record in this investigation demonstrates that any specific KBT model identified in number (2) above was imported and sold in the United States bearing Japanese-language labels or is otherwise materially different than the closest corresponding KTC model with respect to any of the differences found to be "material" in the ID.

In addition, the Commission requested written submissions on the issues of remedy, the public interest, and bonding. 62 Fed. Reg. 2179 (Jan. 15, 1997).

Submissions and reply submissions on remedy, the public interest, and bonding and on the issues under review were received from complainants, respondents, and the Commission investigative attorney (IA). In addition, complainants filed a request for oral hearing pursuant to Commission rule 210.45, complainants filed a request to strike pages 4-20 of respondents' brief on review, respondents filed a request to strike certain consumer survey information submitted by complainants and to sanction complainants for submitting that information, complainants filed a motion for leave to file a surreply brief in response to the reply brief of the IA, and respondents filed an objection to complainants' surreply brief.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has determined (1) to reverse the ALJ's finding of no infringement and no violation with respect to the KBT model L200 tractor; (2) to find a violation of section 337 with respect to 20 models of KBT tractors in addition to the 25 models considered by the ALJ; and (3) to deny complainants' request for oral hearing, both requests to strike, respondents' request for sanctions, and complainants' motion for leave to file a surreply brief. The Commission has further determined that the appropriate form of relief is a general exclusion order prohibiting the unlicensed entry for consumption of agricultural tractors under 50 power take-off horsepower manufactured by Kubota Corporation of Japan that infringe the federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) and eleven cease and desist orders directed to respondents Bay Implement Company, Casteel World Group, Inc. (and related entities), Gamut Trading Co. (and related entities), Lost Creek Tractor Sales, MGA, Inc. Auctioneers, The Tractor Shop, Tractor Company, and Wallace International Trading Co., prohibiting the importation, sale for importation, or sale in the United States after importation of agricultural tractors under 50 power take-off horsepower manufactured by Kubota Corporation of Japan that infringe the federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330).

The Commission has also determined that the public interest factors enumerated in subsections 1337(d) and (f) do not preclude the issuance of the general exclusion order and cease and desist orders, and that the bond during the Presidential review period shall be in the amount of 90 percent of the entered value of the articles in question.

Accordingly, the Commission hereby ORDERS that --

1. Agricultural tractors under 50 power take-off horsepower that are manufactured by Kubota Corporation of Japan and that infringe the federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330)[1] are excluded from entry for consumption into the United States for the remaining term of the trademark, including any renewals, or, if sooner, until such time as the trademark is abandoned, except (1) if imported by, under license from, or with the permission of the trademark owner, or (2) as provided by law.

2. The aforesaid agricultural tractors otherwise excluded by paragraph 1 above are entitled to entry for consumption into the United States under bond in the amount of ninety (90) percent of the entered value of such items 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 sixty (60) days after the date of receipt of this Order.

3. In accordance with subsection (l) of section 337 (19 U.S.C. § 1337(l)), the provisions of this Order shall not apply to agricultural tractors 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 United States Government.

4. 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 U.S. Customs Service.

5. The Commission may modify this Order in accordance with the procedure described in rule 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76 (1996).

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

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[1] A copy of Registration No. 922,330 is attached.

By Order of the Commission.

Donna R. Koehnke

Donna R. Koehnke
Secretary

Issued: February 25, 1997

United States Patent Office

922,330
Registered Oct 19, 1971

PRINCIPAL REGISTER
Trademark

Ser. No. 355,074, filed Mar. 26, 1970

KUBOTA

Kubota Tekko Kabushiki Kaisha (Kubota, Ltd.) (Japanese corporation)
No. 22, 2-chome, Funade-cho
Naniwa-ku, Osaka, Japan

For: GASOLINE, KEROSENE AND DIESEL ENGINES, POWER TILLERS, FARM TRACTORS, GARDEN TRACTORS, SPRAYERS, DUSTERS, HARVESTERS, THRESHERS, HULLERS, RICE PLANTING MACHINES, SEEDERS, PNEUMATIC AND ELECTROMAGNETICALLY HEATED GRAIN DRYERS; WEEDERS, RICE POLISHERS, FERTILIZING MACHINES, BRUSH CUTTERS, MILKING MACHINES, IRRIGATION PUMPS AND ATTACHMENTS AND PARTS THEREFOR; BELT CONVEYORS, PNEUMATIC CONVEYORS, SCREW CONVEYORS, ROLLER CONVEYORS, CHAIN CONVEYORS, BUCKET ELEVATORS, APRON CONVEYORS, CONVEYORS IN WHICH THE BELT MEMBER IS FORMED OF PANS OR SLATS; OVERHEAD TRAVELLING CRANES, WALL CRANES, GANTRY CRANES, JIB CRANES, BRIDGE CRANES, MOBILE CRANES, TRUCK CRANES, POWER SHOVELS, EXCAVATORS, TRENCHERS; PLANERS, ROLL LATHES, MILLING MACHINES, HORIZONTAL BORING AND MILLING MACHINES; ROCK CRUSHERS, CONCRETE VIBRATORS; WINCHES, WINDLASSES; DIESEL ENGINES FOR GENERATORS, MARINE DIESEL ENGINES; AND PARTS THEREFOR, in CLASS 23 (INT. CLS. 7, 11, and 12).

Owner of Japanese Reg. No. 634,179, dated Jan. 16, 1964.

G. R. LEADER, Examiner

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of	)	
CERTAIN AGRICULTURAL TRACTORS UNDER 50 POWER TAKE-OFF HORSEPOWER	)	Investigation No. 337-TA-380

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT Bay Implement Company, P.O. Box 2001, Red Bay, Alabama 35582, cease and desist from importing, selling for importation into the United States, marketing, distributing, offering for sale, selling in the United States, or otherwise transferring (except for exportation) certain agricultural tractors under 50 power take-off horsepower, as described below, in violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, except as provided in Section IV.

I.

(Definitions)

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Kubota Corporation" or "KBT" shall mean Kubota Corporation, 2-47 Shikitsuhigashi 1-chome, Naniwa-ku, Osaka 556, Japan, Complainant in this investigation, and its successors and assigns.

(C) "Kubota Tractor Corporation" or "KTC" shall mean Kubota Tractor Corporation, 3401 Del Amo Boulevard, Torrance, CA 90503, Complainant in this investigation, and its successors and assigns.

(D) "Kubota Manufacturing of America Corporation" or "KMA" shall mean Kubota Manufacturing of America Corporation, Industrial Park North, 2715 Ramsey Road, Gainesville, Georgia 30501, Complainant in this investigation, and its successors and assigns.

(E) "Respondent" shall mean Bay Implement Company, P.O. Box 2001, Red Bay, Alabama 35582.

(F) "Person" shall mean an individual, or any nongovernmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority owned or controlled subsidiaries, their successors, or assigns.

(G) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(H) The term "covered product" shall mean agricultural tractors under 50 power take-off horsepower manufactured by Kubota Corporation of Japan that infringe federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) and that are not imported by, under license from, or with the permission of the trademark owner.

II.

(Applicability)

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and/or majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

III.

(Conduct Prohibited)

The following conduct of Respondent in the United States is prohibited by this Order. Until the expiration or, if sooner, the abandonment, of the trademark identified in Section I(H) above, Respondent shall not:

(A) import or sell for importation into the United States covered product; or

(B) sell, market, distribute, offer for sale, or otherwise transfer (except for exportation) in the United States imported covered product.

IV.

(Conduct Permitted)

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) has licensed or authorized such specific conduct, or such specific conduct is related to the importation or sale of agricultural tractors by or for the United States.

V.

(Reporting)

For purposes of this reporting requirement, the reporting period shall commence on the first day of September, and shall end on the last day of the following August. The first report required under this section shall cover the period February 25, 1997 through August 31, 1997. This reporting requirement shall continue in force until the expiration, or, if sooner, the abandonment, of the trademark specified in Section I(H) herein unless, pursuant to subsection (j)(2) of section 337 of the

Tariff Act of 1930, the President notifies the Commission within sixty (60) days after the date he receives this Order that he disapproves this Order.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the following: the quantity in units and the value in dollars of foreign-produced covered product that Respondent has imported or sold in the United States during the reporting period or that remains in inventory at the end of the period.

Any failure to make the required report shall constitute a violation of this Order.

VI.

(Recordkeeping and Inspection)

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the importation, sale, offer for sale, marketing, distribution, or otherwise transferring in the United States of imported covered product made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of two (2) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other record documents, both in detail and in summary form, as are required to be retained by subparagraph VI(A) of this Order.

VII.

(Service of Cease and Desist Order)

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the marketing, distribution, or sale of imported covered product in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order had been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraph VII(B) and VII(C) shall remain in effect until the date of expiration or, if sooner, abandonment, of the trademark specified in Section I(H) herein.

VIII.

(Confidentiality)

Any request for confidential treatment of information submitted to or obtained by the Commission pursuant to Sections V and VI of the Order should be in accordance with section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6 (1996). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX.

(Enforcement)

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75 (1996), including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

(Modification)

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76 (1996).

XI.

(Bonding)

The conduct prohibited by Section III of this Order may be continued during the period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond with the Commission in the amount of ninety (90) percent of the entered value of the articles in question. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered product imported on or after February 25, 1997 is subject to the entry bond as set forth in the limited exclusion order issued by the Commission on February 25, 1997, and is not subject to this bond provision.

The bond prescribed in this section is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* Commission rule 210.68, 19 C.F.R. § 210.68 (1996). The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, the Commission's Orders of February 25, 1997, or any subsequent final order issued after the completion of Investigation No. 337-TA-380, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an Order issued by the Commission based upon application therefor made to the Commission.

By Order of the Commission.

Donna R. Koehnke

Donna R. Koehnke
Secretary

Issued: February 25, 1997

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of	
CERTAIN AGRICULTURAL TRACTORS UNDER 50 POWER TAKE-OFF HORSEPOWER	**Investigation No. 337-TA-380**

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT Casteel Farm Implement Company, 107 Highway 425 South, Monticello, Arkansas 71655, cease and desist from importing, selling for importation into the United States, marketing, distributing, offering for sale, selling in the United States, or otherwise transferring (except for exportation) certain agricultural tractors under 50 power take-off horsepower, as described below, in violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, except as provided in Section IV.

I.

(Definitions)

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Kubota Corporation" or "KBT" shall mean Kubota Corporation, 2-47 Shikitsuhigashi 1-chome, Naniwa-ku, Osaka 556, Japan, Complainant in this investigation, and its successors and assigns.

(C) "Kubota Tractor Corporation" or "KTC" shall mean Kubota Tractor Corporation, 3401 Del Amo Boulevard, Torrance, CA 90503, Complainant in this investigation, and its successors and assigns.

(D) "Kubota Manufacturing of America Corporation" or "KMA" shall mean Kubota Manufacturing of America Corporation, Industrial Park North, 2715 Ramsey Road, Gainesville, Georgia 30501, Complainant in this investigation, and its successors and assigns.

(E) "Respondent" shall mean Casteel Farm Implement Company, 107 Highway 425 South, Monticello, Arkansas 71655.

(F) "Person" shall mean an individual, or any nongovernmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority owned or controlled subsidiaries, their successors, or assigns.

(G) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(H) The term "covered product" shall mean agricultural tractors under 50 power take-off horsepower manufactured by Kubota Corporation of Japan that infringe federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) and that are not imported by, under license from, or with the permission of the trademark owner.

II.

(Applicability)

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and/or majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

III.

(Conduct Prohibited)

The following conduct of Respondent in the United States is prohibited by this Order. Until the expiration or, if sooner, the abandonment, of the trademark identified in Section I(H) above, Respondent shall not:

(A) import or sell for importation into the United States covered product; or

(B) sell, market, distribute, offer for sale, or otherwise transfer (except for exportation) in the United States imported covered product.

IV.

(Conduct Permitted)

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) has licensed or authorized such specific conduct, or such specific conduct is related to the importation or sale of agricultural tractors by or for the United States.

V.

(Reporting)

For purposes of this reporting requirement, the reporting period shall commence on the first day of September, and shall end on the last day of the following August. The first report required under this section shall cover the period February 25, 1997, through August 31, 1997. This reporting requirement shall continue in force until the expiration, or, if sooner, the abandonment, of the trademark specified in Section I(H) herein unless, pursuant to subsection (j)(2) of section 337 of

the Tariff Act of 1930, the President notifies the Commission within sixty (60) days after the date he receives this Order that he disapproves this Order.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the following: the quantity in units and the value in dollars of foreign-produced covered product that Respondent has imported or sold in the United States during the reporting period or that remains in inventory at the end of the period.

Any failure to make the required report shall constitute a violation of this Order.

VI.

(Recordkeeping and Inspection)

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the importation, sale, offer for sale, marketing, distribution, or otherwise transferring in the United States of imported covered product made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of two (2) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other record documents, both in detail and in summary form, as are required to be retained by subparagraph VI(A) of this Order.

VII.

(Service of Cease and Desist Order)

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the marketing, distribution, or sale of imported covered product in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order had been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraph VII(B) and VII(C) shall remain in effect until the date of expiration or, if sooner, abandonment, of the trademark specified in Section I(H) herein.

VIII.

(Confidentiality)

Any request for confidential treatment of information submitted to or obtained by the Commission pursuant to Sections V and VI of the Order should be in accordance with section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6 (1996). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX.

(Enforcement)

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75 (1996), including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

(Modification)

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76 (1996).

XI.

(Bonding)

The conduct prohibited by Section III of this Order may be continued during the period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond with the Commission in the amount of ninety (90) percent of the entered value of the articles in question. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered product imported on or after February 25, 1997, is subject to the entry bond as set forth in the limited exclusion order issued by the Commission on February 25, 1997, and is not subject to this bond provision.

The bond prescribed in this section is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* Commission rule 210.68, 19 C.F.R. § 210.68 (1996). The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, the Commission's Orders of February 25, 1997, or any subsequent final order issued after the completion of Investigation No. 337-TA-380, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an Order issued by the Commission based upon application therefor made to the Commission.

By Order of the Commission.

Donna R. Koehnke

Donna R. Koehnke
Secretary

Issued: February 25, 1997

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of CERTAIN AGRICULTURAL TRACTORS UNDER 50 POWER TAKE-OFF HORSEPOWER	Investigation No. 337-TA-380

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT Casteel Farm Implement Company, 4110 Highway 65 South, Pine Bluff, Arkansas 71601, cease and desist from importing, selling for importation into the United States, marketing, distributing, offering for sale, selling in the United States, or otherwise transferring (except for exportation) certain agricultural tractors under 50 power take-off horsepower, as described below, in violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, except as provided in Section IV.

I.

(Definitions)

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Kubota Corporation" or "KBT" shall mean Kubota Corporation, 2-47 Shikitsuhigashi 1-chome, Naniwa-ku, Osaka 556, Japan, Complainant in this investigation, and its successors and assigns.

(C) "Kubota Tractor Corporation" or "KTC" shall mean Kubota Tractor Corporation, 3401 Del Amo Boulevard, Torrance, CA 90503, Complainant in this investigation, and its successors and assigns.

(D) "Kubota Manufacturing of America Corporation" or "KMA" shall mean Kubota Manufacturing of America Corporation, Industrial Park North, 2715 Ramsey Road, Gainesville, Georgia 30501, Complainant in this investigation, and its successors and assigns.

(E) "Respondent" shall mean Casteel Farm Implement Company, 4110 Highway 65 South, Pine Bluff, Arkansas 71601.

(F) "Person" shall mean an individual, or any nongovernmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority owned or controlled subsidiaries, their successors, or assigns.

(G) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(H) The term "covered product" shall mean agricultural tractors under 50 power take-off horsepower manufactured by Kubota Corporation of Japan that infringe federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) and that are not imported by, under license from, or with the permission of the trademark owner.

II.

(Applicability)

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and/or majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

III.

(Conduct Prohibited)

The following conduct of Respondent in the United States is prohibited by this Order. Until the expiration or, if sooner, the abandonment, of the trademark identified in Section I(H) above, Respondent shall not:

(A) import or sell for importation into the United States covered product; or

(B) sell, market, distribute, offer for sale, or otherwise transfer (except for exportation) in the United States imported covered product.

IV.

(Conduct Permitted)

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) has licensed or authorized such specific conduct, or such specific conduct is related to the importation or sale of agricultural tractors by or for the United States.

V.

(Reporting)

For purposes of this reporting requirement, the reporting period shall commence on the first day of September, and shall end on the last day of the following August. The first report required under this section shall cover the period February 25, 1997, through August 31, 1997. This reporting requirement shall continue in force until the expiration, or, if sooner, the abandonment, of the trademark specified in Section I(H) herein unless, pursuant to subsection (j)(2) of section 337 of

the Tariff Act of 1930, the President notifies the Commission within sixty (60) days after the date he receives this Order that he disapproves this Order.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the following: the quantity in units and the value in dollars of foreign-produced covered product that Respondent has imported or sold in the United States during the reporting period or that remains in inventory at the end of the period.

Any failure to make the required report shall constitute a violation of this Order.

VI.

(Recordkeeping and Inspection)

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the importation, sale, offer for sale, marketing, distribution, or otherwise transferring in the United States of imported covered product made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of two (2) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other record documents, both in detail and in summary form, as are required to be retained by subparagraph VI(A) of this Order.

VII.

(Service of Cease and Desist Order)

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the marketing, distribution, or sale of imported covered product in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order had been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraph VII(B) and VII(C) shall remain in effect until the date of expiration or, if sooner, abandonment, of the trademark specified in Section I(H) herein.

VIII.

(Confidentiality)

Any request for confidential treatment of information submitted to or obtained by the Commission pursuant to Sections V and VI of the Order should be in accordance with section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6 (1996). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX.

(Enforcement)

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75 (1996), including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

(Modification)

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76 (1996).

XI.

(Bonding)

The conduct prohibited by Section III of this Order may be continued during the period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond with the Commission in the amount of ninety (90) percent of the entered value of the articles in question. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered product imported on or after February 25, 1997, is subject to the entry bond as set forth in the limited exclusion order issued by the Commission on February 25, 1997, and is not subject to this bond provision.

The bond prescribed in this section is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* Commission rule 210.68, 19 C.F.R. § 210.68 (1996). The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, the Commission's Orders of February 25, 1997, or any subsequent final order issued after the completion of Investigation No. 337-TA-380, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an Order issued by the Commission based upon application therefor made to the Commission.

By Order of the Commission.

Donna R. Koehnke

Donna R. Koehnke
Secretary

Issued: February 25, 1997

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of CERTAIN AGRICULTURAL TRACTORS UNDER 50 POWER TAKE-OFF HORSEPOWER	Investigation No. 337-TA-380

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT Casteel World Group, Inc., 2896 Highway 83 North, Monticello, Arkansas 71655, cease and desist from importing, selling for importation into the United States, marketing, distributing, offering for sale, selling in the United States, or otherwise transferring (except for exportation) certain agricultural tractors under 50 power take-off horsepower, as described below, in violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, except as provided in Section IV.

I.

(Definitions)

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Kubota Corporation" or "KBT" shall mean Kubota Corporation, 2-47 Shikitsuhigashi 1-chome, Naniwa-ku, Osaka 556, Japan, Complainant in this investigation, and its successors and assigns.

(C) "Kubota Tractor Corporation" or "KTC" shall mean Kubota Tractor Corporation, 3401 Del Amo Boulevard, Torrance, CA 90503, Complainant in this investigation, and its successors and assigns.

(D) "Kubota Manufacturing of America Corporation" or "KMA" shall mean Kubota Manufacturing of America Corporation, Industrial Park North, 2715 Ramsey Road, Gainesville, Georgia 30501, Complainant in this investigation, and its successors and assigns.

(E) "Respondent" shall mean Casteel World Group, Inc., 2896 Highway 83 North, Monticello, Arkansas 71655.

(F) "Person" shall mean an individual, or any nongovernmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority owned or controlled subsidiaries, their successors, or assigns.

(G) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(H) The term "covered product" shall mean agricultural tractors under 50 power take-off horsepower manufactured by Kubota Corporation of Japan that infringe federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) and that are not imported by, under license from, or with the permission of the trademark owner.

II.

(Applicability)

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and/or majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

III.

(Conduct Prohibited)

The following conduct of Respondent in the United States is prohibited by this Order. Until the expiration or, if sooner, the abandonment, of the trademark identified in Section I(H) above, Respondent shall not:

(A) import or sell for importation into the United States covered product; or

(B) sell, market, distribute, offer for sale, or otherwise transfer (except for exportation) in the United States imported covered product.

IV.

(Conduct Permitted)

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) has licensed or authorized such specific conduct, or such specific conduct is related to the importation or sale of agricultural tractors by or for the United States.

V.

(Reporting)

For purposes of this reporting requirement, the reporting period shall commence on the first day of September, and shall end on the last day of the following August. The first report required under this section shall cover the period February 25, 1997 through August 31, 1997. This reporting requirement shall continue in force until the expiration, or, if sooner, the abandonment, of the trademark specified in Section I(H) herein unless, pursuant to subsection (j)(2) of section 337 of the

Tariff Act of 1930, the President notifies the Commission within sixty (60) days after the date he receives this Order that he disapproves this Order.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the following: the quantity in units and the value in dollars of foreign-produced covered product that Respondent has imported or sold in the United States during the reporting period or that remains in inventory at the end of the period.

Any failure to make the required report shall constitute a violation of this Order.

VI.

(Recordkeeping and Inspection)

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the importation, sale, offer for sale, marketing, distribution, or otherwise transferring in the United States of imported covered product made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of two (2) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other record documents, both in detail and in summary form, as are required to be retained by subparagraph VI(A) of this Order.

VII.

(Service of Cease and Desist Order)

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the marketing, distribution, or sale of imported covered product in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order had been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraph VII(B) and VII(C) shall remain in effect until the date of expiration or, if sooner, abandonment, of the trademark specified in Section I(H) herein.

VIII.

(Confidentiality)

Any request for confidential treatment of information submitted to or obtained by the Commission pursuant to Sections V and VI of the Order should be in accordance with section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6 (1996). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX.

(Enforcement)

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75 (1996), including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

(Modification)

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76 (1996).

XI.

(Bonding)

The conduct prohibited by Section III of this Order may be continued during the period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond with the Commission in the amount of ninety (90) percent of the entered value of the articles in question. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered product imported on or after February 25, 1997, is subject to the entry bond as set forth in the limited exclusion order issued by the Commission on February 25, 1997, and is not subject to this bond provision.

The bond prescribed in this section is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* Commission rule 210.68, 19 C.F.R. § 210.68 (1996). The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, the Commission's Orders of February 25, 1997, or any subsequent final order issued after the completion of Investigation No. 337-TA-380, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an Order issued by the Commission based upon application therefor made to the Commission.

By Order of the Commission.

Donna R. Koehnke

Donna R. Koehnke
Secretary

Issued: February 25, 1997

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of CERTAIN AGRICULTURAL TRACTORS UNDER 50 POWER TAKE-OFF HORSEPOWER	Investigation No. 337-TA-380

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT Gamut Imports, 14354 Cronese Road, Apple Valley, California 92307, cease and desist from importing, selling for importation into the United States, marketing, distributing, offering for sale, selling in the United States, or otherwise transferring (except for exportation) certain agricultural tractors under 50 power take-off horsepower, as described below, in violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, except as provided in Section IV.

I.

(Definitions)

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Kubota Corporation" or "KBT" shall mean Kubota Corporation, 2-47 Shikitsuhigashi 1-chome, Naniwa-ku, Osaka 556, Japan, Complainant in this investigation, and its successors and assigns.

(C) "Kubota Tractor Corporation" or "KTC" shall mean Kubota Tractor Corporation, 3401 Del Amo Boulevard, Torrance, CA 90503, Complainant in this investigation, and its successors and assigns.

(D) "Kubota Manufacturing of America Corporation" or "KMA" shall mean Kubota Manufacturing of America Corporation, Industrial Park North, 2715 Ramsey Road, Gainesville, Georgia 30501, Complainant in this investigation, and its successors and assigns.

(E) "Respondent" shall mean Gamut Imports, 14354 Cronese Road, Apple Valley, California 92307.

(F) "Person" shall mean an individual, or any nongovernmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority owned or controlled subsidiaries, their successors, or assigns.

(G) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(H) The term "covered product" shall mean agricultural tractors under 50 power take-off horsepower manufactured by Kubota Corporation of Japan that infringe federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) and that are not imported by, under license from, or with the permission of the trademark owner.

II.

(Applicability)

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and/or majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

III.

(Conduct Prohibited)

The following conduct of Respondent in the United States is prohibited by this Order. Until the expiration or, if sooner, the abandonment, of the trademark identified in Section I(H) above, Respondent shall not:

(A) import or sell for importation into the United States covered product; or

(B) sell, market, distribute, offer for sale, or otherwise transfer (except for exportation) in the United States imported covered product.

IV.

(Conduct Permitted)

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) has licensed or authorized such specific conduct, or such specific conduct is related to the importation or sale of agricultural tractors by or for the United States.

V.

(Reporting)

For purposes of this reporting requirement, the reporting period shall commence on the first day of September, and shall end on the last day of the following August. The first report required under this section shall cover the period February 25, 1997, through August 31, 1997. This reporting requirement shall continue in force until the expiration, or, if sooner, the abandonment, of the trademark specified in Section I(H) herein unless, pursuant to subsection (j)(2) of section 337 of

the Tariff Act of 1930, the President notifies the Commission within sixty (60) days after the date he receives this Order that he disapproves this Order.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the following: the quantity in units and the value in dollars of foreign-produced covered product that Respondent has imported or sold in the United States during the reporting period or that remains in inventory at the end of the period.

Any failure to make the required report shall constitute a violation of this Order.

VI.

(Recordkeeping and Inspection)

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the importation, sale, offer for sale, marketing, distribution, or otherwise transferring in the United States of imported covered product made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of two (2) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other record documents, both in detail and in summary form, as are required to be retained by subparagraph VI(A) of this Order.

VII.

(Service of Cease and Desist Order)

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the marketing, distribution, or sale of imported covered product in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order had been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraph VII(B) and VII(C) shall remain in effect until the date of expiration or, if sooner, abandonment, of the trademark specified in Section I(H) herein.

VIII.

(Confidentiality)

Any request for confidential treatment of information submitted to or obtained by the Commission pursuant to Sections V and VI of the Order should be in accordance with section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6 (1996). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX.

(Enforcement)

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75 (1996), including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

(Modification)

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76 (1996).

XI.

(Bonding)

The conduct prohibited by Section III of this Order may be continued during the period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond with the Commission in the amount of ninety (90) percent of the entered value of the articles in question. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered product imported on or after February 25, 1997, is subject to the entry bond as set forth in the limited exclusion order issued by the Commission on February 25, 1997, and is not subject to this bond provision.

The bond prescribed in this section is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* Commission rule 210.68, 19 C.F.R. § 210.68 (1996). The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, the Commission's Orders of February 25, 1997, or any subsequent final order issued after the completion of Investigation No. 337-TA-380, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an Order issued by the Commission based upon application therefor made to the Commission.

By Order of the Commission.

Donna R. Koehnke

Donna R. Koehnke
Secretary

Issued: February 25, 1997

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of	)	
CERTAIN AGRICULTURAL TRACTORS UNDER 50 POWER TAKE-OFF HORSEPOWER	)	Investigation No. 337-TA-380

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT Gamut Trading Company, Inc., 13450 Nomwaket Road, Apple Valley, California 92308, cease and desist from importing, selling for importation into the United States, marketing, distributing, offering for sale, selling in the United States, or otherwise transferring (except for exportation) certain agricultural tractors under 50 power take-off horsepower, as described below, in violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, except as provided in Section IV.

I.

(Definitions)

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Kubota Corporation" or "KBT" shall mean Kubota Corporation, 2-47 Shikitsuhigashi 1-chome, Naniwa-ku, Osaka 556, Japan, Complainant in this investigation, and its successors and assigns.

(C) "Kubota Tractor Corporation" or "KTC" shall mean Kubota Tractor Corporation, 3401 Del Amo Boulevard, Torrance, CA 90503, Complainant in this investigation, and its successors and assigns.

(D) "Kubota Manufacturing of America Corporation" or "KMA" shall mean Kubota Manufacturing of America Corporation, Industrial Park North, 2715 Ramsey Road, Gainesville, Georgia 30501, Complainant in this investigation, and its successors and assigns.

(E) "Respondent" shall mean Gamut Trading Company, Inc., 13450 Nomwaket Road, Apple Valley, California 92308.

(F) "Person" shall mean an individual, or any nongovernmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority owned or controlled subsidiaries, their successors, or assigns.

(G) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(H) The term "covered product" shall mean agricultural tractors under 50 power take-off horsepower manufactured by Kubota Corporation of Japan that infringe federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) and that are not imported by, under license from, or with the permission of the trademark owner.

II.

(Applicability)

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and/or majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

III.

(Conduct Prohibited)

The following conduct of Respondent in the United States is prohibited by this Order. Until the expiration or, if sooner, the abandonment, of the trademark identified in Section I(H) above, Respondent shall not:

(A) import or sell for importation into the United States covered product; or

(B) sell, market, distribute, offer for sale, or otherwise transfer (except for exportation) in the United States imported covered product.

IV.

(Conduct Permitted)

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) has licensed or authorized such specific conduct, or such specific conduct is related to the importation or sale of agricultural tractors by or for the United States.

V.

(Reporting)

For purposes of this reporting requirement, the reporting period shall commence on the first day of September, and shall end on the last day of the following August. The first report required under this section shall cover the period February 25, 1997, through August 31, 1997. This reporting requirement shall continue in force until the expiration, or, if sooner, the abandonment, of the trademark specified in Section I(H) herein unless, pursuant to subsection (j)(2) of section 337 of

the Tariff Act of 1930, the President notifies the Commission within sixty (60) days after the date he receives this Order that he disapproves this Order.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the following: the quantity in units and the value in dollars of foreign-produced covered product that Respondent has imported or sold in the United States during the reporting period or that remains in inventory at the end of the period.

Any failure to make the required report shall constitute a violation of this Order.

VI.

(Recordkeeping and Inspection)

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the importation, sale, offer for sale, marketing, distribution, or otherwise transferring in the United States of imported covered product made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of two (2) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other record documents, both in detail and in summary form, as are required to be retained by subparagraph VI(A) of this Order.

VII.

(Service of Cease and Desist Order)

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the marketing, distribution, or sale of imported covered product in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order had been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraph VII(B) and VII(C) shall remain in effect until the date of expiration or, if sooner, abandonment, of the trademark specified in Section I(H) herein.

VIII.

(Confidentiality)

Any request for confidential treatment of information submitted to or obtained by the Commission pursuant to Sections V and VI of the Order should be in accordance with section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6 (1996). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX.

(Enforcement)

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75 (1996), including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

(Modification)

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76 (1996).

XI.

(Bonding)

The conduct prohibited by Section III of this Order may be continued during the period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond with the Commission in the amount of ninety (90) percent of the entered value of the articles in question. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered product imported on or after February 25, 1997, is subject to the entry bond as set forth in the limited exclusion order issued by the Commission on February 25, 1997, and is not subject to this bond provision.

The bond prescribed in this section is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* Commission rule 210.68, 19 C.F.R. § 210.68 (1996). The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, the Commission's Orders of February 25, 1997, or any subsequent final order issued after the completion of Investigation No. 337-TA-380, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an Order issued by the Commission based upon application therefor made to the Commission.

By Order of the Commission.

Donna R. Koehnke

Donna R. Koehnke
Secretary

Issued: February 25, 1997

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of CERTAIN AGRICULTURAL TRACTORS UNDER 50 POWER TAKE-OFF HORSEPOWER	Investigation No. 337-TA-380

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT Lost Creek Tractor Sales, 1050 South Nutmeg Street, Bennett, Colorado 80102, cease and desist from importing, selling for importation into the United States, marketing, distributing, offering for sale, selling in the United States, or otherwise transferring (except for exportation) certain agricultural tractors under 50 power take-off horsepower, as described below, in violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, except as provided in Section IV.

I.

(Definitions)

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Kubota Corporation" or "KBT" shall mean Kubota Corporation, 2-47 Shikitsuhigashi 1-chome, Naniwa-ku, Osaka 556, Japan, Complainant in this investigation, and its successors and assigns.

(C) "Kubota Tractor Corporation" or "KTC" shall mean Kubota Tractor Corporation, 3401 Del Amo Boulevard, Torrance, CA 90503, Complainant in this investigation, and its successors and assigns.

(D) "Kubota Manufacturing of America Corporation" or "KMA" shall mean Kubota Manufacturing of America Corporation, Industrial Park North, 2715 Ramsey Road, Gainesville, Georgia 30501, Complainant in this investigation, and its successors and assigns.

(E) "Respondent" shall mean Lost Creek Tractor Sales, 1050 South Nutmeg Street, Bennett, Colorado 80102.

(F) "Person" shall mean an individual, or any nongovernmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority owned or controlled subsidiaries, their successors, or assigns.

(G) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(H) The term "covered product" shall mean agricultural tractors under 50 power take-off horsepower manufactured by Kubota Corporation of Japan that infringe federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) and that are not imported by, under license from, or with the permission of the trademark owner.

II.

(Applicability)

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and/or majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

III.

(Conduct Prohibited)

The following conduct of Respondent in the United States is prohibited by this Order. Until the expiration or, if sooner, the abandonment, of the trademark identified in Section I(H) above, Respondent shall not:

(A) import or sell for importation into the United States covered product; or

(B) sell, market, distribute, offer for sale, or otherwise transfer (except for exportation) in the United States imported covered product.

IV.

(Conduct Permitted)

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) has licensed or authorized such specific conduct, or such specific conduct is related to the importation or sale of agricultural tractors by or for the United States.

V.

(Reporting)

For purposes of this reporting requirement, the reporting period shall commence on the first day of September, and shall end on the last day of the following August. The first report required under this section shall cover the period February 25, 1997 through August 31, 1997. This reporting requirement shall continue in force until the expiration, or, if sooner, the abandonment, of the trademark specified in Section I(H) herein unless, pursuant to subsection (j)(2) of section 337 of the

Tariff Act of 1930, the President notifies the Commission within sixty (60) days after the date he receives this Order that he disapproves this Order.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the following: the quantity in units and the value in dollars of foreign-produced covered product that Respondent has imported or sold in the United States during the reporting period or that remains in inventory at the end of the period.

Any failure to make the required report shall constitute a violation of this Order.

VI.

(Recordkeeping and Inspection)

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the importation, sale, offer for sale, marketing, distribution, or otherwise transferring in the United States of imported covered product made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of two (2) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other record documents, both in detail and in summary form, as are required to be retained by subparagraph VI(A) of this Order.

VII.

(Service of Cease and Desist Order)

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the marketing, distribution, or sale of imported covered product in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order had been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraph VII(B) and VII(C) shall remain in effect until the date of expiration or, if sooner, abandonment, of the trademark specified in Section I(H) herein.

VIII.

(Confidentiality)

Any request for confidential treatment of information submitted to or obtained by the Commission pursuant to Sections V and VI of the Order should be in accordance with section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6 (1996). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX.

(Enforcement)

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75 (1996), including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

(Modification)

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76 (1996).

XI.

(Bonding)

The conduct prohibited by Section III of this Order may be continued during the period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond with the Commission in the amount of ninety (90) percent of the entered value of the articles in question. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered product imported on or after February 25, 1997, is subject to the entry bond as set forth in the limited exclusion order issued by the Commission on February 25, 1997, and is not subject to this bond provision.

The bond prescribed in this section is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* Commission rule 210.68, 19 C.F.R. § 210.68 (1996). The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, the Commission's Orders of February 25, 1997, or any subsequent final order issued after the completion of Investigation No. 337-TA-380, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an Order issued by the Commission based upon application therefor made to the Commission.

By Order of the Commission.

Donna R. Koehnke

Donna R. Koehnke
Secretary

Issued: February 25, 1997

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of CERTAIN AGRICULTURAL TRACTORS UNDER 50 POWER TAKE-OFF HORSEPOWER	Investigation No. 337-TA-380

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT MGA, Inc., 28999 Front Street, Suite 203, Temecula, California 92590, cease and desist from importing, selling for importation into the United States, marketing, distributing, offering for sale, selling in the United States, or otherwise transferring (except for exportation) certain agricultural tractors under 50 power take-off horsepower, as described below, in violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, except as provided in Section IV.

I.

(Definitions)

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Kubota Corporation" or "KBT" shall mean Kubota Corporation, 2-47 Shikitsuhigashi 1-chome, Naniwa-ku, Osaka 556, Japan, Complainant in this investigation, and its successors and assigns.

(C) "Kubota Tractor Corporation" or "KTC" shall mean Kubota Tractor Corporation, 3401 Del Amo Boulevard, Torrance, CA 90503, Complainant in this investigation, and its successors and assigns.

(D) "Kubota Manufacturing of America Corporation" or "KMA" shall mean Kubota Manufacturing of America Corporation, Industrial Park North, 2715 Ramsey Road, Gainesville, Georgia 30501, Complainant in this investigation, and its successors and assigns.

(E) "Respondent" shall mean MGA, Inc., 28999 Front Street, Suite 203, Temecula, California 92590.

(F) "Person" shall mean an individual, or any nongovernmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority owned or controlled subsidiaries, their successors, or assigns.

(G) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(H) The term "covered product" shall mean agricultural tractors under 50 power take-off horsepower manufactured by Kubota Corporation of Japan that infringe federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) and that are not imported by, under license from, or with the permission of the trademark owner.

II.

(Applicability)

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and/or majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

III.

(Conduct Prohibited)

The following conduct of Respondent in the United States is prohibited by this Order. Until the expiration or, if sooner, the abandonment, of the trademark identified in Section I(H) above, Respondent shall not:

(A) import or sell for importation into the United States covered product; or

(B) sell, market, distribute, offer for sale, or otherwise transfer (except for exportation) in the United States imported covered product.

IV.

(Conduct Permitted)

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) has licensed or authorized such specific conduct, or such specific conduct is related to the importation or sale of agricultural tractors by or for the United States.

V.

(Reporting)

For purposes of this reporting requirement, the reporting period shall commence on the first day of September, and shall end on the last day of the following August. The first report required under this section shall cover the period February 25, 1997, through August 31, 1997. This reporting requirement shall continue in force until the expiration, or, if sooner, the abandonment, of the trademark specified in Section I(H) herein unless, pursuant to subsection (j)(2) of section 337 of the Tariff Act of 1930, the President notifies the Commission within sixty (60) days after the date he receives this Order that he disapproves this Order.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the following: the quantity in units and the value in dollars of foreign-produced covered product that Respondent has imported or sold in the United States during the reporting period or that remains in inventory at the end of the period.

Any failure to make the required report shall constitute a violation of this Order.

VI.

(Recordkeeping and Inspection)

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the importation, sale, offer for sale, marketing, distribution, or otherwise transferring in the United States of imported covered product made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of two (2) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other record documents, both in detail and in summary form, as are required to be retained by subparagraph VI(A) of this Order.

VII.

(Service of Cease and Desist Order)

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the marketing, distribution, or sale of imported covered product in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order had been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraph VII(B) and VII(C) shall remain in effect until the date of expiration or, if sooner, abandonment, of the trademark specified in Section I(H) herein.

VIII.

(Confidentiality)

Any request for confidential treatment of information submitted to or obtained by the Commission pursuant to Sections V and VI of the Order should be in accordance with section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6 (1996). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX.

(Enforcement)

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75 (1996), including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

(Modification)

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76 (1996).

XI.

(Bonding)

The conduct prohibited by Section III of this Order may be continued during the period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond with the Commission in the amount of ninety (90) percent of the entered value of the articles in question. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered product imported on or after February 25, 1997, is subject to the entry bond as set forth in the limited exclusion order issued by the Commission on February 25, 1997, and is not subject to this bond provision.

The bond prescribed in this section is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* Commission rule 210.68, 19 C.F.R. § 210.68 (1996). The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, the Commission's Orders of February 25, 1997, or any subsequent final order issued after the completion of Investigation No. 337-TA-380, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an Order issued by the Commission based upon application therefor made to the Commission.

By Order of the Commission.

Donna R. Koehnke

Donna R. Koehnke
Secretary

Issued: February 25, 1997

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of CERTAIN AGRICULTURAL TRACTORS UNDER 50 POWER TAKE-OFF HORSEPOWER	Investigation No. 337-TA-380

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT Tractor Company, 8392 Meadowbrook Way S.E., Snoqualmie, Washington 98045, cease and desist from importing, selling for importation into the United States, marketing, distributing, offering for sale, selling in the United States, or otherwise transferring (except for exportation) certain agricultural tractors under 50 power take-off horsepower, as described below, in violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, except as provided in Section IV.

I.

(Definitions)

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Kubota Corporation" or "KBT" shall mean Kubota Corporation, 2-47 Shikitsuhigashi 1-chome, Naniwa-ku, Osaka 556, Japan, Complainant in this investigation, and its successors and assigns.

(C) "Kubota Tractor Corporation" or "KTC" shall mean Kubota Tractor Corporation, 3401 Del Amo Boulevard, Torrance, CA 90503, Complainant in this investigation, and its successors and assigns.

(D) "Kubota Manufacturing of America Corporation" or "KMA" shall mean Kubota Manufacturing of America Corporation, Industrial Park North, 2715 Ramsey Road, Gainesville, Georgia 30501, Complainant in this investigation, and its successors and assigns.

(E) "Respondent" shall mean Tractor Company, 8392 Meadowbrook Way S.E., Snoqualmie, Washington 98045.

(F) "Person" shall mean an individual, or any nongovernmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority owned or controlled subsidiaries, their successors, or assigns.

(G) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(H) The term "covered product" shall mean agricultural tractors under 50 power take-off horsepower manufactured by Kubota Corporation of Japan that infringe federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) and that are not imported by, under license from, or with the permission of the trademark owner.

II.

(Applicability)

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and/or majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

III.

(Conduct Prohibited)

The following conduct of Respondent in the United States is prohibited by this Order. Until the expiration or, if sooner, the abandonment, of the trademark identified in Section I(H) above, Respondent shall not:

(A) import or sell for importation into the United States covered product; or

(B) sell, market, distribute, offer for sale, or otherwise transfer (except for exportation) in the United States imported covered product.

IV.

(Conduct Permitted)

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) has licensed or authorized such specific conduct, or such specific conduct is related to the importation or sale of agricultural tractors by or for the United States.

V.

(Reporting)

For purposes of this reporting requirement, the reporting period shall commence on the first day of September, and shall end on the last day of the following August. The first report required under this section shall cover the period February 25, 1997, through August 31, 1997. This reporting requirement shall continue in force until the expiration, or, if sooner, the abandonment, of the trademark specified in Section I(H) herein unless, pursuant to subsection (j)(2) of section 337 of

the Tariff Act of 1930, the President notifies the Commission within sixty (60) days after the date he receives this Order that he disapproves this Order.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the following: the quantity in units and the value in dollars of foreign-produced covered product that Respondent has imported or sold in the United States during the reporting period or that remains in inventory at the end of the period.

Any failure to make the required report shall constitute a violation of this Order.

VI.

(Recordkeeping and Inspection)

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the importation, sale, offer for sale, marketing, distribution, or otherwise transferring in the United States of imported covered product made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of two (2) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other record documents, both in detail and in summary form, as are required to be retained by subparagraph VI(A) of this Order.

VII.

(Service of Cease and Desist Order)

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the marketing, distribution, or sale of imported covered product in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order had been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraph VII(B) and VII(C) shall remain in effect until the date of expiration or, if sooner, abandonment, of the trademark specified in Section I(H) herein.

VIII.

(Confidentiality)

Any request for confidential treatment of information submitted to or obtained by the Commission pursuant to Sections V and VI of the Order should be in accordance with section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6 (1996). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX.

(Enforcement)

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75 (1996), including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

(Modification)

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76 (1996).

XI.

(Bonding)

The conduct prohibited by Section III of this Order may be continued during the period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond with the Commission in the amount of ninety (90) percent of the entered value of the articles in question. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered product imported on or after February 25, 1997, is subject to the entry bond as set forth in the limited exclusion order issued by the Commission on February 25, 1997, and is not subject to this bond provision.

The bond prescribed in this section is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* Commission rule 210.68, 19 C.F.R. § 210.68 (1996). The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, the Commission's Orders of February 25, 1997, or any subsequent final order issued after the completion of Investigation No. 337-TA-380, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an Order issued by the Commission based upon application therefor made to the Commission.

By Order of the Commission.

Donna R. Koehnke

Donna R. Koehnke
Secretary

Issued: February 25, 1997

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of CERTAIN AGRICULTURAL TRACTORS UNDER 50 POWER TAKE-OFF HORSEPOWER	Investigation No. 337-TA-380

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT The Tractor Shop, 1804 Azalea, Wiggins, Mississippi 39577, cease and desist from importing, selling for importation into the United States, marketing, distributing, offering for sale, selling in the United States, or otherwise transferring (except for exportation) certain agricultural tractors under 50 power take-off horsepower, as described below, in violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, except as provided in Section IV.

I.

(Definitions)

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Kubota Corporation" or "KBT" shall mean Kubota Corporation, 2-47 Shikitsuhigashi 1-chome, Naniwa-ku, Osaka 556, Japan, Complainant in this investigation, and its successors and assigns.

(C) "Kubota Tractor Corporation" or "KTC" shall mean Kubota Tractor Corporation, 3401 Del Amo Boulevard, Torrance, CA 90503, Complainant in this investigation, and its successors and assigns.

(D) "Kubota Manufacturing of America Corporation" or "KMA" shall mean Kubota Manufacturing of America Corporation, Industrial Park North, 2715 Ramsey Road, Gainesville, Georgia 30501, Complainant in this investigation, and its successors and assigns.

(E) "Respondent" shall mean The Tractor Shop, 1804 Azalea, Wiggins, Mississippi 39577.

(F) "Person" shall mean an individual, or any nongovernmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority owned or controlled subsidiaries, their successors, or assigns.

(G) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(H) The term "covered product" shall mean agricultural tractors under 50 power take-off horsepower manufactured by Kubota Corporation of Japan that infringe federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) and that are not imported by, under license from, or with the permission of the trademark owner.

II.

(Applicability)

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and/or majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

III.

(Conduct Prohibited)

The following conduct of Respondent in the United States is prohibited by this Order. Until the expiration or, if sooner, the abandonment, of the trademark identified in Section I(H) above, Respondent shall not:

(A) import or sell for importation into the United States covered product; or

(B) sell, market, distribute, offer for sale, or otherwise transfer (except for exportation) in the United States imported covered product.

IV.

(Conduct Permitted)

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) has licensed or authorized such specific conduct, or such specific conduct is related to the importation or sale of agricultural tractors by or for the United States.

V.

(Reporting)

For purposes of this reporting requirement, the reporting period shall commence on the first day of September, and shall end on the last day of the following August. The first report required under this section shall cover the period February 25, 1997, through August 31, 1997. This reporting requirement shall continue in force until the expiration, or, if sooner, the abandonment, of the trademark specified in Section I(H) herein unless, pursuant to subsection (j)(2) of section 337 of

the Tariff Act of 1930, the President notifies the Commission within sixty (60) days after the date he receives this Order that he disapproves this Order.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the following: the quantity in units and the value in dollars of foreign-produced covered product that Respondent has imported or sold in the United States during the reporting period or that remains in inventory at the end of the period.

Any failure to make the required report shall constitute a violation of this Order.

VI.

(Recordkeeping and Inspection)

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the importation, sale, offer for sale, marketing, distribution, or otherwise transferring in the United States of imported covered product made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of two (2) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other record documents, both in detail and in summary form, as are required to be retained by subparagraph VI(A) of this Order.

VII.

(Service of Cease and Desist Order)

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the marketing, distribution, or sale of imported covered product in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order had been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraph VII(B) and VII(C) shall remain in effect until the date of expiration or, if sooner, abandonment, of the trademark specified in Section I(H) herein.

VIII.

(Confidentiality)

Any request for confidential treatment of information submitted to or obtained by the Commission pursuant to Sections V and VI of the Order should be in accordance with section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6 (1996). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX.

(Enforcement)

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75 (1996), including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

(Modification)

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76 (1996).

XI.

(Bonding)

The conduct prohibited by Section III of this Order may be continued during the period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond with the Commission in the amount of ninety (90) percent of the entered value of the articles in question. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered product imported on or after February 25, 1997, is subject to the entry bond as set forth in the limited exclusion order issued by the Commission on February 25, 1997, and is not subject to this bond provision.

The bond prescribed in this section is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* Commission rule 210.68, 19 C.F.R. § 210.68 (1996). The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, the Commission's Orders of February 25, 1997, or any subsequent final order issued after the completion of Investigation No. 337-TA-380, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an Order issued by the Commission based upon application therefor made to the Commission.

By Order of the Commission.

Donna R. Koehnke

Donna R. Koehnke
Secretary

Issued: February 25, 1997

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of CERTAIN AGRICULTURAL TRACTORS UNDER 50 POWER TAKE-OFF HORSEPOWER	Investigation No. 337-TA-380

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT Wallace International Trading Company, 1197 Bacon Way, Lafayette, California 94549, cease and desist from importing, selling for importation into the United States, marketing, distributing, offering for sale, selling in the United States, or otherwise transferring (except for exportation) certain agricultural tractors under 50 power take-off horsepower, as described below, in violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, except as provided in Section IV.

I.

(Definitions)

As used in this Order:

(A) "Commission" shall mean the United States International Trade Commission.

(B) "Kubota Corporation" or "KBT" shall mean Kubota Corporation, 2-47 Shikitsuhigashi 1-chome, Naniwa-ku, Osaka 556, Japan, Complainant in this investigation, and its successors and assigns.

(C) "Kubota Tractor Corporation" or "KTC" shall mean Kubota Tractor Corporation, 3401 Del Amo Boulevard, Torrance, CA 90503, Complainant in this investigation, and its successors and assigns.

(D) "Kubota Manufacturing of America Corporation" or "KMA" shall mean Kubota Manufacturing of America Corporation, Industrial Park North, 2715 Ramsey Road, Gainesville, Georgia 30501, Complainant in this investigation, and its successors and assigns.

(E) "Respondent" shall mean Wallace International Trading Company, 1197 Bacon Way, Lafayette, California 94549.

(F) "Person" shall mean an individual, or any nongovernmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority owned or controlled subsidiaries, their successors, or assigns.

(G) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.

(H) The term "covered product" shall mean agricultural tractors under 50 power take-off horsepower manufactured by Kubota Corporation of Japan that infringe federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) and that are not imported by, under license from, or with the permission of the trademark owner.

II.

(Applicability)

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and/or majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

III.

(Conduct Prohibited)

The following conduct of Respondent in the United States is prohibited by this Order. Until the expiration or, if sooner, the abandonment, of the trademark identified in Section I(H) above, Respondent shall not:

(A) import or sell for importation into the United States covered product; or

(B) sell, market, distribute, offer for sale, or otherwise transfer (except for exportation) in the United States imported covered product.

IV.

(Conduct Permitted)

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) has licensed or authorized such specific conduct, or such specific conduct is related to the importation or sale of agricultural tractors by or for the United States.

V.

(Reporting)

For purposes of this reporting requirement, the reporting period shall commence on the first day of September, and shall end on the last day of the following August. The first report required under this section shall cover the period February 25, 1997, through August 31, 1997. This reporting requirement shall continue in force until the expiration, or, if sooner, the abandonment, of the trademark specified in Section I(H) herein unless, pursuant to subsection (j)(2) of section 337 of

the Tariff Act of 1930, the President notifies the Commission within sixty (60) days after the date he receives this Order that he disapproves this Order.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the following: the quantity in units and the value in dollars of foreign-produced covered product that Respondent has imported or sold in the United States during the reporting period or that remains in inventory at the end of the period.

Any failure to make the required report shall constitute a violation of this Order.

VI.

(Recordkeeping and Inspection)

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the importation, sale, offer for sale, marketing, distribution, or otherwise transferring in the United States of imported covered product made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of two (2) years from the close of the fiscal year to which they pertain.

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other record documents, both in detail and in summary form, as are required to be retained by subparagraph VI(A) of this Order.

VII.

(Service of Cease and Desist Order)

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the marketing, distribution, or sale of imported covered product in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order had been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraph VII(B) and VII(C) shall remain in effect until the date of expiration or, if sooner, abandonment, of the trademark specified in Section I(H) herein.

VIII.

(Confidentiality)

Any request for confidential treatment of information submitted to or obtained by the Commission pursuant to Sections V and VI of the Order should be in accordance with section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6 (1996). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX.

(Enforcement)

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75 (1996), including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

(Modification)

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76 (1996).

XI.

(Bonding)

The conduct prohibited by Section III of this Order may be continued during the period in which this Order is under review by the President pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), subject to Respondent posting a bond with the Commission in the amount of ninety (90) percent of the entered value of the articles in question. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered product imported on or after February 25, 1997, is subject to the entry bond as set forth in the limited exclusion order issued by the Commission on February 25, 1997, and is not subject to this bond provision.

The bond prescribed in this section is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* Commission rule 210.68, 19 C.F.R. § 210.68 (1996). The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the President approves, or does not disapprove within the Presidential review period, the Commission's Orders of February 25, 1997, or any subsequent final order issued after the completion of Investigation No. 337-TA-380, unless the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the President disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the President, upon service on Respondent of an Order issued by the Commission based upon application therefor made to the Commission.

By Order of the Commission.

Donna R. Koehnke

Donna R. Koehnke
Secretary

Issued: February 25, 1997

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of	)	
CERTAIN AGRICULTURAL TRACTORS UNDER 50 POWER TAKE-OFF HORSEPOWER	)	Investigation No. 337-TA-380

COMMISSION OPINION

INTRODUCTION

On January 9, 1997, the Commission determined not to review that portion of the presiding administrative law judge's (ALJ's) final initial determination (ID) finding that there has been a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in this investigation. The ID found that 24 tractor models produced by Kubota Corporation of Japan and imported used into the United States infringe the federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330). The Commission determined, however, to review other portions of the ID, and on February 24, 1997, the Commission reversed the ALJ's determination of no infringement and no violation with respect to one tractor (the KBT model L200), and further modified the ID by finding a violation of section 337 with respect to 20 additional tractor models not addressed by the ALJ. The Commission further concluded that a general exclusion order is the appropriate remedy in this investigation, that the public interest factors enumerated in section 337(d) do not preclude such a remedy, and that the bond during the Presidential review period should be set in the amount of 90 percent of the entered value of the articles in question.

PROCEDURAL BACKGROUND

This trademark-based section 337 investigation was instituted by the Commission on February 14, 1996, based on a complaint filed by Kubota Tractor Corporation ("KTC"), Kubota Manufacturing of America ("KMA"), and Kubota Corporation ("KBT") (collectively "complainants"). Complainants alleged unfair acts in violation of section 337 in the importation, sale for importation, and/or the sale within the United States after importation, of certain agricultural tractors under 50 power take-off horsepower, by reason of infringement of complainants' four registered trademarks, U.S. Reg. Nos. 922,330 ("KUBOTA" in block letters), 1,775,620 (stylized "KUBOTA"), 1,028,221 (Gear Design),

and 1,874,414 (stylized "K").[1] The Commission's notice of investigation named 20 respondents: Eisho World Ltd., Nitto Trading Corporation, Nitto Trading Co. Ltd., Sanko Industries Co., Ltd., Sonica Trading, Inc., Suma Sangyo, Toyo Service Co., Ltd., Bay Implement Company, Casteel Farm Implement Co. of Monticello, Arkansas, Casteel Farm Implement Co. of Pine Bluff, Arkansas, Casteel World Group, Inc., Gamut Trading Co., Gamut Imports, Lost Creek Tractor Sales, MGA, Inc. Auctioneers, Tom Yarbrough Equipment Rental and Sales, Inc., The Tractor Shop, Tractor Company, Wallace International Trading Co. and Wallace Import Marketing Co. Inc.[2]

On May 29, 1996, the Commission determined not to review an ID (Order No. 13) finding respondents Tractor Company, Sonica Trading, and Toyo Service in default pursuant to Commission rule 210.16 (19 C.F.R. § 210.16), and ruling that they had waived their respective rights to appear, to be served with documents, and to contest the allegations at issue in the investigation. On June 19, 1996, the notice of investigation was amended to add Fujisawa Trading Company as a respondent. On September 25, 1996, the Commission issued a consent order terminating the investigation as to respondent Nitto Trading Corporation. On September 30, 1996, the Commission issued a consent order terminating the investigation as to respondent Tom Yarbrough Equipment Rental and Sales, Inc.

On August 21, 1996, the Commission determined not to review an ID (Order No. 40) granting complainants' motion for summary determination that complainants' four trademarks are valid and that the "KUBOTA" (block letters) and Gear Design marks are incontestable. On September 6, 1996, the Commission determined not to review an ID (Order No. 47) granting complainants' motion for summary determination that a domestic industry exists with respect to the "KUBOTA" (block letters) and "KUBOTA" (stylized) trademarks.

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[1] The accused tractors are agricultural tractors under 50 power take-off horsepower that are manufactured in Japan by complainant KBT and bear the Japanese-registered trademark "KUBOTA." KBT sells these tractors new to Japanese consumers through its Japanese dealer network. Various trading companies, including the named foreign respondents in this investigation, purchase used KBT tractors from Japanese consumers for export to the United States. The domestic respondents import the used tractors into the United States or purchase them from other importers for resale to U.S. consumers. FF 3, 7, 48, 52, 53, 57, 61, 64, 71, 74, 86-140. We refer to the accused tractors as "KBT tractors." KBT also manufactures agricultural tractors under 50 PTO horsepower for the United States market, which bear the federally-registered U.S. trademark "KUBOTA." These tractors are partially assembled in the United States by complainant KTC and sold new to U.S. consumers by KTC through KTC's network of over 1100 authorized dealers. FF 11-19. We refer to the authorized U.S. tractors as "KTC tractors." Because the accused tractors are KBT products intended by the manufacturer KBT for sale in Japan and imported into the United States without its consent, we also refer to the accused KBT tractors as "gray market" or "parallel" imports. See K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 285 (1988).

[2] 61 Fed. Reg. 6802 (Feb. 22, 1996).

In his final ID, the ALJ found that there had been imports of the accused products; that 24 specific models of the accused tractors[3] infringed the "KUBOTA" (block letters) trademark (U.S. Reg. No. 922,330); that one model of the accused tractors, the KBT L200, did not infringe the "KUBOTA" (block letters) trademark; that none of the 25 accused KBT models considered infringed the "KUBOTA" (stylized) trademark (U.S. Reg. No. 1,775,620); and that complainants were no longer asserting violations of section 337 based on infringement of the stylized "K" and "Gear Design" trademarks.

On January 9, 1997, the Commission determined to review (1) the finding of no infringement and no violation with respect to the KBT model L200 tractor; and (2) the decision to limit infringement analysis to 25 models of accused tractors. The Commission determined not to review the ID in all other respects. On review, the Commission requested that the parties address the following issues:

> (1) whether the fact that gray market KBT model L200 tractors are imported and sold bearing Japanese-language labels constitutes a "material difference" from the authorized KTC model L200 tractors sufficient to establish a likelihood of consumer confusion;
>
> (2) whether evidence on the record in this investigation demonstrates that specific KBT models other than the 25 identified on [Staff Exhibit] SX-1 have been imported and sold in the United States; and, if so,
>
> (3) whether evidence on the record in this investigation demonstrates that any specific KBT model identified in number (2) above was imported and sold in the United States bearing Japanese-language labels or is otherwise materially different than the closest corresponding KTC model with respect to any of the differences found to be "material" in the ID.

In addition, the Commission requested written submissions on the issues of remedy, the public interest, and bonding.[4]

Submissions and reply submissions on remedy, the public interest, and bonding and on the issues under review were received from complainants, respondents, and the Commission investigative attorney (IA). In addition, complainants filed a request for oral hearing pursuant to Commission rule 210.45; complainants filed a request to strike pages 4-20 of respondents' brief on review; respondents filed a request to strike certain consumer survey information submitted by complainants and to sanction complainants for submitting

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[3] The 24 KBT tractors which the ALJ found to infringe the KUBOTA trademark are those described in Staff Exhibit 1 ("SX-1"), except for the KBT model L200, which the ALJ found not to infringe.

[4] 62 Fed. Reg. 2179 (Jan. 15, 1997).

that information; complainants filed a motion for leave to file a surreply brief in response to the reply brief of the IA; and respondents filed an objection to complainants' surreply brief.

This opinion explains the Commission's final disposition of this investigation, including our decisions: (1) to reverse the ALJ's finding of no infringement and no violation by the KBT model L200 tractor; (2) to find a violation of section 337 with respect to 20 models of KBT tractors in addition to the 25 models considered by the ALJ; (3) to deny complainants' request for oral hearing,[5] both requests to strike, respondents' request for sanctions, and complainants' motion for leave to file a surreply brief; (4) to issue a general exclusion order prohibiting the unlicensed entry for consumption of agricultural tractors under 50 power take-off horsepower manufactured by Kubota Corporation of Japan that infringe the federally-registered U.S. trademark "KUBOTA" (Reg. No. 922,330) and eleven cease and desist orders directed to respondents Bay Implement Company, Casteel World Group, Inc. (and related entities), Gamut Trading Co. (and related entities), Lost Creek Tractor Sales, MGA, Inc. Auctioneers, The Tractor Shop, Tractor Company, and Wallace International Trading Co.; and (5) to set the bond during the Presidential review period at 90 percent of the entered value of the articles in question.[6]

DISCUSSION

I. QUESTIONS UNDER REVIEW

A. The ID

In gray market cases, trademark infringement (and thus a violation of section 337) is established by proof that there are "material differences" between the accused imported products and the products authorized for sale in the United States. The existence of material differences creates a legal presumption that consumers are likely to be confused as to the

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[5] Complainants provide no justification for their request for oral hearing pursuant to Commission rule 210.45, 19 C.F.R. § 210.45. The review and remedy issues in this investigation have been fully briefed by the parties and, while the evidence they present is conflicting on some issues, we have an adequate record to resolve the issues before us. Accordingly, we see no reason to extend further the deadline for completion of the investigation in order to schedule a hearing which would not, in our view, be of any significant benefit to our decision-making process. The request for oral hearing is therefore denied.

[6] Commissioner Crawford voted not to review the ID on any violation issues. Accordingly, she does not join the following discussion of the review issues. She does, however, join the rest of this opinion. See Dissenting Views of Commissioner Carol T. Crawford.

source of the gray market product, resulting in damage to the markholder's goodwill.[7]

Applying this standard, the ALJ found that the evidence before him was sufficient to assess the existence of material differences only with respect to 25 models of gray market (KBT) tractors identified on SX-1.[8] In so concluding, the ALJ rejected complainants' argument that all KBT models are materially different from all KTC models. His analysis may be summarized as follows:

(1) Complainants claim that all KBT models differ from all KTC models with respect to strength, availability of parts and service, and language of labels and operator's manuals.[9]

(2) The testimony of complainants' witness with respect to differences in strength was actually limited to the 25 KBT and 18 KTC models on SX-1, and the witness conceded that complainants had not in fact proved the existence of strength differences for four of those KBT models (the L200, L240, L2000, and L2600). Thus, complainants not only failed to prove that all KBT tractors as a group are not as strong as all KTC tractors, but even failed to prove that all KBT tractors listed on SX-1 are not as strong as the corresponding KTC tractors listed on SX-1.[10]

(3) The other differences that are asserted to exist between all KBT tractors on the one hand and all KTC tractors on the other are non-physical, i.e., availability of parts and service in the United States and availability of English-language labels and manuals.[11]

(4) These non-physical differences are only material with respect to a KBT model for which there is no physically identical KTC model. Otherwise, parts, service, labels and manuals for the identical KTC model will serve equally well for the gray market KBT model.[12]

(5) The evidence showed that the KBT model L200 and the KTC model L200 are physically identical. Therefore, not all KBT models are physically different

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7 ID at 21-22.

8 ID at 18-19.

9 ID at 15-16.

10 ID at 18-19, 33-34, FF 153.

11 ID at 24-32.

12 ID at 24-25.

from all KTC models.[13]

(6) Among a long list of physical differences between KBT and KTC models proffered by complainants, no difference appeared in every KBT/KTC comparison on SX-1 and each comparison resulted in a different combination of differences and similarities.[14]

(7) Therefore, material differences can only be demonstrated on a model-by-model basis, through proof that there is no KTC model that is physically identical to a particular KBT model that has been imported and sold in the United States.[15]

(8) The only KBT models as to which there is sufficient record evidence to make the inquiry identified in (7) above are the 25 models identified on SX-1.[16]

Among those 25 KBT models, the ALJ found that one model, the KBT L200, was physically identical to the corresponding KTC L200. He concluded that, because there was no evidence of structural differences between the gray market KBT L200 tractor and the corresponding authorized KTC L200 tractor, any parts and service for the KTC L200 tractors, which are available in the United States from KTC dealers, would be interchangeable with those required for the KBT L200 model. English-language manuals and warning labels would likewise be available from KTC dealers. Therefore, the ALJ found no material differences between the accused KBT L200 and the authorized KTC L200.[17]

The ALJ found that there was no KTC model physically identical to any of the remaining 24 KBT models on SX-1.[18] For those tractors, the ALJ found that only some of the necessary parts would be interchangeable with those for KTC models. Because KTC dealers do not have parts manuals for the accused KBT tractors, they are unable to determine which parts are the same and which are different, and they are not trained to perform repairs on KBT models.[19] Thus, some KTC dealers are unwilling to provide service to KBT tractors, and those that are willing are unable to provide the same level of parts and service support as they do for KTC tractors. The ID also found that the accused KBT tractors differ

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13 ID at 25-26.

14 ID at 32-41.

15 ID at 18-19.

16 ID at 18-19.

17 ID at 25-26.

18 ID at 31.

19 ID at 26-27.

from KTC tractors because they are sold with Japanese-language safety labels and operator's manuals.[20]

The ALJ found that consumers consider the availability of parts and service support to be a significant factor in their purchasing decisions. He also found evidence that the absence of parts and service support by KTC for KBT tractors has caused actual consumer confusion, disappointment, and anger.[21] Similarly, he found that English-language labels and operator's manuals are important for the safe operation and maintenance of a tractor.[22] Thus, the ALJ concluded that each of these non-physical differences was a material difference sufficient to create a presumption of a likelihood of confusion, and hence a violation of section 337, with respect to each of the 24 models of accused KBT tractors.[23]

B. Review Issue (1): The ID's Finding of No Infringement by the KBT L200

1. Arguments of the Parties

Complainants argue that the fact that gray market KBT L200 tractors are imported and sold bearing Japanese-language labels constitutes a material difference from the authorized KTC L200 model tractors sufficient to establish a likelihood of confusion.[24] They assert that there is no factual dispute among the parties that the KBT L200 tractor has Japanese-language warning and instructional labels, whereas the KTC L200 has English-language labels.[25] They argue that the proper inquiry is not whether circumstances "would allow" a gray market dealer to use appropriate English-language labels on the KBT L200, as the ALJ appears to reason, but whether the tractors are materially different at the time of importation. Thus, complainants request that the Commission reverse the ALJ's finding that

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[20] ID at 29-30. The ALJ found that some domestic respondents replace the Japanese-language labels with English-language labels, but that the English-language labels applied are intended either for non-corresponding KTC models or for non-Kubota tractors and therefore contain erroneous safety and operating instructions. ID at 29 & n.27.

[21] ID at 27-28.

[22] FF 215.

[23] ID at 30.

[24] Complainants' Brief on Review, Remedy, Bonding and Public Interest (Jan. 23, 1997) ("Complainants' Brief" or "CB") at 5; Complainants' Response to Respondents' and the Staff's Briefs on Review, and Remedy, Bonding and Public Interest (Jan. 30, 1997) ("CR") at 5 n.6.

[25] CB at 6, citing ID at 29.

the KBT L200 does not infringe complainants' U.S. "KUBOTA" trademark.[26]

Respondents do not address any of the three review issues directly.[27] They do concede, however, that all of the accused tractors are imported bearing Japanese-language labels. They reason that since the ID finds that Japanese-language labels on the KBT L200 do not create a material difference with the KTC L200, then those labels cannot be a material difference with respect to any of the other 24 tractors on SX-1.[28] Respondents also argue that labels are not a permanent feature of the tractor, but rather an additional piece of optional equipment that can be added at the discretion of the dealer or purchaser.[29]

The IA argues that the fact that KBT model L200 tractors are imported and sold bearing Japanese-language operating and warning labels constitutes a material difference from otherwise structurally identical KTC model L200 tractors bearing English-language labels.[30] He disagrees with the ID's conclusion that the KBT L200 can be distinguished from the other models on SX-1 because suitable English-language labels for the identical KTC L200 are available. In the IA's view, the fact that a KBT L200 could be rendered non-infringing by affixing English-language KTC L200 labels, thereby eliminating any material differences between the models, does not mean that a KBT L200 is non-infringing when it is imported without the appropriate English-language labels.[31]

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[26] CB at 7.

[27] Respondents address most of the arguments in their briefs to findings in the ID which the Commission has already determined not to review and which are therefore no longer at issue in this proceeding. See generally Respondents' "Response to Commission" (Jan. 22, 1997) ("Respondents' Brief" or "RB"); Respondents' "Reply Submission to OUII and Complainants' Memorandum" (Jan. 29, 1997) ("Respondents' Response" or "RR"). Complainants urge us to strike pages 4-20 of respondents' brief on the grounds that those pages address issues the Commission has declined to review. CR at 1-2. Although we have determined to deny complainants' request to strike, we have disregarded those of respondents' arguments that are not relevant to the issues before us.

[28] RB at 14.

[29] RB at 15; RR at 11, 14.

[30] Brief of the Office of Unfair Import Investigations on the Issues Under Review and on Remedy, the Public Interest, and Bonding (Jan. 23, 1997) ("Staff Brief" or "SB") at 4-5; Reply Brief of the Office of Unfair Import Investigations on the Issues Under Review and on Remedy, the Public Interest, and Bonding (Jan. 30, 1997) ("SR") at 2-3.

[31] SB at 6.

2. Analysis

We agree with complainants and the IA and reverse the ALJ's finding of no infringement with respect to the KBT L200.

The ALJ found that KBT L200s are imported and sold with Japanese-language labels, and that Japanese-language labels are materially different from English-language labels.[32] The ALJ found that the KBT L200 tractor does not infringe Kubota's trademark, however, because it is physically identical to the KTC L200, for which English-language labels are readily available in the United States.[33] The ALJ's finding of no infringement therefore rests on his conclusions that the absence of English-language labels on the KBT L200 is a non-physical difference and that non-physical differences are not material in the absence of physical differences.

In our view, the labels attached to a tractor at sale are not non-physical or after-market items like the availability of replacement parts, service, or operator's manuals, but rather an integral part of the tractor, i.e., a physical difference. Accordingly, we agree with complainants and the IA that the fact that a KBT L200 could be rendered non-infringing by affixing English-language KTC L200 labels after importation does not preclude a finding of material differences. The unlawful act defined by section 337 is the "importation into the United States, the sale for importation into the United States, or the sale within the United States after importation" of an article that infringes a registered trademark. 19 U.S.C. § 1337(a)(1)(C). Thus, for purposes of establishing a violation of section 337, the question whether an item is infringing should be determined at the time of its importation or sale, not at some later point in time when the ultimate purchaser may have an opportunity to acquire the proper labels.

A number of court decisions have considered language differences in labels and other printed material associated with a trademarked product and have uniformly considered such differences to be material.[34] Similarly, courts have uniformly found differences in label text

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[32] ID at 29-30.

[33] ID at 25-26.

[34] See, e.g., Fender Musical Instruments Corp. v. Unlimited Music Center Inc., 35 U.S.P.Q.2d 1053, 1056 (D. Conn. 1995) (gray market guitars with Japanese-language owner's manuals); PepsiCo v. Nostalgia Products Corp., 18 U.S.P.Q.2d 1404, 1405 (N.D. Ill. 1990) (Mexican PEPSI bottle labels were in Spanish and did not contain a list of ingredients); Original Appalachian Artworks, Inc. v. Granada Electronics, Inc., 816 F.2d 68, 73 (2d Cir. 1987) (Spanish-language adoption papers and birth certificates included with gray market Cabbage Patch Dolls); Osawa & Co. v. B & H Photo, 589 F. Supp. 1163, 1169 (S.D.N.Y. 1984) (camera equipment with foreign language instruction manuals).

and other content to be material.[35] While none of the decided cases has addressed a situation where the only proven difference between the gray market and authorized products was the language of the label (or indeed where only a single difference of any kind was at issue), the courts have stated that a single material difference is sufficient to establish trademark infringement.[36]

In this case, the ALJ found that, "because a high percentage of the users of these tractors are non-professional weekend farmers, the absence of proper instructional labels in English is a great concern."[37] In the absence of proper instructional and warning labels, the operator would have to determine how to use the engine speed hand throttle, the transmission, the four-wheel drive, the power take-off, the hydraulic power lift, and other controls on the tractor "by experimentation."[38] We therefore find that the absence of English-language warning and instructional labels on the KBT L200 at the time of its importation and sale constitutes a material difference from the otherwise identical KTC L200 and reverse the ALJ's finding of no violation by the KBT L200.

C. Review Issues (2) and (3): Material Differences with Respect to Other Imported KBT Models

1. Arguments of the Parties

Complainants identified 22 KBT models in addition to those identified on SX-1 which they contend have been imported and sold in the United States as of July 1996.[39] They argue

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[35] See, e.g., Helene Curtis v. National Wholesale Liquidators, Inc., 890 F. Supp. 152, 155 (E.D.N.Y. 1995) (gray market Canadian hair care products were labeled in French as well as English, and labels listed quantity in milliliters instead of ounces and did not contain a list of ingredients as required by federal law); Ferrero U.S.A., Inc. v. Ozak Trading, Inc., 753 F. Supp. 1240, 1243-44 (D.N.J. 1991) (differences in the print and content of labels on U.S. and U.K. TIC TAC mints); Dial Corp. v. Manghnani Inv. Corp., 659 F. Supp. 1230, 1234 (D. Conn. 1987) (gray market DIAL soap label did not list all of the individual ingredients, as required of U.S. DIAL soap).

[36] See, e.g., Societe des Produits Nestle, S.A. v. Casa Helvetia, Inc., 982 F.2d 633, 641 (1st Cir. 1992) ("the existence of any difference between the registrant's product and the allegedly infringing gray good that consumers would likely consider to be relevant when purchasing a product creates a presumption of consumer confusion sufficient to support a Lanham Trade-Mark Act claim").

[37] ID at 115, FF 215.

[38] Id.

[39] Those models are: B1402, B1502, B1702, B1902, XB-1, L140, L170, L260, L270, (continued...)

further that record evidence shows that all KBT tractors differ from all KTC tractors with respect to the language of the labels, and that all parties agree with this conclusion.[40] Complainants also renew the argument, made in their petition for review, that all KBT tractors are materially different from all KTC tractors with respect to the language of the operator's manuals, the overall strength of the tractor, and the availability of 100 percent parts and service support, and continue to argue that a model-by-model comparison is not legally required to find material differences.[41]

The IA argues that the record supports the conclusion that 19 KBT models in addition to those listed on SX-1 have been imported and sold bearing Japanese-language labels.[42] The IA states that the record indicates that all KBT tractors that have been imported into the United States are manufactured for the Japanese market, and that when they are imported, they bear Japanese-language labels. In contrast, all KTC models are manufactured for the United States, and when they are originally sold in the United States, they bear English-language labels.[43] According to the IA, the evidence further indicates that all KBT models imported into the United States bear their original labels, with an occasional exception where an older tractor has lost its original labels due to wear. He also points to evidence indicating that, although some KBT tractors are affixed with English-language warning labels after importation, they still bear Japanese-language instructional labels.[44] The IA argues that the lack of English-language labels is a material difference between these 19 KBT models and

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[39] (...continued)
L280, L350, L1511, L2602, L2802, L3202, L3500, L3602, L4202, L1-R26, M4000, M4050, M4950. CB at 9. Complainants also agree with the IA that models L35, L3002, and B15 are being imported. CR at 5.

[40] CB at 10-11.

[41] CB at 12-16; CR at 6 n.9.

[42] SB at 7; SR at 4 n.4. The models initially identified by the IA are: L1511, L2602, L3202, L3500, L140, L280, L2500, L350, L4202, L3000, L3602, L35, L2001, L270, L2802, L3002, B1402, B1502, B1702, B1902, XB-1, B15, B700E. SB at 7, citing, ID at 69, FF 92; ID at 71, FF 106; ID at 71, FF 111; ID at 72, FF 115; ID at 73, FF 122, 125; ID at 75, FF 137. The IA subsequently withdrew models B700E, L2500, L3000, and L2001, based on complainants' representation that no such KBT models exist. The IA also indicated his understanding that the L35 may also be known as a KBT L135 or a GL35 and that the B15 may be a KBT B1-15. SR at 4 n.4.

[43] SB at 7.

[44] SB at 8, citing ID at 115, FF 216; ID at 158, FF 315.

the closest corresponding KTC tractors.[45]

The IA argues that, with the exception of labeling, any other material differences between the 19 models he has identified and the closest corresponding KTC tractor for each of those models can only be established through a feature-by-feature comparison, and that complainants did not present evidence sufficient to support such a model-by-model structural comparison. Thus, the IA contends that the record will not support finding any additional material differences between these 19 KBT tractor models and the closest corresponding KTC models.[46]

2. Analysis

On review, we have considered whether, if the lack of English-language labels renders the KBT L200 infringing, the same would not be true of other KBT models not listed on SX-1. We conclude that we can find a violation of section 337 with respect to additional KBT models not addressed by the ALJ if there is evidence: (1) that those models have been imported and sold in the United States, and (2) that they bore Japanese-language labels (or no labels) at the time of their importation. As noted above, the parties all agree that the second condition is met: all imported KBT tractors are imported without English-language warning and instructional labels.[47] Complainants impliedly argue, however, that the first condition is not necessary and that we should find a violation with respect to all KBT models based on the label evidence alone.

We disagree. As noted above, the act that section 337 declares unlawful is the importation or sale after importation of an article that infringes a registered trademark. 19 U.S.C. § 1337(a)(1)(C). Thus, "[i]mportation (or at least a sale for importation) of the infringing articles is an essential element of a violation of section 337" and a product which

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[45] SR at 5-6.

[46] SB at 8-9; SR at 7-13. On February 11, 1997, complainants filed a motion for leave to file a surreply brief in response to the reply brief of the IA. In their motion, complainants assert that a surreply "is necessary to address new issues raised" in the IA's brief with respect to both the review issues and the appropriate remedy in this case. We conclude that there are no new issues raised in the IA's reply brief that would warrant granting complainants a surreply. Rather, complainants' motion is simply another of several attempts on their part to have the last word on the issues before us. Moreover, as we explain further in our discussion of the Jacoby survey, infra, it is disingenuous for complainants to accuse the IA of raising new arguments with respect to a survey that complainants presented for the first time in their brief on remedy. Accordingly, complainants' motion for leave to file a surreply brief is denied.

[47] CB at 10-11; RB at 14; SB at 7; SR at 4.

infringes, but which has not been imported, cannot be the basis for a finding of violation.[48] Since importation and infringement are separate elements of a violation of section 337, complainants err in contending that the fact that all KBT tractors are labeled in Japanese (and therefore infringing) supports a finding of violation with respect to all KBT models without individualized proof of importation or sale in the United States. This conclusion has even more force in a gray market case, because gray market goods are by definition legitimately trademarked products until such time as they cross the U.S. border.[49] Therefore, in a gray market case, even a finding of infringement depends upon importation into an unauthorized territory.

The discovery responses, invoices, and other materials cited by the parties provide record evidence that each of the following 20 KBT models, in addition to those listed on SX-1, has been imported into and sold in the United States:

B-series: B1402, B1502, B1702, B1902, XB-1, B15 (or B1-15)

L-series: L35 (or L135 or GL35), L140, L270, L280, L350, L1511, L2602, L2802, L3002, L3202, L3500, L3602, L4202, L1-R26[50]

The parties agree that all such models were imported bearing Japanese-language labels (or no labels). We therefore find that these additional 20 KBT models are materially different from KTC models and find a violation of section 337 with respect to each of the 20 additional KBT models identified above.

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[48] Certain Integrated Circuit Telecommunication Chips and Products Containing Same Including Dialing Apparatus, Inv. No. 337-TA-337, USITC Pub. 2670, Commission Opinion at 24 (Aug. 1993) (where several models of chips produced by respondent UMC infringed the patent at issue, but the only model that was shown to have been imported was specifically found to be non-infringing, no violation of section 337 was proven against UMC).

[49] K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 285 (1988).

[50] See FF 92, 106, 111, 115, 122, 125, and 137; CX240 at 15-16. Complainants assert that KBT models L170 and L260 have also been imported and sold in the United States. After reviewing all of the exhibits cited by complainants, we were unable to locate any evidence of importation or sale of these two models, only evidence that Kubota has produced tractors with these model numbers. CX64 (Attachment 1A-7). Complainants also argue that there is evidence of importation or sale of M-series models M4000, M4050, and M4950. The IA argues that we should not find a violation with respect to M-series tractors, since complainants only asserted violations with respect to B- and L-series tractors in their complaint. Since the Commission instituted this investigation with respect to all KBT tractors under 50 PTO horsepower, we could find a violation based on imports of M-series tractors under 50 PTO horsepower. FF 139-140. However, complainants have not directed us to any evidence of importation or sale of these models.

We conclude, however, that the record does not support finding any further material differences, aside from the absence of English-language labels, with respect to the 20 additional KBT models, and decline to find that any of the other material differences asserted by complainants exists with respect to these 20 KBT models.

Labels aside, the ALJ found that one or more of the KBT models on SX-1 were not materially different from the closest corresponding KTC models with respect to each of the other physical or non-physical differences asserted by complainants in this investigation, including overall strength, various operating and safety features, and the availability of parts, service and English-language operator's manuals.[51] We did not determine that any of these factual findings was clearly erroneous and they are not subject to review at this time.

Although complainants continue to press the argument, made before the ALJ and again in their petition for review, that a model-by-model analysis is not legally required, their argument misses the point. The ALJ never found that he was *legally required* to do a model-by-model comparison.[52] Rather, he found *as a matter of fact* that, because none of the generalized differences asserted by complainants appeared in all 25 of the KBT models on SX-1, the record could not support the inference that such differences would appear in all other KBT models. Since the record did not support making generalized findings of material differences (other than Japanese-language labels) that distinguish all KBT tractors from all KTC tractors, material differences could only be demonstrated on a model-by-model basis. Complainants do not dispute that the only models for which such a comparison is possible are those listed on SX-1.[53] We therefore find that evidence on the record does not demonstrate that any of the 20 KBT models identified in response to review issue (2) is materially different from the closest corresponding KTC model with respect to any of the differences found to be "material" in the ID, aside from having Japanese-language labels.

II. REMEDY, THE PUBLIC INTEREST, AND BONDING

Where a violation of section 337 has been found, the Commission must consider the issues of remedy, the public interest, and bonding. Under subsections 337(d) and (f), the Commission may issue an exclusion order, a cease and desist order, or both, depending on

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[51] ID at 18-19, 33-34 and FF 153 (no proof of strength differences for KBT L200, L240, L2000 and L2600); ID at 32-41 (other physical features); ID at 24-25 (parts, service and English-language manuals available for KBT L200).

[52] Some courts have relied on generalized findings with respect to a group of products. See, e.g., Ferrero, 753 F. Supp. at 1244; Nestle, 982 F.2d at 642; Nestle, 777 F. Supp. 161, 163-64 (D.P.R. 1991). Other courts have addressed differences on a product-by-product basis. See, e.g., Helene Curtis, 890 F. Supp. at 155-156 (separate comparisons for various hair care products, including various kinds of shampoo, after-shampoo treatment, hair spray, spray gel, and mousse).

[53] CB at 4.

the circumstances. The Commission has broad discretion in selecting the form, scope, and extent of the remedy in a section 337 proceeding.[54] The Commission may make factual determinations in the remedy phase of a section 337 investigation, to the extent necessary, in order to reach its determination, which may be based on the evidence of record, or on the basis of submissions of the parties on remedy, the public interest, and bonding.[55]

A. Remedy

There are two types of exclusion orders: general exclusion orders and limited exclusion orders. A general exclusion order instructs the U.S. Customs Service to exclude from entry all articles which infringe the involved trademarks, without regard to source. Thus, a general exclusion order applies to persons who were not parties to the Commission's investigation and, indeed, to persons who could not have been parties, such as persons who decide to import after the Commission's investigation is concluded. A limited exclusion order instructs the Customs Service to exclude from entry all articles which infringe the involved trademarks and that originate from a firm that was a party to the Commission investigation. A general exclusion order is the broadest type of relief available from the Commission. Because of its considerable impact on international trade, potentially extending beyond the parties and articles involved in the investigation, more than just the interests of the parties is involved. Therefore, the Commission exercises caution in issuing general exclusion orders and requires that certain conditions be met before one is issued.[56]

In addition to exclusion orders, the Commission can also issue cease and desist orders. A cease and desist order is an order to a person to cease its unfair acts and is generally directed to respondents that maintain inventories of the accused product in the United States. Unlike an exclusion order, a cease and desist order is enforced by the Commission, through the courts, rather than by the Customs Service.

1. The RD

The ALJ's recommended determination (RD) recommends that the Commission issue

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[54] Viscofan, S.A. v. U.S. Int'l Trade Comm'n, 787 F.2d 544, 548 (Fed. Cir. 1986) (affirming Commission remedy determination in Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Products, Inv. Nos. 337-TA-148 and -169, USITC Pub. 1624 (Dec. 1984)); Hyundai Electronics Industries Co. v. U.S. Int'l Trade Comm'n, 899 F.2d 1204 (Fed. Cir. 1990) (affirming Commission remedy issued in Certain Erasable Programmable Read-Only Memories, Components Thereof, Products Containing Such Memories, and Processes for Making Such Memories, Inv. No. 337-TA-276, USITC Pub. 2196 (May 1989)).

[55] Sealed Air Corp. v. U.S. Int'l Trade Comm'n, 645 F.2d 976 (C.C.P.A. 1981).

[56] See 19 U.S.C. § 1337(d); Certain Airless Paint Spray Pumps, Inv. No. 337-TA-90, USITC Pub. 1199, Commission Opinion at 17-18 (Nov. 1981).

a general exclusion order, and that the order apply to all infringing KBT models, rather than just to those as to which the Commission makes a finding of violation.[57] The RD recommends, however, that the Commission's general exclusion order permit infringing tractors to enter the United States if each infringing tractor has affixed to it a permanent, non-removable label, in the same location and size as the largest "KUBOTA" trademark appearing on that tractor, containing the following information:

> (1) that the tractor was not manufactured for sale or use in the United States and differs from the tractors Kubota Corporation manufactures for sale in the United States;
>
> (2) that Kubota Corporation has not authorized the sale of this tractor model in the United States;
>
> (3) that Kubota Corporation and authorized Kubota dealers are unable to provide parts and service support for this tractor model in the United States;
>
> (4) that accessories for Kubota tractors authorized for sale in the United States may not be compatible with this tractor;
>
> (5) that important English-language instructional and warning labels are not available;
>
> (6) that English-language operator's manuals are not available for this tractor model; and
>
> (7) that this tractor may not comply with U.S. industry standards for safety.[58]

The RD further recommends that the Commission issue cease and desist orders prohibiting the sale of infringing KBT tractors by respondents Wallace, Gamut, The Tractor Shop, Bay, Casteel, MGA, and Lost Creek unless those tractors are sold bearing the prescribed label,[59] and that the cease and desist orders direct respondents to inform consumers of gray market tractors of the information contained in the label and prohibit them from suggesting that the label information should be ignored.[60] Finally, the RD recommends that the respondents named in the orders be required to file quarterly reports with the Commission on the number of infringing Kubota brand tractors, by model number, imported

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[57] RD at 43-44.

[58] RD at 43-44.

[59] Some of these named respondents actually consistent of two or more related businesses which the ALJ treated as single entities. FF 49-61, 66.

[60] RD at 55.

into the United States, sold after importation, or remaining in inventory.[61]

2. Arguments of the Parties

a. Complainants' Position

Complainants contend that the appropriate remedy in this case is an unconditional general exclusion order prohibiting the importation and sale of all KBT tractors coupled with unconditional cease and desist orders directed to the domestic selling respondents prohibiting the sale of all KBT tractors.[62] They argue that gray market case law, general trademark law, and Commission precedent all reject labeling as an appropriate remedy for consumer confusion.[63] In addition, complainants submitted with their remedy brief a consumer survey designed and conducted under the supervision of Dr. Jacob Jacoby, whom they present as a leading expert in the field of consumer behavior. They also submitted a declaration containing Dr. Jacoby's expert opinion that consumers will not read, recall, or understand the content of the ALJ's proposed label and that such a label would be useless in preventing consumer confusion.[64] Finally, complainants argue that the proposed label would exacerbate consumer confusion, and that, as a practical matter, a labeling remedy would be impossible to enforce.[65]

b. Respondents' Position

Respondents oppose the imposition of any remedy on the grounds that there has been no showing of trademark infringement and that Kubota is in the best position to remedy its own problems by ending its refusal to service KBT tractors in the United States.[66] Respondents state, however, that they are "not completely opposed" to a labeling requirement, and propose the following label:

> (1) This tractor was not manufactured for sale or use in the United States.
>
> (2) Kubota Corporation has not authorized the sale for [sic] this tractor model in the United States.

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61 RD at 55-56.

62 CB at 16-22.

63 CB at 22-33; CR at 8-9.

64 CB at 33-41.

65 CB at 42-54; CR at 9-11, 13-15.

66 RB at 21-23.

(3) Parts and service may not be available in the United States.

(4) Accessories for Kubota tractors authorized for sale in the United States may not be compatible with this tractor.

(5) English language operator's manuals may not be available for this tractor model.[67]

Respondents further contend that the required label should be smaller, non-permanent, less prominently located, and affixed to the tractor prior to any sale in the United States rather than at the time of importation.[68] Respondents accept the idea of an annual reporting requirement.[69]

c. The IA's Position

The IA agrees that the prerequisites for issuance of a general exclusion order are satisfied in this case and that there should be a labeling provision in the Commission's remedial orders.[70] The IA argues that the court and Commission decisions cited by complainants for the proposition that labeling is not an appropriate remedy in gray market cases are inapposite, because they do not deal with used goods that do not compete directly with the trademark owner's new product.[71] He argues that the Commission should give little if any weight to the Jacoby survey and declaration submitted by complainants, since it is at odds with record testimony and, in any event, does not prove that labels are ineffective.[72] The IA disputes complainants' claim that the proposed label wording is itself confusing or

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67 RB at 23; RR at 13, 17.

68 RB at 23-24; RR at 17-18.

69 RR at 16-18.

70 SB at 10-11, 15, 17. The IA argues that several of the proposed items in the label should be modified to better reflect the record evidence. SB at 16-17. The IA also states that, "technically," the order may be styled as a limited exclusion order, because the infringing gray market products all originate from a single source, KBT. Because the statutory requirements for a general exclusion order are met, however, and in order to make clear that the order bars the importation of KBT tractors by all importers regardless of whether they were parties to the investigation, the IA recommends that we style the order as a general exclusion order. SR at 13 n.11.

71 SR at 14-17.

72 SR at 18-20.

would create administrative difficulties for the Customs Service.[73]

The IA supports the ALJ's recommendations that the Commission issue cease and desist orders against the domestic respondents, and that the proposed cease and desist orders contain the same labeling exception as the proposed general exclusion order.[74] The IA disagrees, however, with the ALJ's recommendations that the cease and desist order require respondents to inform customers of the information set forth in the label and to refrain from suggesting to customers that the information on the labels is erroneous or should be ignored. Finally, the IA contends that the facts in this case do not warrant a quarterly reporting requirement and proposes an annual requirement instead.[75]

3. Analysis

a. General Exclusion Order

i. Criteria for Issuance

We agree with complainants, the IA, and the ALJ that the prerequisites for issuance of a general exclusion order are satisfied in this case.

Section 337(d) provides that Commission exclusion orders "shall be limited to persons determined by the Commission to be violating this section" unless the Commission finds the existence of certain conditions that would undermine the effectiveness of a limited order.[76] The legislative history to section 337(d) indicates that the statutory criteria for the issuance of a general exclusion order do not "differ significantly" from the criteria previously applied by the Commission in determining whether a general exclusion order is appropriate.[77] The Commission first enunciated these criteria in Certain Airless Paint Spray Pumps.[78] In that case, the Commission stated that it would "require that a complainant seeking a general exclusion order prove both a widespread pattern of unauthorized use of its patented invention and certain business conditions from which one might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles." Factors relevant to demonstrating whether there is a "widespread pattern of unauthorized use" include:

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73 SR at 21-23.

74 SB at 17-18.

75 SB at 18-19.

76 19 U.S.C. § 1337(d).

77 S. Rep. No. 412, 103d Cong., 2d Sess. at 120 (1994).

78 Inv. No. 337-TA-90, USITC Pub. 1199, Commission Opinion at 17-18 (Nov. 1981).

"(1) a Commission determination of unauthorized importation into the United States of infringing articles by numerous foreign manufacturers;

(2) the pendency of foreign infringement suits based upon foreign patents which correspond to the domestic patent in issue; or

(3) other evidence which demonstrates a history of unauthorized foreign use of the patented invention."[79]

Factors relevant to showing whether "certain business conditions" exist include:

"(1) an established demand for the patented product in the U.S. market and conditions of the world market;

(2) the availability of marketing and distribution networks in the United States for potential foreign manufacturers;

(3) the cost to foreign entrepreneurs of building a facility capable of producing the patented article;

(4) the number of foreign manufacturers whose facilities could be retooled to produce the patented article; or

(5) the cost to foreign manufacturers of retooling their facility to product the patented articles."[80]

With respect to the first criterion, a "widespread pattern of unauthorized use," we find that a large number of foreign parties are engaged in the exportation and importation of infringing tractors, including a number of entities other than the named foreign respondents.[81] Since the accused tractors are used goods, the foreign parties of concern are not the foreign manufacturer KBT, but rather the exporters who have directed KBT tractors to the United States market.

We likewise find that market conditions exist from which one might reasonably infer that foreign exporters and domestic importers other than the named respondents to the investigation may attempt to enter the U.S. market with infringing articles. First, there is

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79 Id.

80 Id.

81 See, e.g., FF 123, 126, 330, 332, 335, 342, 344-46, 348.

considerable demand for used KBT tractors in the United States.[82] Second, there are extensive dealer networks for the distribution of gray market KBT tractors.[83] Third, the initial investment for entities entering into the business of exporting or importing KBT tractors is minimal.[84] Collectively, these factors strongly suggest that importation of low-cost used Kubota tractors is an attractive business opportunity.

Therefore, it is reasonable under Spray Pumps to infer that additional exporters and importers may attempt to enter the United States with infringing KBT tractors. Accordingly, unless a general exclusion order is issued, it may become necessary to institute repeated section 337 investigations each time a new exporter is identified.[85] Thus, in our view, the interest in granting an effective remedy requires the issuance of a general exclusion order in this investigation.

ii. Type of Entry

As the Commission stated in Certain Devices for Connecting Computers Via Telephone Lines, although the Commission's remedial authority is quite broad, it has applied this authority "in measured fashion and has issued only such relief as is adequate to redress the harm caused by the prohibited imports."[86] Here, complainants have provided no evidence that they are likely to be affected by entries other than for consumption of the accused infringing tractors.[87] We therefore conclude that the general exclusion order should be directed to entries for consumption only.

iii. Whether to Limit the Order to Models as to Which A Violation Has Been Found

As recommended by the ALJ, we have not limited our exclusion order (or our cease and desist orders) in this investigation to those KBT tractor models which we specifically found to violate section 337. In Certain Cellular Radiotelephones and Subassemblies and Component Parts Thereof, the Commission stated that, in a case where multiple models of a

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82 FF 347.

83 See, e.g., FF 116-119.

84 See CX 601 (Kinoshita witness statement) at 19, ¶54; Hearing Tr. at 2442-44 (DePue).

85 See Spray Pumps at 18 (complainant should not be compelled to file a series of complaints as it becomes aware of new foreign participants in the market; such a result wastes the resources of both complainant and the Commission).

86 Inv. No. 337-TA-360, Commission Opinion, December 12, 1994 at 9.

87 Accord SB at 11 n.6.

product are at issue, "[a]n exclusion order or cease and desist order which specifically lists the models to which it applies merely invites an unscrupulous respondent to change the model numbers to circumvent the order."[88] The Commission clarified that its decision was not dependent on proof that any of the respondents in that investigation would behave in such a fashion. It simply saw "no reason to issue orders listing specific models, given the potential for circumvention and abuse." Because there are over a hundred existing KBT models, new models are introduced every year, and respondents do not appear to use model numbers accurately in some instances,[89] we find that the rationale of Cellular Radiotelephones applies in this case.

iv. Whether to Include a Labeling Exception

We conclude that our general exclusion order in this investigation should not include the labeling exception recommended by the ALJ and supported by respondents and the IA. As discussed below, we disagree with complainants' assertion that there is a legal prohibition against the use of such a label, but conclude that an exclusion order with a labeling exception would not be effective in preventing the likelihood of confusion established in this case.

(a) Legal Status of Labeling Remedies

While the remedy in a trademark infringement case should substantially alleviate the likelihood of confusion, complete elimination of any possibility of consumer confusion is not required.[90] There are a large number of court cases discussing labels, disclaimers, and other measures short of an injunction that may alleviate consumer confusion. The only generalization that can fairly be made about these cases is that courts decide whether a label or disclaimer substantially eliminates any likelihood of confusion based on the particular facts of each case.

The ALJ relied principally on two Supreme Court decisions, Prestonettes, Inc. v. Coty and Champion Spark Plug Co. v. Sanders. In Coty,[91] a French manufacturer of loose face powder claimed that Prestonettes was infringing its trademark by using Coty's name to sell genuine Coty powder which defendant had combined with a binder and placed in a compact. The Supreme Court upheld the defendant's right to sell the compacts, so long as the container was marked with a label prescribed by the lower court, which indicated, in

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88 Inv. No. 337-TA-297, USITC Pub. 2361, Commission Opinion at 5 (Aug. 29, 1989).

89 For example, respondents admitted to having imported at least 4 KBT models that complainants indicate do not exist. SR at 4 n.4.

90 See, e.g., Home Box Office, Inc. v. Showtime/The Movie Channel, 832 F.2d 1311, 1315 (2d Cir. 1987) ("We have found the use of disclaimers to be an adequate remedy when they are sufficient to avoid substantially the risk of consumer confusion.").

91 264 U.S. 359 (1924).

letters of the same size, color, type and general distinctiveness, that "Prestonettes, Inc., not connected with Coty, states that the compact of face powder herein was independently compounded by it from Coty's . . . loose powder and its own binder." The Court observed that a trademark, unlike a copyright, does not confer a monopoly over a word or words but merely the right to prohibit confusing uses. "When the mark is used in a way that does not deceive the public we see no such sanctity in the words as to prevent its being used to tell the truth."[92]

In Champion,[93] the Supreme Court rejected the claim that a label was not an adequate remedy for infringement of Champion's mark by a company that was using the mark to sell reconditioned, used Champion plugs. The Court agreed that there was ample evidence that a used spark plug does not perform as well as a new one, but concluded that the reconditioning was not so extensive as to suggest that the plugs were not still genuine Champion products. The Court found that consumers expect used goods to be inferior to new ones and generally pay less for them, but that inferiority is immaterial so long as the product is clearly and distinctly sold as repaired or used rather than new. The Court reasoned that "[f]ull disclosure gives the manufacturer all the protection to which he is entitled."[94] Thus, the Court upheld the lower court's order that defendant clearly mark all the spark plugs as used.

Neither of the cases relied on by the ALJ, nor any other case we have found, deals

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92 Id. at 368. Numerous decisions since Coty have affirmed the principle that a trademark may be used to truthfully identify the source of inputs to a further processed or assembled product. See, e.g., William Grant & Sons Ltd. v. European Beverages Co., 668 F. Supp. 1421 (C.D. Cal. 1987) (despite differences between Glenfiddich whiskey and defendant's whiskey, permitting defendant to use a label stating that it is an independent bottler not associated with the distiller but has bottled a product originally distilled at the Glenfiddich Distillery, but specifying that the product was not bottled under the supervision of the distiller and that the distiller is not responsible for the product); Caterpillar, Inc. v. Nationwide Equipment, 877 F. Supp. 611, 617 (M.D. Fla. 1994) (importer of equipment produced mostly from genuine Caterpillar parts and assembled in Turkey permitted to use the Caterpillar marks in connection with sale of the equipment in the U.S. so long as it does falsely suggest that the products are genuine Caterpillar or that they are sponsored or approved by the trademark owner).

Complainants argue that in Lever Bros. Co. v. United States, 877 F.2d 101, 108 (D.C. Cir. 1989), the court found the rationale of Coty to be inapplicable in the gray market context. In Lever, the court found that use of Lever's "Sunlight" and "Shield" trademarks on materially different gray market goods was not "truthful" in the sense of Coty, since the words did not connote the same product in the two countries. The Lever court did not consider whether a label specifically identifying the differences between authorized and gray market goods could eliminate the likelihood of confusion.

93 331 U.S. 125 (1947).

94 Id. at 130.

with the exact situation in this case. Coty is not directly on point, because it deals with the fair use of a trademark by a processor of a downstream product, while in this case respondents are not using KBT tractors to make another product. Champion is not directly on point because the courts were trying to remedy confusion between the new product and the used product, whereas no one in this case is misrepresenting the fact that the KBT tractors are used. These cases do, however, support the general principle that a label may be an appropriate remedy if it can be fashioned in such a way that it truthfully identifies the original manufacturer of a trademarked product while effectively disassociating the manufacturer/markholder from that product when used in a context that the markholder does not sponsor or approve.

Complainants, on the other hand, rely on a number of cases in which courts have found that labels did not adequately eliminate a likelihood of confusion. These cases stand for the proposition that bare disclaimers stating that the seller is not associated with the markholder are inadequate to avoid confusion if they are contained in fine print nowhere near the offending mark, or are otherwise insufficient to bring the necessary disclaimers to the attention of the typical purchaser.[95] Contrary to complainants' representations, none of these cases states that labels or disclaimers are a disfavored remedy, but only that inadequate and ineffective labels are disfavored. Moreover, none of these cases deals with a label as large, detailed, and conspicuously located as the one recommended by the ALJ here.

Similarly, case law does not support complainants' claim that labels are never an appropriate remedy against confusion caused by gray market imports. Most of the gray market cases do not discuss labels in the context of remedy, but rather consider whether the presence of some kind of distinguishing label is a defense to the claim of infringement. Thus, for example, in PepsiCo Inc. v. Giraud,[96] the court found that "fine print" indicating that the product was imported from Venezuela was insufficient to demonstrate the absence of infringement where the bottles were marked with the familiar Pepsi logo but were materially

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[95] See, e.g., Omega Importing Corp. v. Petri-Kine Co., 451 F.2d 1190, 1194 (2d Cir. 1971) (stamping defendant's EXAKTA cameras "made in Japan" not adequate to avoid confusion with plaintiff's German EXAKTA cameras); Boston Professional Hockey Ass'n v. Dallas Cap and Emblem Mfg., Inc., 597 F.2d 71, 77 (5th Cir. 1979) (disclaimer on defendant's unauthorized NHL team emblems inadequate because it was located where no one was likely to see it prior to purchase); United States Jaycees v. Philadelphia Jaycees, 639 F.2d 134, 412 (3d Cir. 1981) (use of adjective "Philadelphia" plus disclaimer that Philadelphia Jaycees are not associated with the national organization insufficient to remedy likelihood of confusion); International Kennel Club of Chicago, Inc. v. Mighty Star, Inc., 846 F.2d 1079, 1093 (7th Cir. 1989) (rejecting a disclaimer that was used in advertising but not on the products themselves, the accompanying literature, or in-store advertisements).

[96] 7 U.S.P.Q.2d 1371 (D.P.R. 1988).

different from the Puerto Rican bottler's product.[97] The only gray market case cited by complainants that does discuss labels as a remedy is Helene Curtis.[98] In that case, one of the material differences between the authorized and gray market hair care products identified by the courts was that the labels on the gray market product did not meet FDA requirements for listing ingredients and other factors. Defendant argued that the appropriate remedy would be to require the labels to meet FDA requirements. The court rejected this suggestion, reasoning that the proposed labels would do nothing to address the likelihood of confusion arising out of material differences in composition and quality control between the products. Overall, none of the gray market cases on which complainants rely has considered the efficacy a label of the kind proposed here.[99]

Moreover, although the Commission has discussed labels in several prior cases, none has involved the kind of label proposed here. In Certain Alkaline Batteries,[100] the Commission considered whether it should exclude all gray market batteries, or merely require that they be repackaged to comply with the requirements of the Fair Packaging and Labeling Act, which requires that instructions, warnings and guarantees be in English. In other words, the label at issue in Batteries was not an additional label used to point out the differences between the gray market and authorized products, but instead was one that would actually mask one of those differences by translating the foreign labels into English without addressing the other differences at all.[101] The Commission concluded that neither Coty nor Champion supported the proposed labeling remedy. The Commission distinguished those

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97 Similarly, in Nestle, 982 F.2d at 639, the court found that use of the PERUGINA trademark and overall package design could cause confusion even though the gray market chocolates were labeled "made in Venezuela" in the "fine print" while the real ones said "made in Italy". In Ferrero U.S.A., Inc. v. Ozak Trading, Inc., 753 F. Supp. 1240 (D.N.J. 1991), also cited by complainants, the court found that the statement "Ferrero U.K. is the sole importer for the U.K." was a material difference between the authorized and gray market goods and did not even consider the question whether the disclaimer was an ameliorating factor.

98 890 F. Supp. at 160 n.11.

99 By contrast, in Bell & Howell: Mamiya Co. v. Masel Supply Co., 719 F.2d 42, 46 (2d Cir. 1983), not cited by complainants, the court denied a request for a preliminary injunction against gray market imports on the grounds that, since the only identified difference was the lack of a warranty for the gray market products, and since consumers could be made aware that the gray market camera equipment was sold without a warranty by the use of labels, the need for any injunction had not been shown.

100 Inv. No. 337-TA-165, USITC Pub. 1616, Commission Opinion at 39-41 (Nov. 1984).

101 See also Certain Cube Puzzles, Inv. No. 337-TA-112, USITC Pub. 1334 at 22 n.82 (1982) (label merely indicating manufacturer of the accused goods not a defense to the claim of trademark infringement where use of the label had not prevented actual confusion).

cases from the situation in Batteries because (1) in those cases, the mark was not being used to deceive the public but rather to inform the public, and (2) in those cases the infringer's product was not sold in direct competition with the markholder's product.[102] The Commission also concluded that, because of the strength of the DURACELL trademark, the low value of the product, and the fact that the imported batteries were being sold in the same trade dress, consumers were unlikely to invest the time in reading label disclosures.[103]

In Certain Nut Jewelry and Parts Thereof,[104] by contrast, the Commission did issue a labeling remedy. Nut Jewelry involved claims of false designation of origin, unfair competition, and passing off by importers of kukui nut jewelry who were using labels and trade dress to suggest falsely that their products were made in Hawaii. The Commission issued a general exclusion order which allowed importation of the accused jewelry if three conditions were met: (1) the jewelry bore a foreign origin label attached "as permanently as possible" and did not use the phrase "genuine kukui nuts" except in close proximity to the origin label; (2) labels on the product did not contain any representation, depiction, symbol, characteristic feature, or scene of the state of Hawaii; and (3) the country of origin label included the warning: "Removal of this disclosure of foreign origin prior to final sale may be punishable by law under 19 U.S.C. § 1304(e)." While complainants are correct that Nut Jewelry was not a gray market case, or even a trademark case, it does stand for the proposition that labeling can be an appropriate remedy under section 337 if the label will substantially eliminate the violation.

Based on the preceding analysis, we conclude that there is no legal prohibition against the issuance of a labeling remedy in a gray market case, including this case.

(b) Effectiveness of the Proposed Labeling Remedy

Complainants contend that a labeling remedy, even if legally permissible, would not succeed in eliminating the likelihood of confusion established in this investigation. They argue first that a consumer confronted with the proposed label is still likely to be confused, and second, that consumers will not have the opportunity to consider the proposed label, since it is likely to be removed from the tractor prior to sale. We disagree with the first

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[102] The Commission relied on the same reasoning in Certain Soft Sculpture Dolls Popularly Known as "Cabbage Patch Kids," Related Literature and Packaging Therefor, Inv. No. 337-TA-231, USITC Pub. 1923, Commission Opinion at 23-24 (Nov. 1986). We note, however, that Cabbage Patch Kids was a copyright case, and that "truthful" use of copyrighted material is not a defense to copyright infringement.

[103] Two concurring Commissioners argued that labeling would be an adequate remedy, so long as the label was in English and contained a disclaimer stating that the gray market batteries were not sponsored by Duracell, and so long as respondents ceased using Duracell's trade dress. Views of Chairwoman Stern and Commissioner Rohr at 34-35.

[104] Inv. No. 337-TA-229, USITC Pub. 1929, Commission Opinion at 20-21 (Nov. 1986).

objection, but agree that the second presents a serious enforceability problem.

(i) Will Consumers Understand the Label?

In support of their argument that the proposed label will not alleviate consumer confusion, complainants submitted the survey and declaration prepared by Dr. Jacoby. We accord little weight to the Jacoby survey and declaration.[105] Although we have no record basis for questioning Dr. Jacoby's qualification as an expert in the field of consumer behavior or his survey design, a search of the literature reveals that Dr. Jacoby is well known for his view that labels are virtually never an appropriate remedy for trademark infringement.[106] Given his apparent predisposition to find fault with any proposed labeling remedy and the inability of respondents, the ALJ, or the IA to test his conclusions through discovery or cross-examination, we do not view those conclusions as controlling or even compelling. As the IA points out, the survey results actually show that a large number of participants did recall the labels, and it is reasonable to assume that prospective purchasers would be even more attentive if they were about to spend thousands of dollars rather than just participate in a survey. In addition, Dr. Jacoby's description of a careless, uninformed tractor purchaser who might even buy a tractor sight unseen over the telephone is at odds with the evidence in this case that the typical gray market tractor purchaser is a weekend farmer making an expensive, once-in-a-lifetime purchase.[107] Finally, we do not agree with Dr. Jacoby's assertion that a label is not an effective remedy if there is any possibility that some purchaser may read and fully understand the label but nevertheless choose to disregard or discount its warnings.[108] As noted above, a label need only substantially eliminate the likelihood of confusion; it need not guarantee that even the most obtuse of purchasers will

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[105] Respondents have requested that we strike the Jacoby survey on the grounds that it is "a contrived survey designed to reach a preconceived result." They have also asked us to sanction complainants for submitting allegedly false information in the study. RR at 6-9. Survey evidence is routinely submitted in trademark infringement cases, and we may consider such evidence in the remedy phase of an investigation. Thus, we decline to strike the survey or sanction complainants for submitting it. We caution parties in section 337 investigations, however, that survey evidence should, whenever possible, be presented to the ALJ, so that its 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.

[106] See, e.g., Jacoby and Szybilli, "Why Disclaimers Fail," 84 Trademark Reporter 224 (1994); Jacoby and Raskopf, "Disclaimers in Trademark Infringement Litigation: More Trouble than They are Worth?," 76 Trademark Reporter 35 (1986). Cf. Home Box Office, 832 F.2d at 1315-16 (noting that these authors have concluded that disclaimers "are frequently not effective").

[107] FF 215; SR at 18, citing Complainants' Proposed Finding of Fact No. 481.

[108] CB, Attachment F at 4-5.

not disregard it.[109]

Complainants also criticize the RD's reliance on Kubota's "Buyer Beware" program as evidence that labels will alleviate consumer confusion. Before the ALJ, complainants' senior vice president for sales and marketing (Mr. Killian) and the manager of its Tractor Engineering Department (Mr. Kashihara), complainants' expert (Dr. Leviticus), and complainants' witness Mr. Tomlinson (a purchaser of a gray market KBT tractor) all testified that labels identifying the accused tractors as gray market products would enable consumers to make an informed decision.[110] Complainants now argue that we should not rely upon this testimony, because Kubota's "Buyer Beware" program did not work.[111] What complainants fail to mention is that the success of the "Buyer Beware" program at eliminating consumer confusion was severely constrained by Kubota's inability to educate gray market purchasers at the actual point of sale. As Mr. Killian conceded, the "Buyer Beware' program consisted of warning notices distributed by authorized KTC dealers at their parts counters, through advertising, and through direct mailings to existing customers.[112] Thus, the lesson of the "Buyer Beware" program is not that educational labels failed to eliminate the actual consumer confusion found in this case, but that information must be presented to prospective purchasers *at the point of sale* if it is to inform their purchasing decisions.

Complainants also argue that the specific factual statements in the proposed label are insufficient to eliminate the likelihood of confusion in this case. We disagree. Contrary to complainants' assertion, it is not necessary for the labels to answer all of a prospective purchaser's questions. The point of the label is to make prospective purchasers aware that they are purchasing a gray market tractor and that the purchase of a gray market tractor may have certain consequences. Once they have that information, they can make an informed decision regarding whether it is worthwhile to purchase the KBT tractor, perhaps after seeking further information from respondents, authorized KTC dealers, or other sources. To fully answer every conceivable question about gray market tractors would require the label to contain a large part of the record in this investigation. That much information is simply unnecessary to achieve the label's purpose. Similarly, we are not persuaded by complainants' argument that the proposed statements do not go far enough to deter purchasers from buying equipment that may be unsafe due to the absence of English-language instructions, safety equipment, and model-appropriate implements. The Commission's

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109 Home Box Office, 832 F.2d at 1315 ("a disclaimer can avoid the problem of objectionable infringement by significantly reducing or eliminating consumer confusion"); see generally McCarthy on Trademarks and Unfair Competition (3d ed. 1996) at §23:3 ("likelihood" of confusion means confusion is probable, not merely possible, as to some significant number of people).

110 RD at 52-54; FF 301-310, 312, 315.

111 CB at 50.

112 FF 301.

statutory obligation is to substantially eliminate any likelihood of confusion, not to make sure that the accused imports are made perfectly safe. Although all parties in this investigation agree that older tractors are generally less safe than newer tractors, there is no law requiring that used tractors be retrofitted to any particular safety standard, and the evidence shows that used KTC models (as well as other manufacturers' tractors) are also sold without current safety equipment.[113] Nothing in section 337 forbids a consumer from purchasing a product that is not completely safe, so long as he is not acting under any misimpression resulting from a violation of the statute.

(ii) Will Consumers Get to See the Labels?

In our view, the most serious concern complainants raise about the efficacy of the recommended remedy is the possibility that the required labels will be removed between the time of importation and the time of sale to the ultimate consumer. Thus, while we disagree with their legal analysis and with their objections to the label itself, we agree that the remedy proposed by the ALJ is unworkable.

A number of domestic respondents have testified that they routinely remove the original Japanese-language instructional and warning labels from KBT tractors as part of the refurbishing process. Sometimes they replace these labels with English-language KTC labels for non-corresponding KTC models, or even with labels for non-Kubota tractors.[114] Labels can also become obliterated over time.[115] Indeed, respondents concede that there is no such thing as a "permanent" label in this context.[116]

In addition, the record demonstrates that gray market tractors may be sold several times within the United States prior to the first sale to a consumer, and that consumers themselves sometimes resell their KBT tractors as well.[117] In our view, the clear inference to be drawn from this evidence is that most, if not all, of the accused tractors will pass through the hands of a seller, dealer, auctioneer or other middleman that was not a party to this investigation prior to their sale to consumers and may pass through such hands again upon resale by consumers.

A Commission exclusion order is effective at the border, and we could order that the accused tractors be permitted entry only if they bear the recommended labels at the time of

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113 FF 262, 263A, 265, 274, 287, 288, 294.

114 FF 198, 210; CX592 at 41.

115 FF 217.

116 RB at 15.

117 FF 107, 116-120, 123, 125-26, 133, 136, 335-36, 345-46; CX530 at K012884; Hearing Tr. at 1159 (Tomlinson).

importation. An exclusion order does not, however, have any effect after importation and cannot be used to require that the labels stay on the accused tractors at all times. Thus, the proposed exclusion order could not prohibit the domestic respondents from removing the prescribed labels from the tractors, along with the original warning and instructional labels, in the course of refurbishing the tractors, nor could it require them to reaffix the required labels afterwards.

As we noted above in our discussion of the "Buyer Beware" program, labels and disclaimers aimed at consumers are only effective if they are brought to the consumer's attention at the point of sale.[118] Respondents concede this point, arguing that the Commission should require the labels to be affixed to the tractor after rehabilitation and prior to sale to a consumer, not at the time of importation, when they will only have to be removed again.[119] Our ability to order that accused tractors bear the required labels *at the time they are sold to consumers* is extremely limited. As discussed in the next section below, the prerequisites for issuing cease and desist orders are met with respect to eleven domestic respondents. In those cease and desist orders, we could require that the named respondents cease and desist from selling accused tractors unless the appropriate labels are affixed. We could also order those eleven respondents not to tell their customers that the information in the labels is false or should be ignored, as the ALJ has recommended. Those respondents, however, are likely to resell the tractors to other dealers or middlemen, who would not be bound by the Commission's orders. Moreover, not all, and perhaps not even a majority of, KBT tractors sold in the United States pass through the hands of these eleven respondents.

Given that removing labels is evidently a normal practice in the gray market tractor industry, and that the Commission's remedial orders cannot control the actions of many industry participants, not to mention consumer/resellers, we conclude that a labeling remedy would be ineffective to prevent confusion in the marketplace. Accordingly, while we believe that the proposed labels could substantially eliminate the likelihood of consumer confusion if they were always affixed to the tractor at the time of sale, because such affixation cannot be guaranteed, we decline to adopt a labeling exception in this case.

v. Specific Provisions of the Exclusion Order

The general exclusion that we issued on February 25, 1997, orders the Customs Service to exclude from entry for consumption into the United States agricultural tractors under 50 power take-off horsepower that are manufactured by Kubota Corporation of Japan

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[118] See generally Int'l Kennel Club of Chicago, Inc. v. Mighty Star, Inc., 846 F.2d 1079, 1093 (7th Cir. 1988) (disclaimer ineffective if not used on the product itself and where parties subject to order cannot control use of disclaimer by their distributors); LeSportsac, Inc. v. K Mart Corp., 754 F.2d 71, 80 (2d Cir. 1985) (label not effective if contained on an easily removable "hang tag").

[119] RR at 17.

and infringe the "KUBOTA" trademark (U.S. Reg. No. 922,330).[120] Under the terms of the exclusion order, accused tractors may be imported for consumption into the United States only: (1) if they are imported by, under license from, or with the permission of the trademark owner (that is, KBT and its licensees KTC and KMA); (2) as otherwise provided by law; or (3) if the importer demonstrates to the satisfaction of the Customs Service that the particular tractor at issue is non-infringing.[121]

b. Cease and Desist Orders

As recommended by the ALJ, we have issued cease and desist orders prohibiting the sale of infringing KBT tractors by respondents Wallace, Gamut, The Tractor Shop, Bay, Casteel, MGA, and Lost Creek and related entities, for a total of ten cease and desist orders.[122] In addition, we have issued an eleventh cease and desist order prohibiting sale of infringing KBT tractors by respondent Tractor Company, which the ALJ found to be in default pursuant to Commission rule 210.16. In general, cease and desist orders are warranted with respect to domestic respondents that maintain commercially significant U.S. inventories of the infringing product.[123] In this case, the record demonstrates that each of the domestic respondents remaining in the case maintains a commercially significant inventory of

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[120] Because the "KUBOTA" (block letters) trademark registration covers use of the trademark "KUBOTA" in any kind of type, tractors bearing the new stylized version of the "KUBOTA" trademark (U.S. Reg. No. 1,775,620) are also covered by the exclusion order. ID at 20.

[121] In accordance with the ID, as modified by our discussion of labels, supra, an accused tractor is non-infringing if it is structurally identical to a KTC model and the original Japanese-language labels have been replaced with English-language labels for the corresponding, identical KTC model prior to importation. For example, a KBT L200 to which English-language KTC L200 warning and instructional labels had been properly attached prior to importation would not be infringing.

[122] The ALJ uses the term "Casteel" to refer to three related entities: Casteel Farm Implement Co. of Montincello, Arkansas, Casteel Farm Implement Co. of Pine Bluff, Arkansas, and Casteel World Group, Inc. FF 49. The ALJ uses the term "Gamut" to refer to two related entities: Gamut Trading Co. and Gamut Imports. FF at 54. The ALJ uses the term "Wallace" to refer to two entities: Wallace International Trading Co. and its predecessor Wallace Import Marketing Co., Inc. FF 66. Since Wallace Import Marketing Co., Inc. changed its name to Wallace International Trading Co. in 1993, the former no longer exists.

[123] See, e.g., Certain Crystalline Cefadroxil Monohydrate, Inv. No. 337-TA-293, USITC Pub. 2391, Commission Opinion at 37-42 (June 1991).

infringing KBT tractors in the United States.[124]

The cease and desist orders do not contain a labeling exception. As noted above, the evidence indicates that most, if not all, of the accused tractors will pass through the hands of a seller, dealer, auctioneer, or other middleman that was not a party to this investigation prior to their sale to consumers, and may pass through such hands again upon resale by consumers. Thus, using cease and desist orders to require eleven respondents, most of which act at least in part as wholesalers supplying other tractor dealers, to sell their gray market tractors with labels affixed would not prevent those respondents' customers from removing the labels prior to sale to consumers. Nor would a labeling requirement contained in the cease and desist orders have any effect at all on the unknown, but possibly considerable, volume of gray market tractors that never pass through the hands of those respondents. Accordingly, even putting the labeling requirement in cease and desist orders would not substantially increase the likelihood that such labels will still be affixed to the tractors at the time they are sold to consumers.

Finally, while we concur with the ALJ's recommendation that we impose a reporting requirement on the eleven respondents named in the cease and desist orders, we have specified that the reports should be annual rather than quarterly. Although the Commission has discretion to order quarterly reports, neither the ALJ nor complainants provided any justification for requiring quarterly reports and we are not aware of any.[125]

B. The Public Interest

Prior to issuing relief, the Commission is required to consider the effect of such relief on the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers. 19 U.S.C. §§ 1337(d) and (f). If the Commission finds that a proposed remedy is not in the public interest, then the proposed remedy will not be ordered.

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[124] FF 125, 137, 318-320, 351, 352. Tractor Company, 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 Tractor Company maintains significant inventories of infringing tractors in the United States. Of the other respondents named in our notice of investigation, two have been terminated from the investigation pursuant to consent orders and the rest are foreign respondents whose activities will be covered by the general exclusion order.

[125] Compare Certain Variable Speed Wind Turbines and Components Thereof, Inv. No. 337-TA-376, USITC Pub. 3003 (Nov. 1996) (quarterly reporting necessitated by complainant's recent bankruptcy); Certain Plastic Encapsulated Integrated Circuits, Inv. No. 337-TA-315, USITC Pub. 2710, Commission Opinion at 8-10 (July 2, 1993) (quarterly reporting required in connection with a license ceiling).

The Commission has found the public interest concerns to be overriding in only three cases to date. In Certain Automatic Crankpin Grinders,[126] the Commission found that issuance of an exclusion order would deprive the domestic automotive industry of a tool needed to supply the domestic market with parts for fuel efficient automobile engines. In Inclined Field Acceleration Tubes,[127] the Commission determined that continuing basic atomic research using high quality imported acceleration tubes was an overriding public concern and declined to issue an exclusion order. In Fluidized Support Apparatus,[128] the Commission found that the domestic manufacturer was unable to meet the demand for the patented hospital beds for burn patients and that no comparable product was available.

In contrast, in Telecommunication Chips,[129] the Commission held that public interest considerations did not preclude the issuance of a remedy, since the infringing tone dialer chips and low end telephone sets which were to be excluded were not products that affected the general health and welfare, and complainant, its licensees, and other manufacturers of like goods had sufficient manufacturing capacity to supply the needs of U.S. consumers. The Commission also stated that the public interest in protecting intellectual property rights of complainants in section 337 proceedings outweighed the added expense encountered by domestic manufacturers or the harm to their competitive positions by being prevented from disposing of their inventories of cheap infringing telecommunication chips.[130]

1. Arguments of the Parties

Complainants argue that, in this investigation, the public interest factors mandate that infringing KBT tractors be totally excluded and demonstrate that a restrictive remedy, such as labeling, would adversely affect the public interest.[131] Complainants contend that an unconditional exclusion order would benefit the public health and welfare because it will prevent physical injuries to United States consumers who might purchase used KBT tractors

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126 Inv. No. 337-TA-60 (1978).

127 Inv. No. 337-TA-67, USITC Pub. 1119 (1980).

128 Inv. Nos. 337-TA-182/-188, USITC Pub. 1667 (1984).

129 Inv. No. 337-TA-337 (1993), Commission Opinion at 38-39.

130 Accord Certain Acid-Washed Denim Garments and Accessories, Inv. No. 337-TA-324, USITC Pub. 2576 (Nov. 1992) (general exclusion order issued); Certain Plastic Encapsulated Integrated Circuits, Inv. No. 337-TA-315, USITC Pub. 2574 (Nov. 1992) (limited exclusion order issued despite arguments that relief would undermine U.S. competitiveness, threaten U.S. jobs, and cripple customers requiring product, including a defense contractor); Certain Tape Dispensers, Inv. No. 337-TA-354, USITC Pub. 2786 (June 1994).

131 CB at 56.

that lack various safety features or English-language operating instructions.[132] Complainants argue that there are plenty of other sources of used tractors available to U.S. consumers, such that competitive conditions will not be adversely affected by exclusion of KBT tractors.[133]

Respondents argue that, although the accused tractors are part of a larger used tractor industry in the United States, "[t]here is no other source of these small tractors at a modest price than these imported Japanese tractors. There is [sic] no equivalent tractors produced or available to [sic] U.S. consuming public." RB at 24.

The IA argues that in intellectual property cases, public interest considerations generally weigh in favor of a remedy to enforce the rights at issue, and that, in this case, there are no public interest factors which would suggest that the Commission refrain from issuing the recommended remedy.[134] However, the IA disputes complainants' claim that reduction of physical injuries is a valid reason for preferring an unconditional exclusion order to a labeling remedy.[135]

2. Analysis

In addressing the statutory public interest factors, the Commission is charged to consider whether public interest considerations suggest that, despite a violation of section 337, the Commission should not issue any remedy at all. The only such contention was raised by the respondents, who argue that there is no adequate substitute for KBT tractors available to U.S. consumers at such a modest price. In fact, however, the record indicates that there are numerous other sources of new and used tractors available to U.S. consumers. Respondents themselves testified that respondent and non-respondent suppliers would continue to import other brands of used tractors.[136] Authorized KTC dealers and other manufacturers' dealers also sell used tractors.[137] Thus, we conclude that the exclusion order and cease and desist orders will have limited economic impact in the United States and that there will continue to be considerable competition in the U.S. market for small tractors -- including the market for used tractors -- even if infringing KBT tractors are excluded from the market entirely.

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132 CB at 57-61.

133 CB at 62.

134 SB at 19-20.

135 SR at 23-24.

136 Hearing Tr. at 2366-67; FF 320.

137 FF 307; Hearing Tr. at 1421-25.

Rather than addressing whether any remedy should be issued, complainants' principal argument goes to whether the public interest factors are better served by an unconditional or conditioned exclusion order. Because we have issued a general exclusion order that does not contain a labeling exception, we need not reach this issue.

C. Bonding

Section 337(j) provides for the entry of infringing articles upon the payment of a bond during the 60-day Presidential review period.[138] The bond is to be set at a level sufficient to "protect complainant from any injury" during the Presidential review period.[139]

The RD recommends that we set the amount of the bond during the 60-day Presidential review period at 90 percent of the entered value of the KBT tractor.[140] Complainants agree that the bond should be set in the amount of 90 percent of the entered value of KBT tractors and the IA has no objection to the proposed rate.[141] Respondents do not address the issue of bonding.

Based on the comparative pricing evidence of record, complainants' statement that a bond of 90 percent would adequately protect their interests, and the absence of objection by any other party, we have ordered that the bond during the 60-day Presidential review period be set at 90 percent of the entered value of the KBT tractors.

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138 19 U.S.C. § 1337(j); 19 C.F.R. §210.50(a)(3).

139 Id.

140 RD at 56. This recommendation is based on a comparative advertisement run by respondent Lost Creek offering an accused 22.5 HP, 4x4 KBT tractor for $6100, while an authorized KTC dealer would offer a comparable 21 HP, 4x4 KTC tractor for $11,500. FF 320. The 90 percent bond derives from the fact that the amount by which the price of the KTC tractor exceeds that for the KBT tractor ($5400) comes to nearly 89 percent of the value of the KBT tractor.

141 CB at 55; SB at 20-21.

DISSENTING VIEWS OF COMMISSIONER CAROL T. CRAWFORD

My colleagues have decided to review the initial determination of the Administrative Law Judge and have determined that the KBT L200 model tractor, and an additional 20 models of KBT tractors, infringed on Complainant's trademark in violation of section 337. I respectfully dissent.

In his Initial Determination, Judge Luckern reasonably determined that the sale and importation of the KBT L200 did not result in trademark infringement. At pages 25-29 of his Initial Decision, the Judge explains that there are no structural differences between the accused KBT L200 and the corresponding model KTC L200 tractor. Because the two tractor models are identical, the Judge reasons that the English language manuals, warning labels, and parts manuals for the KTC L200 can be used for the accused KBT L200. Judge Luckern made a reasonable determination that warning labels and service manuals are non-physical differences. He reasons further that the differences between the KBT L200 and KTC L200 tractors associated with the language used in warning labels and service manuals should not confuse the consumer as to the source of the tractor and, therefore, those differences are not material.

Some courts have required a showing of physical differences in order to find infringement, while others have held that non-physical differences may also be material and justify a finding of infringement. But this is not the case here. Here, Judge Luckern has examined both the physical and non-physical aspects of the accused tractor and has determined, based upon the evidence presented in the case, that there are non-physical differences but that they are not material. The only evidence in the record as to any difference between the 20 additional models of KBT tractors and KTC tractors relates to warning labels, a difference Judge Luckern reasonably determined to be non-physical, and not material.

The Commission's authority to review an initial determination is not wholly discretionary, but rather is defined by the Commission's rules [19 CFR 210.43]. Under the terms of the Commission's rules, the Commission may review an initial determination only if it appears that:

(i) a finding or conclusion of material fact is clearly erroneous;

(ii) a legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or

(iii) the determination is one affecting Commission policy, or if the petition raises a policy matter connected with the initial determination, which the Commission thinks it necessary or appropriate to address.

This initial determination does not fall within the parameters set by the Commission's rules. Our rules do not provide for review simply because one or more Commissioners

might have reached a different finding or conclusion. Our rules empower the Administrative Law Judges to make findings and conclusions. Unless their initial determinations raise questions that fit within the criteria set forth in the rules, I believe it inappropriate and impermissible for the Commission to second guess those determinations.

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC

In the Matter of	)	
	)	
CERTAIN AGRICULTURAL TRACTORS UNDER 50 POWER TAKE-OFF HORSEPOWER	)	Investigation No. 337-TA-380
	)	
	)	
	)	

Initial and Recommended Determinations
Paul J. Luckern, Administrative Law Judge

Pursuant to the Notice of Investigation (61 Fed. Reg. 6802 (February 22, 1996)), this is the administrative law judge's initial final determination, under Commission rule 210.42(a)(1)(i). The administrative law judge hereby determines, after a review of the record developed, that there is a violation of subsection (a)(1)(B)(i) of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), in the importation into the United States, the sale for importation, or the sale within the United States after importation, of certain agricultural tractors under 50 power take-off horsepower.

This is also the administrative law judge's recommended determination on issues concerning permanent relief and bonding under Commission rule 210.42(a)(1)(ii). The administrative law judge hereby recommends, after a review of the record developed, that a general exclusion order should issue which would permit importation of the infringing tractors if they have certain labels. He further recommends that cease and desist orders should issue against certain respondents which orders should have certain reporting

requirements and should permit those respondents to import and sell the infringing tractors provided said tractors have certain labels. The administrative law judge additionally recommends a bond of ninety percent (90%) of the entered value of unlabeled infringing tractors.

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ABBREVIATIONS

CB	Complainants' Posthearing Brief
CBR	Complainants' Reply Brief
CPFF	Complainants' Proposed Finding of Fact
CPX	Complainants' Physical Exhibit
CRFF	Complainants' Proposed Reply Finding of Fact
CRX	Complainants' Rebuttal Exhibit
CX	Complainants' Documentary Exhibit
FF	Findings of Fact
RB	Walker Respondents' Posthearing Brief
RPX	Walker Respondents' Physical Exhibit
RBR	Walker Respondents' Reply Brief
RPFF	Walker Respondents' Proposed Finding of Fact
RRFF	Walker Respondents' Proposed Reply Finding of Fact
RX	Walker Respondents' Documentary Exhibit
SB	Staff's Posthearing Brief
SBR	Staff's Reply Brief
SPFF	Staff's Proposed Finding of Fact
SRFF	Staff's Proposed Reply Finding of Fact
SX	Staff's Documentary Exhibit
Tr	Transcript of Hearing, Including Closing Arguments

PROCEDURAL HISTORY

On January 16, 1996, a complaint was filed by Kubota Tractor Corporation (KTC), Kubota Manufacturing of America Corporation (KMA) and Kubota Corporation (KBT). The complaint, as supplemented on February 2, 1996, alleged violation of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain agricultural tractors under 50 power take-off horsepower by reason of alleged infringement of U.S. Registered Trademark No. 922,330, No. 1,028,211, No. 1,775,620 or No. 1,874,414. The complaint further alleged that there exists an industry in the United States as required by subsection (a)(2) of section 337. Based upon the complaint, as supplemented, the Commission on February 13, 1996 instituted this investigation, naming twenty companies as respondents. The Notice of Investigation was published in the Federal Register on February 22, 1996 (61 *Fed. Reg.* 6802).

The respondents identified in the notice of investigation were Eisho World Ltd. (Eisho), Nitto Trading Corporation, Nitto Trading Co. Ltd., Sanko Industries Co., Ltd. (Sanko), Sonica Trading, Inc. (Sonica), Suma Sangyo (Suma), Toyo Service Co., Ltd. (Toyo), Bay Implement Company (Bay), Casteel Farm Implement Co. of Monticello, Arkansas, Casteel Farm Implement Co. of Pine Bluff, Arkansas, Casteel World Group, Inc., Gamut Trading Co., Gamut Imports, Lost Creek Tractor Sales (Lost Creek), MGA Inc. Auctioneers (MGA), Tom Yarbrough Equipment Rental and Sales, Inc. (Yarbrough), The Tractor Shop, Tractor Company, Wallace International Trading Co. and Wallace Import Marketing Co., Inc.[1]

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[1] At the prehearing conference, counsel for the three Casteel respondents represented that the "facility" of Casteel Farm Implement Co. of Pine Bluff, Arkansas "has been closed" and he is only dealing with Casteel Farm Implement Co. of Monticello, Arkansas. However, he also represented that

An initial determination (Order No. 16) granted complainants' motion to amend the complaint and notice of investigation by adding Fujisawa Trading Agency (Fujisawa) as a respondent. In a notice which issued on June 28, 1996 the Commission determined not to review that initial determination.[2]

An initial determination (Order No. 13) found Sonica, Toyo and the Tractor Company in default pursuant to Commission rule 210.16 and to have waived their right to appear, to be served with documents and to contest the allegations at issue in the investigation. In a notice, which issued on June 10, 1996 the Commission determined not to review said initial determination.

An initial determination (Order No. 47), on complainants' Motion Nos. 380-22 and 380-40, found that complainants have established a domestic industry that exploits each of complainants' U. S. Registered Trademark Nos. 922,330 and 1,775,620. In a notice, which issued on September 9, 1996, the Commission determined not to review said initial determination.

Casteel World Group, Inc. is the umbrella group and that the real party in interest is Casteel World Group, Inc. (Tr at 13 to 15). Complainants' counsel argued that the complaint was sufficient to identify Casteel Farm Implement Co. of Pine Bluff, Arkansas and indicated that it had past activities and that he is prepared to present evidence to show that Casteel Farm Implement Co. of Pine Bluff, Arkansas has violated section 337. (Tr at 17, 18).

[2] Respondents Bay, Casteel Farm Implement Co. of Monticello, Arkansas, Casteel Farm Implement Co. of Pine Bluff, Arkansas, Casteel World Group, Inc., Gamut Trading Co., Gamut Imports, The Tractor Shop, Wallace International Trading Co., and Wallace Import Marketing Co., Inc. are represented by Lloyd J. Walker and are referred to as the "domestic Walker respondents." Mr. Walker also represents respondents Eisho, Sanko, Suma and Fujisawa. Those respondents as well as the domestic Walker respondents are referred to as "the Walker respondents."

An initial determination (Order No. 50) terminated the investigation, as to Nitto Trading Corporation, based on a consent order. In a notice, which issued on September 25, 1996, the Commission determined not to review said initial determination. An initial determination (Order No. 54) also terminated the investigation, as to Yarbrough, based on a consent order. In a notice, which issued on September 30, 1996, the Commission determined not to review said initial determination.

Order No. 44 granted in part complainants' Motion No. 380-34 for sanctions against Eisho, Sanko and Suma. Order No. 51 granted in part complainants' Motion No. 380-45 for sanctions against Nitto Trading Co., Ltd. Order No. 52 granted in part complainants' Motion No. 380-49 for sanctions against the Walker domestic respondents. Order No. 53 granted in part complainants' Motion No. 380-51 for sanctions against Fujisawa.

The evidentiary hearing in this investigation began on August 29, 1996, lasted nine hearing days, and was completed on September 7, 1996. Following the filing of post-hearing submissions, closing arguments were heard on October 24, 1996.[3]

Pursuant to Order No. 4, the initial determination on violation issues is due November 22, 1996. Also pursuant to said order, the target date for completion of the investigation is February 24, 1997.

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[3] On October 30, 1996 complainants filed a motion for leave to file a "Statement Clarifying Closing Arguments" (Motion Docket No. 380-56). Respondents opposed Motion No. 380-56. The staff took no position on Motion No. 380-56. Complainants had ample opportunity through their post hearing submissions and at closing arguments, which lasted from 8:30 a.m. to 7:00 p.m. on October 24, to argue their case. Moreover, during closing arguments, the administrative law judge granted Complainants' Motion for Leave to File Supplemental Rebuttal Post-hearing Statement (Motion Docket No. 380-55), and allowed the Walker respondents an additional 15 minutes of closing argument to address any points raised in complainants' supplemental rebuttal post-hearing statement (Tr at 2672). Accordingly, Motion No. 380-56 is denied.

The matter is now ready for a decision.

These initial and recommended determinations are based on the record compiled at the hearing and the exhibits admitted into evidence. The administrative law judge has also taken into account his observation of the witnesses who appeared before him during the hearing. Proposed findings submitted by the parties not herein adopted, in the form submitted or in substance, are rejected as either not supported by the evidence or as involving immaterial matter and/or as irrelevant. The findings of fact included herein have references to supporting evidence in the record. Such references are intended to serve as guides to the testimony and exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence supporting said findings.

PARTIES

See FF1 to FF82 for identification of the private parties.

PRODUCTS IN ISSUE

The accused products in issue consist of certain agricultural tractors under 50 PTO horsepower made in Japan and which have been used in Japan prior to importation to the United States.

TRADEMARKS IN ISSUE

See FF83 to FF85.

IMPORTATION AND SALE

See FF86 to FF138.

JURISDICTION

In opening arguments, counsel for the Walker respondents represented (Tr at 55, 56):

> JUDGE LUCKERN: Is it Respondents' position that the Commission has no jurisdiction over used goods?
>
> MR. WALKER, SR.: Yes, Your Honor, that would be our position under the law and under the complaint. It's because of the proof that's been established and the terms of the complaint which refers again only to new tractors.

However, at closing arguments, counsel for the Walker respondents represented that the Commission "has jurisdiction to inquire into the matters raised" and "[w]e are not contesting you do not have that jurisdiction (Tr at 2865).

The complaint in this matter alleges that the respondents have violated subsection 337(a)(1)(C) in the importation and sale of products bearing complainants' valid and enforceable registered trademarks, viz. U.S. Registered Trademark Nos. 922,330 and 1,775,620. In this regard, subsection 337(a)(1)(C) declares as unlawful:

> The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that infringe a valid and enforceable United States trademark registered under the Trademark Act of 1946.

19 U.S.C. § 1337(a)(1)(C). As the Federal Circuit held in Amgen Inc. v. USITC, 902 F.2d 1532 (Fed. Cir. 1990):

> [the] jurisdictional requirements of section 1337 mesh with the factual requirements necessary to prevail on the merits. In such a situation, the Supreme Court has held that the tribunal should assume jurisdiction and treat (and dismiss on, if necessary) the merits of the case.

Id. at 1536. Because section 337 declares unlawful the conduct that the complaint alleged, i.e. that the respondents have been engaging in importation into the United States, the sale for importation, or the sale within the United States after importation of articles that infringe a valid U.S. Trademark, and makes no distinction between new and used articles, the

administrative law judge finds that the Commission has jurisdiction over the subject matter of this investigation.

The Walker respondents, and MGA[4] have responded to the complaint and participated in the investigation, and are thereby subject to the personal jurisdiction of the Commission. Moreover, respondents Lost Creek, and Nitto Trading Co. Ltd. have responded to the complaint and have participated in discovery in this investigation. Accordingly, the administrative law judge finds that those respondents are subject to the personal jurisdiction of the Commission.

The remaining respondents, viz. Tractor Company, Sonica, and Toyo, have been held to have waived their right to appear, to be served with documents and to contest the allegations at issue in this investigation (See Order No. 13).

[4] Counsel for MGA did not appear at the hearing. MGA, however, through counsel did submit a witness statement of Mr. Gorin, which was received into evidence as MGA-1.

OPINION ON VIOLATION

I. The Alleged Unfair Act

Complainants have accused respondents of infringing registered trademarks under Section 32 of the Lanham Act, 15 U.S.C. §§ 1114, and unlawful importation of goods bearing infringing trademarks under Section 42 of the Lanham Act, 15 U.S.C. § 1124.[5] The registered trademarks at issue are (1) KUBOTA®, U.S. Reg. No. 922,330, and (2) KUBOTA (Stylized)® U.S. Reg. No. 1,775,620,[6,7] which are owned by KBT,[

]and which are alleged to be infringed through respondents'

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[5] Section 32 of the Lanham Act declares unlawful:

> (1) Any person who shall, without the consent of the registrant --
>
> (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive

15 U.S.C. § 1114

> Section 42 of the Lanham Act provides in relevant part:
>
> no article of imported merchandise . . . which shall copy or simulate a trademark registered in accordance with the provisions of this chapter . . . shall be admitted to entry at any customhouse of the United States. . . .

15 U.S.C. § 1124.

[6] Complainants are no longer asserting either the gear design trademark, U.S. Reg. No. 1,028,221, or the K (stylized) trademark, U.S. Reg. No. 1,874,414 identified in the Commission's Notice of Investigation (CB at 12, fn 10).

[7] Order No. 40, an initial determination granting in part complainants' motion for summary determination (August 8, 1996), found, inter alia, each of U.S. Reg. No. 922,330, and U.S. Reg. No. 1,775,620 in issue valid, and found U.S. Reg. No. 922,330 in issue incontestable. On August 29, 1996, the Commission determined not to review that initial determination.

importation and/or sale of certain used agricultural tractors under 50 power take-off horsepower (CBr at 12).[8]

A. Uncontroverted Facts

It is uncontroverted that all of the accused tractors are agricultural tractors under 50 power take-off horsepower manufactured and initially sold by KBT in Japan and then used in Japan before being imported into the United States from Japan (Tr at 2802, 2803, 2804); and that SX-1 is a document titled "25 [accused] Gray Market Tractors And U.S. 'Equivalent'" which exhibit, including the title, was received by the staff from complainants (Tr at 2808).[9] It is further uncontroverted that the corresponding U.S. model on SX-1 is an agricultural tractor under 50 power take-off horsepower manufactured by KBT in Japan[

]^{10,11}[ ]

[8] As the Procedural History stated, Order No. 47 found a domestic industry as to U.S. Reg. Nos. 922,330 and 1,775,620.

[9] The left hand column on SX-1 lists certain accused models involved in the investigation. Complainants' Kashihara testified that the word "equivalent" in SX-1 is not accurate because the Japanese models and the U.S. models on SX-1 are not the same and that the word "corresponding" is more precise; that to explain SX-1 it was necessary for complainants to identify models of authorized U.S. Kubota tractors which were most appropriate for comparison with the accused Japanese gray market tractor models; and that for the purpose of this investigation in SX-1 complainants took the identified accused gray market model and identified a corresponding authorized U.S. model which is most similar in terms of style, overall appearance and commonality of parts. (CX-599 at 18). It is a fact that some of the accused models listed on SX-1 have no corresponding U.S. models. (SX-1).

[10] The parties participating at the hearing have entered into a stipulation (SX-1A) which reads:

> SX 1 lists in column two under the heading 'date' the dates that the tractors listed in column 1 were wholesaled by complainant KBT in Japan. For example, model B5000 was wholesaled by KBT in Japan from 1969-1975.

[

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B. Exhaustion Doctrine

The Walker respondents, relying on uncontroverted facts, supra, argued that complainants have exhausted their trademark rights in issue because the accused KBT tractors have been lawfully purchased in Japan and then used in Japan before being imported into the United States, and hence there is no infringement (RB at 12-14).

> The exhaustion doctrine is defined as follows:
>
> Trademark rights are 'exhausted' as to a given item upon the first authorized sale of that item. As to that product purchased and resold without change, the trademark is exhausted, or alternatively, the buyer receives an implied license to use the mark in resales.

3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, § 25.11[1][a] (3d ed. Sept. 1996 rev.) (McCarthy on Trademarks), citing Denbicare U.S.A. Inc. v. Toys "R" Us, Inc., 21 USPQ2d 1711 (N.D.Cal. 1991)("The 'first sale' or 'exhaustion' doctrine is well recognized in trademark law. . . . Once the trademark holder has sanctioned the release of

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SX 1 lists in column four under the heading 'date' the dates that the tractors listed in column 3 were wholesaled by KTC in the United States. For example, the B5100 was wholesaled by KTC in the United States between 1978 and 1987.

[11] In this initial determination, the accused tractors are referred to as "KBT tractor(s)," while the corresponding U.S. model tractors are referred to as "KTC tractors(s)."

the goods into the stream of commerce, . . . his right of control is exhausted, and the subsequent sale of that item cannot serve as the basis for an infringement suit.").

A gray-market good is a foreign-manufactured good, bearing a valid United States trademark that is imported without the consent of the United States trademark holder. K-Mart Corp. v. Cartier, Inc. 486 U.S. 281, 285 (1988) (K-Mart).[12] Such goods are also referred to as "parallel imports." As the Third Circuit stated regarding the term "gray market":

> [Defendants] in the present case note that the term 'gray-market' unfairly implies a nefarious undertaking by the importer, and that the more accurate term for the goods at issue is 'parallel import.' We agree that the term parallel import accurately describes the goods and is, perhaps, a better term because it is devoid of prejudicial suggestion. For that reason, we use that term in this discussion. However, we also employ the term 'gray-market' goods because, for better or worse, it has become the commonly accepted and employed reference to the goods at issue.

Weil Ceramics & Glass, Inc. v. Dash, 878 F.2d 659, 662 n.1, 11 USPQ2d 1001, 1003 n.1 (3d Cir. 1989) (Weil); 4 McCarthy on Trademarks, § 29.18.

A gray market may arise in a situation where a foreign manufacturer (KBT) sells goods abroad (KBT tractors) bearing a trademark, and that foreign manufacturer (KBT) also sells goods in the U.S. market, through a U.S. subsidiary (KTC), bearing an identical U.S. registered trademark (KTC tractors). If those foreign goods (i.e. KBT tractors) are purchased abroad by third parties and imported into the United States without the consent of the trademark holder (KBT), a "gray market" is created. See K-Mart 486 U.S. at 286;[13] Certain

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[12] At issue in K-Mart was whether Customs regulations permitting the importation of certain gray-market goods were a reasonable agency interpretation of §526 of the Tariff Act of 1930, 19 U.S.C. § 1526, a statute which has not been asserted in this investigation. See K-Mart 486 U.S. at 285. That case did not deal with any specific goods, and thus did not deal with used goods.

[13] The three "gray market" case scenarios identified in K-Mart were (1) where a domestic firm purchases from an independent foreign firm the right to use the trademark to sell foreign

Alkaline Batteries, Inv. No. 337-TA-165, USITC Pub. 1616, 6 ITR 1849, 1851 (Nov. 1984) (Batteries) ("after these [foreign] batteries have left the control of Duracell-Belgium and entered the European wholesale distribution system, quantities are purchased by importers . . . for sale in the United States."); 4 McCarthy on Trademarks, § 29.18[1]. In this type of gray market situation, which the administrative law judge finds is involved in this investigation, there will always be a first authorized sale of the trademarked goods to a foreign purchaser.[14] However, a "first sale" abroad has not been found to exhaust the rights of the domestic trademark owner, if the foreign goods are materially different from the domestic goods. See Original Appalachian Artworks, Inc. v. Granada Electronics, Inc., 816 F.2d 68, 73, 2 USPQ2d 1343, 1349 (2d Cir.,), cert denied, 484 U.S. 847 (1987) (Original Appalachian) (Cardamone, concurring) ("The more persuasive view, I believe, is that the 'exhaustion' doctrine does not apply with equal force in the international context"). Thus, the administrative law judge finds that the exhaustion doctrine does not apply in the gray market context of this investigation if material differences are found between the foreign accused KBT tractors and the domestic KTC tractors, because the foreign accused KBT tractors have not been authorized for sale in the United States. See e.g. Osawa & Co. v.

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manufactured products in the U.S., (2) where a domestic firm registers the U.S. trademark for goods that are manufactured abroad by an affiliated manufacturer, and (3) where the domestic trademark holder authorizes an independent foreign manufacturer to use it. See K-Mart, 486 U.S. at 286-287. [

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[14] In this sense all gray market goods are "used" goods, because ownership of the goods has transferred from the foreign manufacturer to a third party.

B&H Photo, 589 F.Supp. 1165, 1173, 223 USPQ 124, 132 (S.D.N.Y. 1984)(Osawa); Original Appalachian 2 USPQ2d at 1349.[15]

C. Goodwill

The Walker respondents argued that, because KBT owns the trademarks in issue, there can be no goodwill in the United States which is separate from the goodwill of KBT in Japan (Tr at 2885). However, in the gray market context, a single entity can establish independent goodwill in both the foreign and domestic market. See Ferrero U.S.A. v. Ozak Trading Inc. 753 F.Supp. 1240, 18 USPQ2d 1052 (D.N.J.), aff'd 935 F.2d 1281 (3d Cir. 1991) (Ferrero). In Ferrero, the U.S. trademarks in issue were owned by a foreign company, P. Ferrero & C. S.p.A., the sister company of the exclusive licensee Ferrero U.S.A. The court held that:

> [Plaintiff] Ferrero U.S.A. has spent substantial time and effort developing its market position, based upon trademarks owned by an affiliated corporation, Ferrero S.p.A., Ferrero U.S.A. is truly the interested party in this litigation. To deny plaintiff standing in this matter merely because it is not the registered trademark owner would not only be contrary to the case law permitting suits to be maintained by exclusive licensee's but also would deny the reality of the actual party in interest.

Id. at 1056. The court in Ferrero also found relevant that defendant "creates customer confusion, usurps the good will created by Ferrero U.S.A.'s marketing efforts," thus finding

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[15] If the accused KBT tractors were found to be identical to corresponding KTC tractors, the exhaustion doctrine may apply, See Weil 11 USPQ2d at 1008, fn. 11 ("The fact that [the district court] made no finding that the porcelain distributed by Jalyn and that distributed by Weil are materially different is significant to our disposition of this appeal."); NEC Electronics v. CAL Circuit Abco, 1 USPQ2d 2056, 2058 (9th Cir. 1987) (NEC) ("The issue before us is whether a United States subsidiary that sells certain goods in this country can sue under [Sections 32 and 42 of the Lanham Act] if another company . . . buys the parent's identical goods abroad and then sells them here using the parent's true mark. We think not."); but c.f. Batteries, 6 ITR at 1862-1863 ("the quality of the foreign DURACELL batteries is irrelevant to our decision.").

an independent goodwill created by an exclusive licensee in a gray market case where the U.S. trademarks were owned by a foreign company. Also, independent goodwill may be presumed where the domestic KTC tractors are materially different from the accused KBT tractors:

> The fact that the gray market goods and the authorized imports are materially different is evidence of the separate existence of good will identified by the mark in the U.S. trademark owner, distinct from good will in the foreign manufacturer. In addition, such material differences evidence the fact that consumer expectation as to the nature of the goods identified by the trademark is not being met. This could be characterized as a form of trademark infringement regardless of which source, domestic or foreign, U.S. consumers identify with the trademark.

McCarthy on Trademarks, §29.19[4], citing Restatement (Third) of Unfair Competition § 24, comment f (May 11, 1993). The evidence of record establishes that KBT, through KTC, has established a dealership network of[ ]authorized dealers in the U.S., and provides parts and service support for authorized KTC tractors in the U.S. through that dealership network, thereby establishing a domestic goodwill that is distinct from the goodwill established by KBT in Japan (FF154).[16] Accordingly, the administrative law judge rejects respondents' contention that there is no infringement because KBT has not established any domestic goodwill.

D. Competition

The Walker respondents argued that the accused used KBT tractors and the new KTC tractors are not in competition and hence that there is no infringement (RBr at 12-14).[17] The

[16] As noted supra, it is uncontroverted that KTC has an exclusive licence under the trademarks in issue (FF12).

[17] As to whether the accused used KBT tractors are in direct competition with any corresponding new KTC tractors, see Remedy Recommendations, Section V A. infra.

absence of direct competition, however, does not prevent a finding of likelihood of confusion and accordingly a finding of trademark infringement, See e.g. Professional Golfers Association of America v. Bankers Life & Casualty Co., 514 F.2d 665, 669 (5th Cir. 1975) ("direct competition is not the sine qua non of trademark infringement; rather the gist of the action lies in the likelihood of confusion to the public."); James Burrough Ltd. v. Sign of Beefeater, Inc., 540 F.2d 266, 275 (7th Cir. 1976), after remand, 572 F.2d 574 (7th Cir. 1978)(lower court gave "improper consideration to factors that should not have been considered. [such as] the absence of competition between the parties."); McCarthy on Trademarks, §24.04[1] ("competition is not necessary between the parties for there to be a likelihood of confusion. Confusion, or the likelihood of confusion, not competition, is the real test of trademark infringement."). Accordingly, the administrative law judge finds that the question of competition between accused used KBT tractors and new KTC tractors is only relevant as it may relate to a likelihood of consumer confusion and remedy issues.

II. The Goods In Issue

Complainants' position, at the closing arguments on October 24, was unclear as to what goods are before the administrative law judge on the issue of violation. While the staff would limit the accused tractors to the twenty five (25) models of Japanese KBT tractors set forth on SX-1, complainants' position is that they "have proven likelihood of confusion for KBT tractors, in addition to the 25 tractors that are shown in SX 1" (Tr at 2824). At one point complainants' position was that the accused tractors are the "120 tractors [set forth in Exhibit A to complainants' posthearing statement titled 'Kubota B & L Series Models Designed and Manufactured for Japanese Market to Date'] plus the M tractors, plus these

that are in existence, and those that are likely to be imported in the next two years" (Tr at 2823, 2829, 2830). Later complainants represented that, while the twenty-five KBT tractors shown under the heading "Japan" on SX-1 are clearly "part" of the accused tractors, complainants' proposed findings 107 through 120 is the evidence in support of KBT tractors that complainants believe that they have proved violation. (Tr at 2826).[18] During closing arguments, complainants represented that, in terms of other tractor models that do not appear in SX-1 but have been imported into the United States, there is evidence including CX 553 which is respondent Gamut Trading Company's brochure that lists models as of December 8, 1995 that it had in its inventory (Tr at 2826). Complainants concluded that "the models you see in SX 1, the model you see in . . . CX-553 . . . and other models which may be appearing in invoices. . . are in violation of 337" (Tr at 2828). Complainants then represented:

> MR. RADDING: The tractors listed on CX 553, and the evidence is the fact that all KBT tractors of whatever model are different from all KTC models of whatever model by virtue of the fact that there is no 100 percent parts and

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[18] Illustrating with complainants' proposed findings 107 and 108 they read:

> 107. KBT produces three lines of agricultural tractors which are categorized by horsepower and size. The smallest is the B series which ranges in PTO horsepower from about 10 to 20. In the middle is the L series, ranging from about 15 to 39 PTO horsepower. The largest is the M Series which ranges from about 42 to 104 PTO horsepower. (Kashihara, CX599C at 6-7.)
>
> 108. The tractors involved in this investigation are primarily KBT tractor models in the B and L series, but include all tractor models produced by KBT for the Japanese market which are under 50 power take-off horsepower, including certain M series models as well as model designations B1, L1, L15, GL, A, AST, GB, X, GT and Z. (CX211C at 3; Kashihara, Tr 742-43.).

It would appear from those findings that complainants put in issue "all tractor models produced by KBT for the Japanese market which are under 50 power take-off horsepower." Complainants admitted that the "50 power take-off horsepower" is a limitation (Tr at 2847).

> service support for KTC [sic] KBT, and there is evidence from Mr. Kashihara that all KTC tractors are made stronger than KBT, and that evidence is sufficient under the case law to support violation of all those tractors. [Tr at 2829-30].

Complainants, when asked about the "M series models," which are specifically referenced in complainants' proposed finding 108, supra, stated that there are "a few [accused] models that are not included on these lists." (Tr at 2830). Thus, it is apparently complainants' position here (Tr at 2828-2830) that they are not required to identify specifically what tractors are accused of violating section 337. Complainants, at closing arguments, represented that their difficulty, which is not understood by complainants and which complainants have a problem with, is "whether you can find a violation on some of the models, but you can grant a broad remedy on all KBT tractor models" (Tr at 2831). It was represented by complainants' counsel:

> I believe that the record would establish, and there is evidence in the record to establish that with respect to, as I mentioned, 100 percent parts and service in the Japanese language, that all KBT tractors of whatever model designation on these lists or others would be materially different from all KTC trailers [sic].
>
> I feel that that might be a sufficient finding for all KBT trailers [sic]. SX 1 contains 25 models for which we have established material differences, or all of the material differences, as a representative sample for the rest of the KBT tractor models. I'm having a problem seeing how we can narrow ourselves down to a violation of 25 models, and grant relief on every model.
>
> If that's the way it works out, that's fine. Then we will be very happy, because that's the remedy we want. I'm trying to establish that if you have to find a violation, that yes, you can find it from every material difference, from every other model you can utilize the material differences of 100 percent parts and service, and Japanese language, and the strength as testified to by Mr.

Kashihara. As Mr. Stevens [the staff] recognized in his brief, as time went on, differences grew progressively different.[19]

(Tr at 2831-2832) (emphasis added). Complainants then represented (Tr at 2837):

MR. RADDING: The SX 1 models were representative models.[20] That is how we tried the case. The Staff was aware of this early on that this was a representative grouping. To prove the 120-some-odd models would make this a more complicated case. Again, I think in your findings, you can discuss SX 1.

I also believe that there is evidence, and I say it again, that all KBT models differ from every KTC model in respect to 100 percent parts and service,

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[19] The staff represented (Tr at 2834-2835):

. . . I think Your Honor needs to know exactly what tractors he is going to adjudicate as accused tractors, say yea or nay on the violation issue. I think the Staff needed to know at the beginning of this investigation which ones are we going to look at, which ones are the accused tractors? We asked that question. We got that list of 25. That's where the evidence is.

That's what we have recommended in our reply brief that you limit your analysis on. Because frankly, Your Honor, there isn't any evidence about these other models, the ones that are not listed on the SX 1 and SX 2.

Thereafter, the administrative law judge asked the staff whether, if the administrative law judge should make a finding that there is no violation as to certain accused tractors, would such tractors be excluded from the remedy that the staff has proposed. The staff replied that "[t]hat's an excellent reason not to address those tractors [in the violation portion of the initial determination];" that the answer to the question would wholly depend on what was said; that Customs would have a hard time excluding a tractor that was not found to be infringing; and that the "best approach" is to say that the parties have put 25 tractors in front of the administrative law judge and that only those are the ones that should be addressed on the violation issue (Tr at 2839, 2840).

[20] At closing arguments complainants argued that in Certain Soft Sculpture Dolls Popularly Known As Cabbage Patch Kids, Related Literature and Packing Therefor, Inv. No. 337-TA-231, USITC Pub. No. 1923, reprinted in part 9 ITRD 1291 (Nov. 1986) (Cabbage), the Commission recognized that "it can utilize representative samples in finding a violation." (Tr at 2841). The administrative law judge rejects that argument. In Cabbage the Commission found that "[n]one of the imported packages identified the country of origin of the doll." (Comm'n Op. at 7). While finding 38 of the ID read "Complainants' Physical Exhibit 5 is a doll manufactured by Coleco. It is representative of the subject matter of the 801 copyright," (USITC Pub. No. 1923 at 17), the administrative law judge can find nothing in the Cabbage record that indicated that other dolls manufactured by Coleco did not have the identical copyright. In this record, there is ample evidence that a KTC tractor can differ from another KTC tractor, and a KBT tractor can differ from another KBT tractor, depending on the model number and what year they were made.

> Japanese language. I believe I'm saying yes, yes, you can limit it to SX 1 as long as it is recognized that it is a representative sample of all of the KBT tractors that are brought into this country. Clearly there have been others brought into this country.[21]

In answer to discovery requests by the staff, complainants in SX-2 specifically identified differences for eighteen (18) of the twenty five KBT tractors listed in SX-1 (FF141, 153). DePue of respondent Gamut testified that each of the remaining seven KBT tractors in SX-1 that did not have an "equivalent" KTC tractor was different from KBT tractors that did have an "equivalent" KTC tractor model (FF152). Complainants have admitted that material differences are critical for finding a likelihood of confusion and hence trademark infringement.

Complainants have argued that the evidence on alleged material differences regarding tractors, other than the twenty-five tractors listed in SX-1, includes differences in parts and service, the lack of English language warning labels and operators manuals and differences in strength (Tr at 2829-30). Complainants' Kashihara testified that "There are a total of 43 models involved in this investigation (i.e. 25 Japanese [KBT] models and 18 U.S. corresponding [KTC] models)." (CX599 at 21), and his testimony regarding strength is limited to those twenty five KBT and eighteen KTC tractor models "involved in this investigation" (FF151). In fact, SX-2 indicates no difference in strength with respect to the accused KBT L200, L240, L2000 and L2600 (FF219, 153). While Kashihara testified at the hearing that he "mistakenly forgot," with no explanation, to indicate the critical difference in strength as to those tractors (FF151) which was an issue central to this investigation, the

[21] The staff could not take the position that SX-1 is representative of other KBT tractors not on SX-1 (Tr at 2838, 2839)

administrative law judge does not find in the present record evidence that "all" KTC tractors are stronger than "all" KBT tractors. Moreover, as shown infra, at least the accused KBT L200 has no alleged structural differences as compared to the authorized KTC L200 (FF153). In addition, while Kashihara testified that additional models not on SX-1 had "material differences," this testimony is conclusory, in that he did not indicate specifically what models were being compared or what those alleged material differences were (FF150). Moreover, complainants did not provide the staff with the opportunity, through discovery, to determine if any KBT tractors, other than those in SX-1 have "equivalent," structurally identical KTC models or if the differences testified to by Kashihara meet the legal threshold of material differences likely to cause consumer confusion. Hence, based on the record, the administrative law judge finds that only the twenty five KBT models listed on SX-1 are in issue for determining a violation of Section 337.

III. U.S. Reg. No. 1,775,620 (Stylized Kubota Trademark)

Complainants argued that the registration of the word "KUBOTA" in block letters (U.S. Reg. No. 922,330) gives KBT the exclusive right to use that word in any form on the goods listed in Registration No. 922,330, citing Phillips Petroleum Co. v. C.J. Webb, Inc. 442 F. 2d 1376, 1378, 170 USPQ 35, 36 (C.C.P.A. 1971); that the stylized Kubota mark (U.S. Reg. No. 1,775,620) does appear on KBT tractors; that Mr. Medeiros testified that said stylized Kubota mark is the current corporate logo and has been since 1990 and that said stylized mark was introduced to the public in 1990 to celebrate the 100th anniversary of KBT; that some KBT tractors manufactured after 1990 bear said stylized Kubota mark; that as demonstrated by the record, Mr. DePue is importing KBT tractors manufactured as late as

1992; and that, because the Commission has determined that a domestic industry that exploits said stylized Kubota mark exists,[22] the administrative law judge should find a violation of section 337 with regard to said stylized Kubota mark. (CB at 22, 23).

The staff argued at closing arguments that, while as a practical matter it won't make a bit of difference in terms of what kind of tractors are excluded from the United States if a violation is found as to one or both of the trademarks in issue,[23] the 25 accused tractors on SX-1 do not bear the stylized mark because they were all made before 1990 and complainants have so admitted. Hence, the staff argued that a determination of no violation of section 337 is appropriate as to the Kubota stylized mark (U.S. Reg. No. 1,775,620).

Based on the finding, supra, that only the twenty five KBT tractors in SX-1 are in issue for finding violation, and the fact, as admitted by complainants, that none of those accused KBT tractors bear the stylized Kubota mark (Tr at 2947), the administrative law judge finds no violation of section 337 based on infringement of said stylized Kubota mark.[24]

IV. Material Differences

Complainants argued that the "gravamen" of a trademark infringement case is confusion and that, in this investigation, the accused KBT tractors are materially different from the authorized KTC tractors, thus causing confusion and hence trademark infringement (CBR at 5-20). The staff argued that, because each of the accused model tractors set forth in

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[22] See Procedural History, supra.

[23] The staff represented that the use of the stylized mark (U.S. Reg. No. 1,775,620) on accused tractors would infringe the other registration in issue, Serial No. 922,330, which complainants have agreed (Tr at 2943,2944, 2945, 2946).

[24] See, however, Section V. Remedy Recommendations, infra.

SX-1 bears the 'KUBOTA' trademark U.S. Reg. No. 922,330 and is materially different from the authorized KTC tractors sold under that mark, and because consumers purchased said accused KBT tractors not knowing that the KBT tractors were not manufactured for sale or use in the United States and that said accused KBT tractors differ in significant ways from the KTC tractors KBT manufactures for sale in the United States, the importation and sale of said accused KBT tractors constitutes infringement of complainants' Registered Trademark No. 922,330 in the word 'KUBOTA.' (SB at 48-49). The staff argued however, that certain of the material differences alleged by complainants were in fact not material differences (SBR at 19). The Walker respondents admitted that, "when materially different products, manufactured abroad for individual domestic markets (e.g., Japan or the U.S.), are imported into the United States without the markholder's consent, a claim for infringement may be stated." However, the Walker respondents contended that complainants have failed to prove any material differences (RB at 12).

In cases involving gray market goods, the question is whether differences between the accused products and the authorized products are "material" and thus sufficient to create confusion over the source of the product and hence to damage the markholder's goodwill. See Societe des Produits Nestle, S.A. v. Casa Helveitia, Inc., 982 F.2d 633, 25 USPQ2d 1256 (1st Cir. 1992) (Nestle); Original Appalachian, supra. When the same trademark appear on gray market goods that are materially different from authorized goods, but nonetheless bear strong similarities in appearance or function, the likelihood of consumer confusion is heightened. However, where the same trademark appears on two blatantly different goods, consumer confusion is unlikely. See Nestle 25 USPQ2d at 1262. Consumer

confusion is more likely where differences in the composition or performance between gray market goods and authorized goods will not be obvious to consumers until they actually begin using the gray market goods. Thus, the threshold of materiality may be "quite low," and courts have presumed that material differences cause confusion unless the party involved in importation or sale of any gray market goods can prove otherwise by a preponderance of the evidence, See Nestle 25 USPQ2d at 1263, citing Coach Leatherware Co. v. AnnTaylor, Inc., 933 F.2d 162, 170, 18 USPQ2d 1907 (2d Cir. 1991); see also Helene Curtis v. National Wholesale Liquidators, Inc., 890 F.Supp. 152, 159 (E.D.N.Y. 1995) (Helene Curtis) ("'relevant' differences separate the Canadian [gray market] products from the comparable domestic goods . . . the resulting presumption of consumer confusion has not been met by any countervailing evidence."); Caterpillar, Inc. v. Nationwide Equipment, 877 F.Supp. 611, 616 (M.D.Fla. 1994).

A. Differences at Issue

While each of complainants and the staff argued that a finding of only one difference (e.g. lack of parts and service) would be sufficient to find a violation of section 337, the complainants and the staff have argued that addressing the multiple alleged material differences should be considered (Tr at 2931-2932).

At least one court explicitly required physical differences between domestic goods and the accused gray market goods at issue. Thus, the Ninth Circuit in NEC reversed a district court determination that was based on consumer confusion regarding servicing and warranties, where the foreign and domestic products were physically identical:

> If . . . Abco sales agents mislead their buyers about the availability of NEC-USA servicing, then Abco may be liable in contract or tort, but not in

> trademark. If NEC-Japan chooses to sell abroad at lower prices than those it could obtain for the identical product here, that is its business.

NEC, 1 USPQ2d at 2059. Other courts have used the terms "physical difference" in place of the term "material difference," see e.g. Lever Bros. Co. v. United States, 877 F.2d 101, 11 USPQ2d 1117, 1125 (D.C. Cir. 1989)(§42 of the Lanham Act "bars foreign goods bearing a trademark identical to a valid US trademark but physically different, regardless of the trademarks' genuine character abroad or affiliation between the producing firms.") (emphasis added) (Lever I); Lever Bros. Co. v. United States, 981 F.2d 1330, 1338, 25 USPQ2d 1579, 1586 (D.C. Cir. 1993) ("Trademarks applied to physically different goods are not genuine from the viewpoint of the American consumer.") (emphasis added) (Lever II); McCarthy on Trademarks, § 29.19[4] ("if the authorized and the gray market imports are substantially physically the same, unless the designated U.S. importer can prove a likelihood of confusion by some other method, Lanham Act confusion remedies are no bar to importation") (emphasis added). The court in Nestle, however, noted that material differences are not limited to physical differences:

> We think 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.

Nestle 25 USPQ2d at 1261 fn. 7. In Fender Musical Instruments Corp. v. Unlimited Music Center Inc., 35 USPQ2d 1053, 1056 (D.Conn. 1995) (Fender), the court found that "consumers would likely be confused that they were buying not just Fender guitars, but also the services and guarantees that usually accompany such a sale." The differences in Fender included the fact that accused gray market guitars came with a Japanese-language owner's

manual, had differences in the shape of the neck, the replacement parts, the available colors (and corresponding touch-up paint), and the availability of Fender's warranty Id. 35 USPQ at 1056, see also Osawa, 223 USPQ at 132 (finding confusion based on lack of warranty service); Helene Curtis 890 F.Supp. at 159 (different labels on authorized and gray market goods was a material difference); Batteries, 6 ITRD at 1880 ("The products are genuine, and they are identical or virtually so." but finding likelihood of confusion on other grounds.) (Views of Chairwoman Stern and Commissioner Rohr). Accordingly, the administrative law judge finds that material differences on the trademark infringement issue are not limited to physical differences.

1. Parts and Service, Operators' Manuals and Labels

Each of complainants and the staff argued that KTC is not set up to provide 100% parts and service support for KBT tractors (CB at 31 to 37) and that KBT tractors lack English-language operator's manuals and warning labels, and hence that KBT tractors are materially different from KTC tractors (CB at 31-37, 51-53; SB at 32-33, 44-46). The Walker respondents deny that English language warning labels are not available (RB at 23). The Walker respondents also argued that parts for the accused KBT tractors are the same as, and interchangeable with, parts for KTC tractors, and that service is available for the accused used KBT tractors (RB at 22).

To determine whether parts and service are a material difference, the administrative law judge finds that any structural differences in the KBT tractors and KTC tractors are relevant. In SX-2, complainants provided a listing of alleged physical differences between accused KBT tractor models and "equivalent" KTC tractor models for eighteen of the

twenty-five accused KBT tractor models listed in SX-1 (FF141, 153). The remaining seven accused KBT tractor models had no "equivalent" KTC model (FF141). DePue of respondent Gamut testified that each of said seven KBT tractors in SX-1 that did not have an "equivalent" KTC tractor were different from KBT tractors that did have an "equivalent" KTC tractor model (FF152). Complainants' Kashihara provided additional testimony on the differences between four of those eighteen (18) accused KBT models in SX-2, viz. the KBT B6000, the KBT B1600, the KBT L1500 and the KBT L2002 tractors were compared to the KTC B6000, the KTC B8200, the KTC L175, and the KTC L275 tractors, respectively (FF224, 230-243).

Based on the record, the administrative law judge finds that the accused KBT L200 tractor on SX-2 has no alleged structural differences from the KTC L200 tractor (FF151, 153). He further finds that, because complainants have not provided evidence of any structural differences between the KBT L200 and the KTC L200, any parts and service for the KTC L200 tractor, which are available from KTC, would be interchangeable with those required for the KBT L200 tractor. Moreover, English language manuals, warning labels, and parts manuals that are available for the KTC L200 would likewise be applicable to the identical KBT L200. During closing arguments, complainants' counsel represented that:

> the L 200 was the original tractor. And it's a very old tractor. I think -- I don't even know if it's being imported in the United States by the Respondents at all, and that if that is -- if there is a problem on that analysis, we will withdraw that one tractor as an accused tractor.

(Tr at 2907). Accordingly, the administrative law judge finds no material differences between the accused KBT L200, and the corresponding KTC L200, and therefore finds no trademark infringement in the importation and sale of the accused KBT L200.[25]

Of the remaining twenty four tractors in SX-1, the administrative law judge finds that the evidence of record indicates that only certain parts are in fact interchangeable, and that service provided for said accused KBT tractors differs from service available for KTC tractors (FF154-195, 221, 223). Regarding parts, the testimony of the Walker respondents' expert, Jeffrey Maass,[26] indicated that not all parts were interchangeable between KBT and KTC tractors (FF170, 171,245). Maass also testified that the differences were in "integral" parts of the tractor, such as the front axle housing, and case axle, without which a tractor will not operate (FF245). Norman Base, an authorized KTC dealer testified that, based on working on KBT tractors, parts for KBT tractors are not interchangeable with parts for KTC tractors (FF175, 177, 179). This testimony regarding the non-interchangeability of parts between KBT and KTC tractors, is further supported by complainants' Killian, Medeiros, and Kashihara and respondents' Varnado (FF161, 162, 168, 197). Moreover, because KTC dealers do not have parts manuals for the accused KBT tractors, they are unable to determine what parts are the same and what parts are different (FF156, 157, 161, 168, 170, 175, 177,

[25] While certain physical differences are alleged as between the KBT L200 and the KTC L210, the administrative law judge finds any such comparison irrelevant. Because no physical differences are alleged between the KBT L200 and the KTC L200, the authorized KTC L200 would have the same physical differences from the authorized KTC L210 as would the accused KBT L200.

[26] Mr. Maass was qualified as a parts expert in connection with certain agricultural tractors under 50 power take-off horsepower (FF149).

179, 191, 194). Accordingly, the administrative law judge rejects the Walker respondents' argument that all KTC parts are interchangeable with all KBT parts.

Regarding the availability of service, the evidence of record indicates that KTC dealers do not have parts manuals in English, nor do they have training sufficient to identify what KTC parts will fit in the accused KBT tractors, making it difficult to service the accused KBT tractors (FF157, 161, 175, 191). Mr. Base, an authorized KTC dealer testified, regarding his attempts to service KBT tractors, that his service required "guesswork" (FF175). Moreover, Base testified that he would warranty service on a KTC tractor, but could not give any warranty for his service of a KBT tractor (FF175). Complainants' Killian testified that KTC provides parts manuals, service manuals and training to authorized KTC dealers to permit them to service KTC tractors, but does not provide this service support for accused KBT tractors (FF154, 181-191). Accordingly, while the Walker respondents and some KTC dealers may attempt to service KBT tractors, other KTC dealers will not service KBT tractors (FF156, 158, 161, 177). The administrative law judge finds that KTC dealers are unable to make service available for the accused KBT tractors at the same level of quality as that available for KTC tractors and that service for the accused KBT tractors is not available from all authorized KTC dealers. In contrast, authorized KTC dealers are required to provide parts and service for all authorized KTC tractors (FF154).

There is substantial evidence that consumers find the lack of parts and service support a significant factor in their purchase decisions (FF160, 163, 172, 181). Two customers who purchased KBT tractors testified that they were confused and angry with KTC because they

had problems getting parts and service (FF178, 195). Moreover, complainants submitted letters and other evidence that customers have expressed disappointment and anger regarding their inability to obtain parts and/or service (FF194, 172, 193, 163, 205). That evidence indicates that the lack of parts and/or service availability for KBT tractors has caused actual customer confusion (FF195, 193, 192, 178, 155). A showing of actual confusion is "highly probative on the question of whether a likelihood of confusion exists." Imagineering Inc. v. Van Klassens Inc., 34 USPQ2d 1526, 1529 (Fed. Cir. 1995). See also McCarthy on Trademarks, at § 23.02[2][a] ("Any evidence of actual confusion is strong proof of the fact of a likelihood of confusion.").

Respondents argued that "[t]he decision not to supply parts rests solely with Kubota. And that is dispositive regarding any customer confusion," citing Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510, 1528 (9th Cir. 1992) (Sega) (RB at 23). In Sega, however, plaintiff Sega designed its video game console such that when an operable game cartridge was inserted it would display the message "produced by or under license from Sega Enterprises Ltd." Defendant Accolade manufactured game cartridges with no license from Sega. The use of Accolade's products in the Sega console would result in the display of the Sega trademark. However, critical to Sega was the finding that:

> There is no evidence whatsoever that Accolade wished Sega's trademark to be displayed when Accolade's games were played on Sega's consoles. To the contrary, Accolade included disclaimers on its packaging materials which stated that 'Accolade, Inc. is not associated with Sega Enterprises, Ltd.'

Sega, 977 F.2d at 1528-1529. In this investigation, the Walker respondents do not try to disclaim any association with KTC (FF199-202). At least certain of the Walker respondents testified that they replace the "Kubota" decal with a new "Kubota" decal if the tractor is

repainted (FF198, 315). Respondent Casteel used the phrase "teaming up with Kubota" in a television commercial for accused KBT tractors (FF202), and respondent Tractor Shop has a KBT L1500 on display on a twenty foot pole outside its facility (FF199). Evidence of record indicates that certain gray market dealers tell customers that parts and service are available for KBT tractors from KTC dealers (FF193, 192, 163, 155). In Original Appalachian, the court found a material difference in the domestic affiliate's "inability or unwillingness to process [defendant's Spanish] adoption papers or mail adoption certificates and birthday cards to [gray market] doll owners." Original Appalachian, 816 F.2d at 73, 2 USPQ2d at 1346 (emphasis added). Similarly, the evidence of record indicates that KTC is currently unable and unwilling to provide parts and service for the accused KBT tractors in the United States (FF197, 156, 158, 161, 162, 168, 170, 177). The record further supports a finding that it would be an expensive proposition for KTC to provide 100% parts and service support for KBT tractors in the United States (FF190, 191).[27]

The evidence of record establishes that all accused KBT tractors in SX-1 originally have Japanese language labels,[28] while all KTC tractors in SX-1 have English language labels (FF211, 212). Certain of the respondents replace the Japanese language labels with English language labels (FF216, 217, 315). However, some of the English labels applied by respondents are not for either KBT or KTC tractors (FF216, 217, 210), and the labels that

[27] Respondents, in effect, would impose a burden on complainants to assist respondents in their infringement. See Osawa, 223 USPQ at 127 (rejecting argument that injury caused by plaintiff providing warranty service to gray market cameras was "self-inflicted," because plaintiff could protect itself by refusing to service gray market cameras).

[28] As noted supra, the fact that the KBT L200 tractor is found identical to the KTC L200 tractor would allow a gray market dealer to use English language KTC L200 labels on KBT L200 tractors.

are KTC English language labels do not correspond to the direct translations of the Japanese labels provided on accused KBT tractors (FF213-216, 276). Those differences in labels are significant because, even where the Walker respondents replace Japanese language labels with English language labels, the English labels may contain erroneous instructions for KBT tractors (FF216, 276, 315). For example, labels contain information on PTO speeds, which are different for certain KBT and KTC tractors (FF276). In addition, neither KTC or KBT is able to ensure that the labels are placed in the correct location on the accused KBT tractors (FF213, 214, 315).

English language operators' manuals are not available to purchasers of KBT tractors (FF203). Certain respondents provide KTC manuals to purchasers of KBT tractors (FF206, 208, 209). Those KTC manuals however, are intended for authorized KTC models and said manuals indicate that the customer should consult the customer's KTC dealer with any questions regarding parts, service, and operation of the KBT tractor (FF206). As discussed supra, KTC dealers are unable and/or unwilling to supply 100% parts, service and operation support for accused KBT tractors.

Based on the foregoing, the administrative law judge finds that the lack of parts and service, and the lack of English language warning labels and operators manuals are material differences between the accused KBT tractors in issue and KTC tractors sufficient to create a presumption of a likelihood of consumer confusion, and hence a violation for each of twenty four of the accused KBT tractors (which excludes the accused KBT L200) on SX-1. See Nestle 25 USPQ2d at 1261 fn. 7.

Complainants have alleged several physical differences between the twenty four (24) accused KBT tractors and the authorized KTC tractors (SX-2, CB at 29-51). The staff argued that four of the alleged physical differences between the twenty four KBT tractors and the KTC tractors are material differences (SBR at 19). The Walker respondents argued that the evidence is inconclusive on any material differences (RBR at 6-7). Assuming, arguendo, that it is necessary to find physical or structural material differences, in addition to the lack of parts and service and the lack of English language warning labels and operators' manuals to create a presumption of a likelihood of confusion and hence a violation of section 337, the administrative law judge finds a violation as to seventeen of the twenty five accused KBT models listed on SX-1.[29]

In support, he finds that only seventeen of the twenty five tractors listed on SX-1 have in fact certain physical or structural material differences identified in SX-2 (FF153).[30] The administrative law judge finds that the lack of PTO shields, differences in strength, the lack of a hydraulic block outlet, differences in maximum speed, differences in PTO speeds, and differences in wheelbase/treadwidth constitute physical material differences likely to cause consumer confusion.[31] Seventeen of the twenty five tractors listed in SX-1 have at least two

[29] The Commission's decision in Batteries did not address the issue of alleged material differences between gray market goods and authorized goods, and therefore did not decide if non-structural differences could be "material differences" likely to cause consumer confusion. The administrative law judge is not aware of any Federal Circuit decision that addresses this issue. Accordingly, this is an issue of first impression for the Commission.

[30] As discussed supra, based on the testimony of DePue, all of the tractors in SX-1, with the exception of the KBT L200 tractor, are found to have some physical difference compared to the KTC tractors in SX-1, however, there is no indication in the record of specifically what those differences are or if those differences in themselves rise to the level of material differences (FF152).

[31] See Sections IV A. 2 to 7 infra.

of those physical material differences. See Structural Material Differences Table infra. Hence, assuming, arguendo, it is necessary to find physical or structural material differences to create a presumption of a likelihood of confusion, he would find seventeen of the twenty five accused KBT tractors create that presumption and accordingly, the administrative law judge would find a violation as to each of those seventeen accused KBT tractors.

2. PTO Shields

None of those remaining 17 accused KBT tractors in SX-2 are equipped with a PTO (power take-off) shield (FF153, 252, 262).[32] With the exception of the KTC B6000 wholesaled in 1974, each of the corresponding KTC tractors were sold with a PTO shield (FF153, 262). Complainants' experts Leviticus and Williams testified that a PTO shield was an important safety device (FF252, 253, 255-261). The Walker respondents argued that no law (or regulation) requires a used tractor dealer to attach a PTO shield prior to selling a used KBT tractor (Rebuttal to CPFF 323, RB at 5). However, the test of material differences are differences that are likely to cause consumer confusion. The Walker respondents have pointed to no authority for the proposition that material differences only apply to differences created by differing legal requirements in the United States and Japan. To the contrary, gray market cases frequently address differences that are at the option of the trademark owner, and not required by any law. In Helene Curtis, the court found that "the percentage of Volatile Organic Compounds, and its concomitant effect on the environment, is a factor that may be relevant to consumers, whether or not the consumers reside in those

[32] Certain of the Walker respondents provide an after market PTO shield on some KBT tractors. However, it is admitted that the PTO shield supplied by respondents is not the same as that supplied on KTC tractors (FF263).

states that require compliance with Clean Air Standards," where gray market hair spray would not meet New York or California Clean Air Standards, which were met by the authorized product. Id. 890 F.Supp. at 159. See also Original Appalachian, Lever Brothers, Osawa, Ferrero. Similarly, while complainants have not shown any legal requirement for used tractor dealers in general to install PTO shields on used tractors,[33] complainants have shown that the remaining seventeen KTC tractors in SX-2, with one exception, do have factory installed PTO shields and all KBT tractors in SX-2 do not (FF153, 262, 263). Moreover, Williams and Leviticus testified that the importance of PTO shields for U.S. tractors has been recognized since 1941 (FF261). Accordingly, the administrative law judge finds that the absence of PTO shields on the accused KBT tractors, with the exception of the accused KBT B6000 tractor as shown in the Structural Material Differences Table, infra, constitutes a material difference.

3. Strength

There is a difference in strength between certain accused KBT tractors and the authorized KTC tractors. At least fourteen of the remaining seventeen authorized KTC tractors listed in SX-2 as shown in the Structural Material Differences Table, infra, have parts that are stronger than the corresponding KBT model, with the exception of the L260, L255, and L285 tractors (FF153). While Kashihara testified that he "mistakenly forgot," without explanation, to indicate the critical difference in strength as to the KTC L260, L255, and L285 tractors, his personal experience would not include a strength comparison of the

[33] Evidence of record indicates that authorized KTC dealers will not install a PTO shield on a tractor that did not originally have a PTO shield (FF263A).

KBT L240 with the KTC L260, the KBT L2000 with the KTC L225, or the KBT L2600 with the KTC L285 because all of those KTC tractors were first wholesaled prior to 1976 (FF151). Accordingly, the administrative law judge finds no difference in strength with respect to the accused KBT L240, L2000 and L2600 tractors, and the KTC L260, L255, and L285 tractors. While SX 2 does not indicate any difference in strength between the KBT L1500 and the KTC L175, Kashihara provided detailed testimony relating to engineering documents which demonstrated a difference in strength between the KBT L1500 and the KTC L175 tractors (FF236-241, 219).

Respondents rely on certain testimony of DePue (FF250A) that DePue had no personal knowledge of a front-end loader breaking an accused KBT tractor due to a lack of strength. However, a showing of inferior quality is not a prerequisite of establishing material differences. See Caterpillar 877 F.Supp. at 615, citing Babbit Electronics v. Dynascan Corp., 828 F.Supp. 944, 957 (S.D.Fla. 1993) ("inferiority is not a prerequisite to a finding of a Lanham Act violation. . . . There can be a Lanham Act violation even if [authorized] and [gray market] goods are of equal quality."). Each of respondents' expert Maass, complainants' Kashihara, complainants' Williams and complainants' Leviticus testified that certain parts were, in fact, made stronger for KTC tractors as compared to KBT tractors, and that such increased strength would prevent the tractors from wearing prematurely or breaking when implements such as a front end loader are used (FF224-250). Accordingly, the administrative law judge finds said testimony of DePue insufficient to rebut the presumption of a likelihood of consumer confusion based on a difference in strength. The administrative law judge finds in the present record evidence of a material difference in

strength for fourteen of the accused KBT tractors listed in SX 2 that is likely to cause consumer confusion, which fourteen excludes the accused KBT L240, L2000 and L2600 tractors.

4. Hydraulic Block Outlet

None of the accused KBT tractors were originally equipped with a hydraulic block outlet, while of the authorized KTC models in SX 2, only the 1974-1975 KTC B6000, and the KTC L260 were not equipped with a hydraulic block outlet (FF153, 265). Testimony of record indicates that the hydraulic block outlet is necessary to operate a front end loader, and that front end loaders are widely used in United States applications (FF264-267). While a hydraulic block outlet can be added by respondents (FF265, 267),[34] complainants have no ability to control the quality of a hydraulic block outlet that is added by respondents. Accordingly, the administrative law judge finds that the lack of factory installed hydraulic block outlets is a material difference between authorized KTC tractors and the accused KBT tractors, with the exception of the accused KBT B6000 and the KBT L240 tractors, as shown in the Structural Material Differences Table, infra.

5. Maximum Speed

Fifteen of the seventeen KBT tractors have a lower maximum speed, as compared to comparable KTC tractors (FF153, 268). The exceptions are the KTC B6000, and KTC B5100 tractors, with maximum speeds within 0.1 km/hr of the maximum speed on their KBT

[34] DePue testified that he could tap into tractor hydraulic lines to provide the function served by a factory installed hydraulic block outlet (FF265). While respondents may be able to simulate certain features of the authorized KTC tractors by making modifications to the accused KBT tractors, any such modification would likely exacerbate rather than alleviate any material difference, because complainants' reputation would become dependent on the quality of respondents' modifications.

counterparts (FF268).[35] There is no evidence in the record that a difference in maximum traveling speed is the type of difference that a consumer would not consider important (See RRFF at 142, SRFF at 25-26). Thus, the administrative law judge finds the differences in maximum speed to be a material difference with the exception of the KBT B6000 and KBT B5001 tractors, as shown in the Structural Material Differences Table, infra.

6. PTO Speeds

With the exception of the KBT B6000, and the KBT L240, all KBT tractors have different PTO speeds compared to corresponding KTC tractors (FF153). This difference is significant because implements designed for KTC tractors will be designed to operate at the PTO speed for that tractor, and may operate differently, or in an unsafe manner if operated at a different PTO speed (FF272, 275). Without English language labels, or English language operators' manuals, the owner of a KBT tractor would not know the actual PTO speeds for his tractor, and may mistakenly believe that they are the same as the corresponding KTC tractor for which a gray market dealer has provided an operators' manual (FF275, 276). For example, if an operator of a KBT L1500 tractor was given PTO speed information for an "equivalent" KTC L175 tractor, that customer would believe that the only two PTO speeds on that KBT L1500 were 540 and 1070 rpm, while the actual PTO speeds for that KTB L1500 tractor are 597, 850, 1185, and 1371 rpm (FF207, 276, SX-2 at 9). Hence, the administrative law judge finds that differences in PTO speeds are a material

[35] Evidence of record indicates that this difference could be accounted for by different tires types (high lug vs. low lug) (FF269). However, the difference in newer tractors could be accounted for by increased horsepower (FF269, 270).

difference for certain accused KBT tractors, as shown in the Structural Material Difference Table, infra.

7. Wheelbase/Treadwidth

Finally, with the exception of the KBT L240 and the KBT L2600 tractors, all KBT tractors, as shown in the Structural Material Differences Table, infra, have different wheel base and/or tread width dimensions as compared to corresponding KTC tractors (FF153, 278). This dimension will impact the stability of certain of the accused tractors (FF277, 279, 280). Respondents and the staff have pointed to nothing in the record to indicate that a difference in a tractor's wheelbase and/or tread width is something that a consumer would not consider important (RRFF at 100, SRFF at 7). Accordingly, the administrative law judge finds that different wheel base and/or tread width dimensions are a material difference.

The above structural material differences are summarized in the following table with "Yes" indicating a material difference (See FF153):

STRUCTURAL MATERIAL DIFFERENCES

Accused KBT Tractor Model	Strength	PTO Shield	Hydraulic Block Outlet	Max. Speed	PTO Speeds	Wheel base/ Tread Width
B5000						
B6000	Yes	No	No	No	No	Yes
B7000						
B5001	Yes	Yes	Yes	No	Yes	Yes
B6001	Yes	Yes	Yes	Yes	Yes	Yes
B7001	Yes	Yes	Yes	Yes	Yes	Yes
B1200(DT)	Yes	Yes	Yes	Yes	Yes	Yes
B1400(DT)	Yes	Yes	Yes	Yes	Yes	Yes
B1500(DT)						
B1600(DT)	Yes	Yes	Yes	Yes	Yes	Yes
L200	No	No	No	No	No	No
L240	No	Yes	No	Yes	No	No
L1500	Yes	Yes	Yes	Yes	Yes	Yes
L2000	No	Yes	Yes	Yes	Yes	Yes
L2200						
L2600	No	Yes	Yes	Yes	Yes	No
L1501(DT)	Yes	Yes	Yes	Yes	Yes	Yes
L1801(DT)						
L2201(DT)	Yes	Yes	Yes	Yes	Yes	Yes
L2601(DT)	Yes	Yes	Yes	Yes	Yes	Yes
L3001(DT)	Yes	Yes	Yes	Yes	Yes	Yes
L1802(DT)	Yes	Yes	Yes	Yes	Yes	Yes
L2002(DT)	Yes	Yes	Yes	Yes	Yes	Yes
L2202(DT)						
L2402(DT)						

Complainants have also alleged the following specific material differences between KBT tractors manufactured for the Japanese market and KTC tractors manufactured for the United States market: (1) ROPS; (2) PTO one-way clutch; (3) hand throttle; (4) warning lamps/tail lamps/Slow Moving Vehicle (SMV) bracket; (5) PTO restrictor; (6) hydraulic capacity; (7) tires and rims; and (8) operator's space. (CPFF 236, SX2C; Complaint at 16-22, ¶¶ 69-79). It is admitted by complainants however, that certain differences vary by model year even among authorized KTC tractors with the same model number (Tr at 2913-2914). In addition, there is testimony from complainants' Kashihara (FF141A) that it would be difficult or impossible for a consumer to identify the year in which a particular model tractor was manufactured.

Certain differences that complainants argued are "material" differences between accused KBT tractors and authorized KTC tractors also are differences between authorized KTC tractors made in one model year and authorized KTC tractors of the same model number made in a different model year. For example, ROPS were not standard on any authorized KTC tractor model listed on SX-1 until 1985 (FF153, 287). Thus, KTC sold the B5100 model from 1978 to 1979 in the U.S. with ROPS as an option, from 1980 to 1984 with ROPS as a "delete option," and from 1985 to 1987 with ROPS as standard equipment (FF153). Hence, a U.S. consumer in the market for a used KTC B5100 would find certain authorized KTC tractors equipped with a ROPS and certain authorized KTC tractors not equipped with a ROPS (FF287).[36] Similarly, as to the alleged material difference in "hazard

[36] KTC has instituted a "ROPS program" to encourage tractor owners to have a ROPS installed (FF287-289, 294).

light," and "tail light," all of the authorized KTC tractors sold prior to 1980 did not have either a "hazard light" or "tail light." Thus, for example, from 1976 to 1979 KTC sold authorized L185 tractors in the U.S. without either a "hazard light" or "tail light," and from 1980 to 1983, KTC sold the authorized L185 tractors in the U.S. with a "hazard light" and "tail light" (FF153). A U.S. consumer in the market for a KTC L185 would find some authorized KTC L185 tractors with a "hazard light" and "tail light" and some authorized KTC L185 tractors without a "hazard light" and "tail light." The same analysis holds for hand throttle lever direction, which was changed on authorized KTC models in 1980, for the PTO one-way clutch, adopted in certain KTC models after 1978, and the PTO restrictor, adopted in certain KTC models after 1982 (FF153). Accordingly, the administrative law judge rejects complainants' argument that differences in PTO one-way clutch, PTO restrictor, ROPS as standard equipment,[37] hand throttle direction, warning lamps, tail lamps, and SMV bracket are "material" differences likely to cause consumer confusion because these differences occur between KTC tractors of varying model year (FF153).

Complainants have alleged a material difference with respect to the hydraulic capacity of KBT tractors, as compared with KTC tractors (CPFF at 85). However, as Kashihara testified, the accused KBT B6000, B1600, and L1500 tractors had identical hydraulic capacity as the authorized KTC B6000, B8200 and L175 tractors, respectively, and the authorized KTC L8200 tractor had different hydraulic capacity for two wheel drive and four wheel drive models (FF296). The only models with different hydraulic capacity was the

[37] The administrative law judge finds the non-availability of certified ROPS as a "parts and service" difference and not a "structural" difference (FF289, 291-295).

KBT L2002 and the KTC L275 tractors (FF296). Moreover, hydraulic capacity was not identified as an alleged material difference in SX-2. The administrative law judge therefore rejects complainants' argument that differences in hydraulic capacity are material differences likely to cause consumer confusion.

Complainants have alleged a material difference with respect to different tires and rims. Complainants' Williams however, testified that:

> it was my judgment that the tires did not represent a big issue. . . . [I]t's my belief that the tires probably don't represent in my judgment a significant factor to the purchase decision or to the ultimate satisfaction of the consumer . . . . And so the life of that tire in this country operating on hard terrain is going to be short-lived. But, on the other hand, the repercussions or the significance of that short product life of the tires is not tremendously significant. I think you can buy a new tire and, if necessary, if you can find a 22-inch, it really doesn't break the piggy bank all that much to go get a new set of rims.

(FF284). Based on this testimony, the administrative law judge finds that complainants have not established a material difference in tires and rims as between the accused KBT and corresponding KTC tractors that it is likely to cause consumer confusion (FF281-284).

The alleged material difference in operator's space is different for only 3 of 7 authorized KTC B series models, and for only eight of twelve L series KTC tractors (FF299). However, the operator's space varies from KTC tractor to KTC tractor, as some KTC models are smaller than others, and a consumer would be able to observe the operator space available before purchasing a tractor (FF298). The administrative law judge, based on the record, finds that complainants have not established a difference in operators space is a "material" difference between a sufficient number of accused KBT and corresponding KTC tractors such that it is likely to cause consumer confusion.

V. Remedy Recommendations

A. General Exclusion Order

Complainants argued that a general exclusion order prohibiting the entry of infringing KBT tractors is necessary. In support, it is argued that there is overwhelming evidence of "a widespread pattern of unauthorized use" of the trademarks at issue on unauthorized infringing KBT tractors; that there is ample evidence that non-respondents may enter the United States market with infringing KBT tractors; and that since sales of gray market KBT tractors have increased significantly over the last several years and are expected to increase, it is "inevitable" that additional dealers will begin selling infringing KBT tractors in the United States. (CB 86-89). Complainants also argued that a general exclusion order, which would permit infringing KBT tractors to enter the United States if they are labeled in a specific manner, would be no relief at all. (CB at 89).

The staff argued that a general exclusion order will be required to provide an adequate remedy (SB at 49-51). The staff argued, however, that while the Commission's general exclusion orders often provide for exclusion of the infringing tractors without qualification, any general exclusion order in this investigation should permit an infringing tractor to enter the United States if it is labeled in a specific manner as outlined by the staff (SB at 52-53). The Walker respondents, assuming arguendo there is a finding of violation, support the staff's remedy recommendation (Tr at 2903).

The standard for determining whether a general exclusion order should issue was set forth by the Commission in Airless Paint Spray Pumps and Components Thereof, ITC Inv. No. 337-TA-90, USITC Pub. No. 1199 (1981).

> ... it is incumbent upon the Commission to balance a complainant's interest in obtaining complete protection from all potential foreign infringers through a single investigation with the inherent potential of a general exclusion order to disrupt legitimate trade. We therefore require that a complainant seeking a general exclusion order show both a widespread pattern of unauthorized use of its patented invention and certain business conditions from which one might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles.

Id., Commission Opinion at 18. The administrative law judge finds that standard to be met. Thus, U.S. Reg. No. 922,330 in issue has been found valid and incontestible (See Order No. 40). See also FF145, 146, 327-352. Accordingly, he recommends a general exclusion order to provide an adequate remedy. However, he further recommends that said general exclusion order permit infringing tractors to enter the United States if the infringing tractors have affixed thereto a permanent, non removable label, in the same location and size as the largest "Kubota" trademark appearing on said tractor which label should contain the following information:

> (1) that the tractor was not manufactured for sale or use in the United States and differs from the tractors Kubota Corporation manufactures for sale in the United States;
>
> (2) that Kubota Corporation has not authorized the sale of this tractor model in the United States;
>
> (3) that Kubota Corporation, and authorized Kubota dealers are unable to provide parts and service support for this tractor model in the United States;
>
> (4) that accessories for Kubota tractors authorized for sale in the United States may not be compatible with this tractor;
>
> (5) that important English language instructional and warning labels are not available;[38]

[38] Inclusion of English language KTC labels is not sufficient to meet this concern because KTC labels contain different information than KBT labels. (FF212-217).

(6) that English language operator's manuals are not available for this tractor model; and

(7) that this tractor may not comply with U.S. industry standards for safety.

He finds that such a label would avoid harm to complainants' reputation and goodwill resulting from consumer confusion caused by material differences between the infringing KBT tractors and authorized KTC tractors.[39]

The administrative law judge has limited his determination of violation to twenty four specific KBT tractor models. See Section IV, Material Differences, supra. However, the administrative law judge notes that different evidentiary standards apply to Commission remedy determinations. See Sealed Air Corp. v. USITC, 645 F.2d 976, (C.C.P.A. 1981) (upholding Commission remedy that required importers to show products did not infringe). The Commission has previously held that exclusion orders, as opposed to violation determinations, should not be limited to specific models, as any such limitation "merely invites an unscrupulous respondent to change the model numbers to circumvent the order." Certain Cellular Radiotelephones and Subassemblies and Component Parts Thereof, Inv. No. 337-TA-297, USITC Pub. 2361, Comm'n Op. on Remedy the Public Interest and Bonding at 5 (Aug. 29, 1989). Accordingly, the administrative law judge recommends that any general

[39] The administrative law judge found no violation of section 337 based on infringement of the stylized Kubota mark (U.S. Reg. No. 1,775,620). However, his determination of violation of Serial No. 922,330 in issue, would cover all tractors that bear the Kubota name whether block or whether stylized, see 2 McCarthy on Trademarks, § 19.16 ("By registration of a work in typed, block letter format, registrant is free to change the type style or display at any time and remain within the protection of the registration because the registration covers the word per se, not any particular form or type style presentation of the word.") and In re Pollio Dairy Corp., 8 USPQ2d 2012 (TTAB 1988). Accordingly, tractors which bear said stylized Kubota mark should also be subject to the recommended remedy.

exclusion order should not be limited to specific infringing KBT tractor models (FF145, 146).

The Commission has broad discretion to fashion an appropriate remedy for any violation of section 337. See Hyundai Electronics v. ITC 899 F. 2d 1204, 1209, 14 USPQ2d 1396, 1401 (Fed. Cir. 1990). There is ample precedent for issuing a general exclusion order which would permit entry of the infringing products into the United States if they are labeled in a specific manner. In Prestonettes, Inc. v. Coty 264 U.S. 359 (1924) (Coty), the Supreme Court held that the ownership of a registered trademark does not carry with it the right to prohibit a purchaser from using the trademark on the purchaser's own labels, provided the trademark was not printed or otherwise used to deceive the public. In Coty, plaintiff Coty sought to restrain alleged unlawful uses by defendant Prestonettes of Coty's registered trademarks, "Coty" and "L'Origan," upon toilet powders and perfumes. Prestonettes had purchased the genuine powder, subjected it to pressure, added a binder to give it coherence and sold the compact in a metal case. The district court had allowed Prestonettes to make compacts from the genuine loose powder of Coty and to sell them with a certain label on the container. Thereafter, the Court of Appeals issued an absolute preliminary injunction against use of the marks in issue except on original packages as marked and sold by Coty, thinking that Prestonettes could not put upon Coty the burden of keeping a constant watch. The Supreme Court reversed the decree of the Court of Appeals, and left standing the decree of the district court stating:

> The defendant of course by virtue of its ownership had a right to compound or change what it brought, to divide either the original or the modified product, and to sell it so divided. . . . Then what new rights does the trademark confer? It does not confer a right to prohibit the use of the word or words. It

> is not a copyright. . . . a trade mark only gives the right to prohibit the use of it so far as to protect the owner's good will against the sale of another's product as his. . . . When the mark is used in a way that does not deceive the public we see no such sanctity in the word as to prevent its being used to tell the truth. It is not taboo. . . .
>
> * * *
>
> This is not a suit for unfair competition. It stands upon the plaintiff's rights as owner of a trademark registered under the act of Congress. The question therefore is not how far the court would go in aid of a plaintiff who showed ground for suspecting the defendant of making a dishonest use of his opportunities, but is whether the plaintiff has the naked right alleged to prohibit the defendant from making even a collateral reference to the plaintiff's mark. [364 U.S. at 366-369]

Thus, the administrative law judge finds that, even in gray market cases, a trademark has no independent significance apart from the good will it symbolizes. Unlike a copyright, any and all reproductions of a trademark are not an infringement.[40] A trademark owner has only the limited right to prohibit uses of the trademark which are likely to cause consumer confusion.[41] As in Coty, the administrative law judge finds that the use of the trademark in issue, in association with the label on the infringing tractors, set out by the administrative law judge, does not deceive the public in a way likely to cause consumer confusion.

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[40] See Weil, NEC supra. (Finding no infringement in gray market cases where plaintiff failed to prove a likelihood of consumer confusion).

[41] Coty has been consistently accepted as the law. See "Designs-Copies by Competitors," 1 A.L.R. 3d 760 (1965); Forstmann Woolen Co. v. Murray Sices Corp., 144 F. Supp. 283, 111 USPQ 261 (D.C.N.Y. 1956) (Allowing a garment manufacturer to use a fabric manufacturer's trademark on garments made from that fabric); Independent New Co. v. Williams, 293 F. 2d 510, 129 USPQ 377 (3d Cir. 1961) (Coty relied on to allow a second-hand periodical dealer to sell magazines, with the covers torn off, under the original magazine trademarks); and William Grant & Sons, Ltc. v. European Beverages Co., 668 F. Supp. 1421, 4 USPQ2d 1162 (C.D. Cal. 1987) (Coty was applied when a court held that a producer of Scotch whiskey can label its bottles with the statement that its whiskey was bottled from a cask of spirits originally distilled at plaintiff's GLENFIDDICH distillery so long as the label contained an appropriate disclaimer that the product was different.).

In addition to Coty, in Champion Spark Plug Co. v. Sanders 331 U.S. 125 (1947) (Champion) the controversy related to the refusal of the Court of Appeals to require respondents to remove the word "Champion" from repaired or reconditioned Champion brand spark plugs which they resold, Id. 331 U.S. at 128. Petitioner was a manufacturer of spark plugs which it sold under the trademark "Champion." Respondents collected the used plugs, repaired them and retained the word "Champion" on the repaired or reconditioned plugs. The outside box or carton in which the plugs were packed had stamped on it, inter alia, the word "Champion." Respondents' company's business name or address was not printed on the cartons. Petitioner had charged respondents with infringement of its trademark and unfair competition. The district court found that respondents had infringed the trademark and enjoined them from offering or selling any of petitioner's plugs which had been repaired and reconditioned unless, inter alia, the trademark was removed. The Court of Appeals held that respondents not only had infringed petitioner's trademark but also were guilty of unfair competition. However, it modified the district court decree by inter alia, eliminating the provision requiring the trademark to be removed from the repaired or reconditioned plugs. Id. 331 U.S. at 126-127.

The Supreme Court in Champion affirmed the decision of the Court of Appeals. It reasoned that second-hand goods are involved and that the spark plugs, though used, are nevertheless Champion plugs and not those of another make; and that while there was evidence to support that a used plug which has been repaired or reconditioned does not measure up to the specifications of a new one, the same would be true of a second-hand Ford or Chevrolet car and the Supreme Court would not suppose that one could be enjoined from

selling a car whose valves had been reground, and whose piston rings had been replaced unless he removed the name Ford or Chevrolet. The Court found, that while cases may be imagined where the reconditioning or repair would be so extensive or so basic that it would be a misnomer to call the articles by their original name, even though the words "used" or "repaired" were added, no such practice was involved. While there was evidence in Champion that inferiority is to be expected in most second-hand articles, it was concluded that inferiority is immaterial so long as the article is clearly and distinctly sold as repaired or reconditioned rather than as new; that while the second-hand dealer gets some advantage from the trademark, such advantage is "wholly permissible so long as the manufacturer is not identified with the inferior qualities of the product resulting from wear and tear or the reconditioning by the dealer" and "[f]ull disclosure gives the manufacturer all the protection to which he is entitled." Id. 331 U.S. at 128-130.[42] In this investigation, the accused tractors are manufactured by Kubota and have been used in Japan. Thus, like Champion genuine used goods are in issue. Moreover, as in Champion, the administrative law judge finds that because of the recommended label, complainants would not be identified with any inferior qualities of the infringing tractors, other than their actual connection as manufacturers of the infringing tractors for use in Japan, and that said label would give the

[42] The Supreme Court was mindful of the fact that the case involved not only trademark infringement but also unfair competition and that where unfair competition is established any doubts as to the adequacy of the relief are generally resolved against the transgressor. However, it found that there was no showing of fraud or palming off and that it could not say that the conduct of respondents or the nature of the article involved and the characteristics of the merchandising methods used to sell it, called for more stringent controls than the Circuit Court of Appeals provided. Id. 331 U. S. 130-131. There is no allegation of unfair competition in this investigation.

complainants all the protection to which they are entitled because the trademark would be used to "tell the truth."

There is precedent for the use of a label in section 337 investigations. Thus, in Certain Nut Jewelry and Parts Thereof, Inv. No. 337-TA-229, U.S.I.T.C. Pub. No. 1929 (November 1986), which investigation was based on the allegation that respondents imported and sold articles with labels that were alleged to be misleading in that the labels would cause a purchaser to believe that the accused products were produced in Hawaii (Comm'n Op. at 1-2), the Commission issued a general exclusion order that would permit entry of the accused products into the United States if the products bore a permanently affixed label disclosing certain information about the origin of the products. Moreover, in Certain Chemiluminescent Composition and Components Thereof and Methods of Using, and Products Incorporating the Same, Inv. No. 337-TA-285, USITC Pub. No. 2370 (March 1991) (Chemiluminescent), the Commission issued a general exclusion order directed to articles that infringed the relevant claims of six patents at issue, and packaging and related literature that infringed two registered trademarks. However, this order contained a provision by which an importer may enter articles covered by the patent claims by certifying that the articles were made using chemicals extracted from complainant's Cyalume products. The order also took into account that "it is not trademark infringement to repackage or rebottle goods and use the trademark of the original goods on the repackaged goods in a limited manner designed to truthfully inform the public of the nature and source of the goods," the Commission noting Coty. ("Commission Opinion on Registered Trademark Infringement, Remedy, The Public Interest, and Bonding" at 11, 12).

In addition, as the staff argued (SB at 54), states have found disclosure labels to be an appropriate way to remedy consumer confusion in gray market situations. California has a statute that requires the retail seller of a gray market product to affix to the product a conspicuous ticket, label or tag disclosing certain things Cal. Civ. Code §17791.81 (1995). New York and Connecticut have similar statutes that require gray market retailers to affix a label on gray market products (or post signs that are clearly visible at the point of sale) indicating that the products are not accompanied by a manufacturer's warranty and, when applicable, that the products are not accompanied by instructions in English. N.Y. Gen. Bus. Law §218-22 (McKinney 1996); Conn. Gen. Stat. Ann. §42-210 (West 1995).

Complainants argued that a general exclusion order which would permit the infringing tractors to enter the United States if they are labeled in a specific manner would be contrary to Commission practice, citing Batteries and Cabbage. In Batteries while the Commission stated that Coty and Champion did not establish that labeling is an adequate remedy, the Commission's statement was qualified by the phrase "in this factual situation." Comm'n Opinion at 39. Moreover, in each of Batteries and Cabbage the Commission emphasized that the goods involved in the violation were being sold as new goods in direct competition with the respective complainant's goods. Thus in Batteries the Commission, after noting that "[b]ecause of the low value of batteries, consumers are unlikely to invest time reading any label disclosures," stated:

> In this case [Batteries] . . . respondents, through the retailers, are selling Belgian-made DURACELL batteries as U.S. -made DURACELL batteries and thereby using the mark so as to capitalize on Duracell's goodwill. In . . . [Champion] the "Champion" spark plugs had already been sold as new spark plugs in the U.S. market and Champion had reaped the benefit from that sale. The spark plugs were then reconditioned and sold as "used" spark plugs. In

> this case, however, the foreign Duracell batteries are sold as new and are competing head-to-head with Duracell's U.S. -made batteries. Every sale of foreign Duracell batteries in the U.S. market deprives Duracell of the benefit of its goodwill which it is legally entitled to for sale of new domestic DURACELL batteries in the United States.

(Comm'n Op. at 40). In Cabbage, which was not concerned with the issue of trademark infringement but rather involved the determination by the Commission that there was a violation of section 304(a) of the Tariff Act of 1930 in that the unauthorized imports were not conspicuously marked with their country of origin, the Commission stated:

> As in [Batteries] . . . complainants are entitled to the profits derived from U.S. sales of the product subject to investigation by virtue of their exclusive right to U.S. sales.

(Comm'n Op. at 9, 23). In this investigation, the administrative law judge finds that the infringing used tractors are not being sold in direct competition with new tractors being sold by authorized KTC dealers. While certain of KTC's daily call reports indicated that authorized KTC dealers are experiencing some gray market competition (FF322 to 325)[43] and respondent Tractor Company has advertized that KBT tractors are not inherently different than KTC tractors sold new in the United States (FF326), as KTC's senior vice president Killian testified (FF300), KTC is really not in competition with the infringing tractors because the customer who is looking for a new tractor and the customer who is looking for a used tractor, i.e. a gray market tractor, have different requirements; and that, while there is some overlap, generally there is a difference in price[44] and a difference in condition (FF317).

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[43] One KTC daily call report stated that sales have been fast and furious; that the authorized dealer has had a hard-time keeping up; and that every one has been working double time.

[44] Respondent Lost Creek has advertized the price of an accused tractor as ranging from $2,450 to $4,300 (FF318). Complainants have asserted that the prices for accused tractors are approximately 65% to 90% lower than the prices for comparable KTC tractors (CPFF947).

Complainants argued that at the hearing witnesses testified that confusion would still exist, regardless of any label, and that confusion may even heightened by such a label (CB at 89). The administrative law judge finds the hearing testimony to the contrary. Thus, while KTC's current senior vice president of sales and marketing testified that if a prospective customer is told up front that the tractor is not sponsored by complainants there would still be confusion, although his testimony here, as to the "BMW," is somewhat ambiguous, see infra (FF304, 305, 309), he also testified about a buyer beware program which KTC has initiated with its authorized dealers and which he was involved in (FF301, 306). The purpose of this program was to educate or inform the consumers, i.e the people involved in the tractor industry (FF301, 302), thereby allowing them to make a more informed decision with respect to purchasing a gray market tractor (FF302, 308). However, the program is not binding on any KTC authorized dealer (FF303). KTC's buyer beware program involved sending several aids to authorized KTC dealers to help them in combating the gray market (FF301). On this non-binding program, Killian testified:

> We believe that, if the consumer understands what he gets and, . . . what he's not getting, that we believe that the consumer, when provided with all the facts, what he gets from the KTC tractor, the dealer network, and what he expects to get when he buys that tractor with the Kubota name on it, we believe that that customer will make a decision that's in his best interest and a decision that he has to make.
>
> I personally also believe that decision will include the purchase of either a KTC tractor or at least a better understanding of a KBT tractor and understand what he is getting is a tractor with no support and without some of the safety features and difficulty having them installed.
>
> . . . if the customer goes and gets these questions answered, he will be able to make an informed decision. If the gray market dealer is successful in overcoming those concerns on the part of the customer, the customer may purchase a gray market tractor.

> If he's not successful and the customer still thinks he wants a small tractor, a small Kubota tractor that is different from the gray market tractor, then it's our hope that he will seek out a KTC dealer and we're successful selling it to them. [FF302]

Killian also in direct testimony on questioning from complainants' counsel, referred to BMW autos (FF304). He later testified:

> Well, the BMW may have been a farfetched example . . . But consumers know what's going on. One of them is made for Germany and one is made for the United States. And the consumer that gets one that's made for Germany is told it's not sponsored here, may not be parts, may not be manuals, may not be other things available. They know what they're getting into. They're not confused, right? [FF305]

Killian further testified on the KTC's buyer beware program:

> . . . And this ad was targeted to make sure those consumers understood that there were some differences and hopefully will prompt questions.
>
> Our belief is that an informed consumer makes a better decision. It may not be the decision that we wanted him to make, but I believe he makes a more informed decision. Frankly our feedback from a number of customers before we issued these things was a significant amount of confusion existed. [FF307], [Emphasis added].

Another witness, Billy Tomlinson, who in 1991 bought a Kubota tractor which he later learned was a gray market tractor, testified that he would not have purchased the tractor if he had known it was a gray market tractor (FF310). While complainant's Leviticus testified that he thought a consumer, if he were to see a label that indicated exactly what differences there were between a KBT tractor and a KTC tractor, still "would be sort of confused," (FF312) he earlier testified on questioning from the administrative law judge:

> THE WITNESS: Okay. Well, if the label would lay out what the tractor really was, I think then we will be fine to buy, because that is the sort of truth in advertising, isn't it?
>
> * * *

> JUDGE LUCKERN: If it had a label on it, a permanent label was made in Japan and it only had 20 horsepower, et cetera . . . would you still say you were misled, you wouldn't bother reading the label?
>
> THE WITNESS: No, I wouldn't - - I wouldn't - - I would not say I was misled. If I still would buy it, then I take the consequences. [FF312].

Complainants' witness Shigeru Kashihara, who is presently manager of KBT's Tractor Engineering Department (FF315), testified:

> Well, if I were a user and if I was not told that this tractor [a KBT tractor] was not intended for the U.S. market, I do not think I wold have been able to distinguish between the models made for Japanese market and models made for the U.S. market. It might be different if you wold put label stating that this model is made for the Japanese market in English [FF316].

B. Cease and Desist Orders

Complainants argued that there is substantial evidence indicating that the domestic respondents in this investigation maintain commercially significant inventories of KBT tractors. Accordingly it is argued that cease and desist orders prohibiting the sale of infringing KBT tractors be issued to respondents Wallace, Gamut, The Tractor Shop, Bay, Casteel, MGA and Lost Creek (CB at 92).

The staff argued that certain of the domestic respondents have significant inventory of the infringing tractors and therefore that cease and desist orders are appropriate. However it is argued that, similar to the general exclusion order as proposed by the staff, any cease and desist orders should prohibit the importation and sale of the infringing tractors bearing the "KUBOTA" trademark unless the respondent imports or sells the tractor with a permanently affixed label. The staff noted that when the Commission issued a general exclusion order with a disclosure label provision in Nut Jewelry, the Commission also issued cease and desist

orders that required the use of disclosure labels as a condition for selling the products involved in the violation.

The administrative law judge finds that the record supports the issuance of cease and desist orders against Wallace, Gamut, The Tractor Shop, Bay, Casteel, MGA and Lost Creek. However, he further finds that any such cease and desist orders should permit the respective respondent to import or sell the infringing tractor with a permanently affixed label as described, supra, with respect to the issuance of a general exclusion order.

There is evidence that certain gray market dealers have informed consumers, who purchase KBT tractors, that parts and service are available from authorized KTC dealers, and that infringing KBT tractors are the same as certain authorized KTC tractors (FF155, 160, 163, 192, 326).[45] Thus, any cease and desist order should also contain a provision directing respondents to inform consumers of gray market tractors of the information contained in the permanently affixed label, and should prohibit any activity that would suggest either that the information contained in said label is erroneous, or that said label should be ignored.

To further ensure compliance with the above cease and desist order, the administrative law judge recommends a quarterly reporting requirement. See Certain Curable Fluoroelastomer Compositions and Precursors Thereof, Inv. No. 337-TA-364, USITC Pub. 2890, Comm'n Op. at 6 (March 16, 1995) (Fluoroelastomer), Certain Plastic Encapsulated Integrated Circuits, Inv. No. 337-TA-315, USITC Pub. 2710, Comm'n Op. at 8-10 (July 2, 1993).[46] As in

[45] Other respondents have informed purchasers that parts and service are not available and have pointed out certain differences between KBT and KTC tractors (FF206).

[46] See also Commission rule 210.74.

Fluoroelastomer, any such reporting requirement would require respondents, subject to the cease and desist orders, to file quarterly reports with the Commission on the number of infringing Kubota brand tractors, by model number, imported into the United States, sold after importation, or remaining in inventory. Id. at 6.

VI. Bonding

Complainants recommended a bond of ninety percent (90%) of the entered value of KBT tractors (CB at 92). The staff recommended a bond of 100 percent although it noted that, under the staff's remedial orders, the accused tractors should be able to be imported in without any bond provided the labels, recommended by the staff, are affixed to them (SB at 57).

Pursuant to 19 U.S.C. §1337(e) and Commission rule 210.50(a)(3), if the Commission issues an exclusion or cease and desist order, respondents may continue to import and sell their products during the pendency of any Presidential review under a bond in an amount determined by the Commission to be "sufficient to protect the complainant from injury." There is evidence that an accused 22.5 HP, 4x4 KBT tractor sells for $6,100 as compared to an authorized KTC dealer's selling of a comparable 21 HP, 4x4 KTC tractor for $11,500 (FF320). Accordingly the administrative law judge finds that a bond of ninety percent (90%) of the entered value of KBT tractors is appropriate. However, under the recommended remedial orders, the infringing tractors should be able to be imported without any bond provided the appropriate labels, supra, are affixed thereon.

FINDINGS OF FACT

I. Parties

A. Complainants

1. Complainant Kubota Corporation (KBT) is a Japanese corporation with an office and place of business at 2-47 Shikitsuhgashi 1-chome, Naniwa-ku, Osaka 556, Japan. (Complaint, ¶ 5.)

2. KBT was previously known as Kubota Limited. The name was changed to Kubota Corporation. (Kinoshita, Tr at 148-49.)

3. KBT is the exclusive owner of both the Japanese and United States Kubota trademarks in issue and the Japanese Kubota trademarks. (Kinoshita, CX601 at 3; CX1, CX3; CX4; CX270; CX292; CX293; CX294; Complaint at 10, ¶ 46; 11, ¶ 51; 12, ¶ 55 and ¶ 59.)

4. KBT manufactures and sells cast iron pipe and other various cast iron products, as well as, agricultural machinery such as tractors, engines, combines, etc., compact construction machinery, environmental equipment, housing materials and utilities, and a broad variety of other products. (Kinoshita, CX601 at 2; Complaint, ¶ 7.)

5. KBT's Tractor Division sales for 1995 were approximately[ ] The Tractor Division's export sales amounted to about[ ] KBT has over[ ]affiliated companies worldwide. In terms of worldwide business development, these companies are doing business in[ ]countries around the world, including the United States, Canada, and the countries of Europe. Those

companies manufacture and sell mainly tractors, engines and construction equipment. (Kinoshita, CX601 at 2-3.)

6. In every country, including the United States, the "Kubota" brand is well known and signifies products of the highest quality. KBT has spent much money and effort to innovate and develop a very good reputation for quality in the United States and worldwide and received the Deming Award for manufacturing excellence and superior quality control in 1976. (Kinoshita, CX601 at 3.)

7. KBT manufactures different tractors for different markets. [

] (Kinoshita, Tr 196-203; CXR45.)

8. [

]

9. KBT presently manufactures approximately[ ]different models of Kubota brand tractors which are designed for different markets and sold throughout the world. (Complaint, ¶ 7.)

10. Complainant Kubota Tractor Corporation (KTC) is a corporation organized and existing under the laws of the State of California with an office and place of business at

3401 Del Amo Boulevard, Torrance, California 90503. (Complaint at 2, ¶ 4.) [

]

11. KTC was founded in 1972 and assembles, distributes, markets, sells and services tractors manufactured by KBT and specifically designed for the United States market. (Kinoshita, CX601 at 3; Complaint at 3-4, ¶¶ 8, 11-14; Killian, CX600 at 3.)

12. [

]

13. An early 1980's videotape produced by KTC entitled "We're Looking for Work," briefly describes KBT and KTC's B, L and M series tractors sold at that time and the diverse types of work the tractors are used for in the United States. (CPX7.) KTC has grown since that time, and its complete line of products is described in the 1995 KTC product guide, CX263. (Killian, CX600 at 3.)

14. KBT is one of KTC's suppliers. KBT builds the tractors KTC sells, in particular, tractors of several PTO horsepower ranges including under 50 PTO horsepower. KBT also supplies some implements, repair parts, and service materials for tractors that KTC sells in the United States. (Killian, CX600 at 1.)

15. KTC sells a wide variety of products in the United States, which are used in several different applications, from lawn and garden and agricultural settings to construction and turf sites. (Killian, CX263; CX281 at 2.)

16. KTC has built a good dealer network which has made the sale of KTC tractors very successful in the United States. (Fransson, Tr at 1027.)

17. KTC's nationwide dealer network includes over[ ]authorized Kubota dealers. (Killian, CX600 at 1-2; Killian, Tr 844; CX281 at 2.)

18. After KTC purchases the tractors, they are sent to one of KTC's[ ]division warehouses where they are assembled and checked for quality. From there, the tractors are sold wholesale to the over[ ]authorized KTC dealers for resale to end user customers. (Killian, CX600 at 1-2.)

19. [

]

20. While KTC can make suggestions to the dealers, the dealers are free and independent businessmen. (Fransson, Tr at 1032; Killian, CX600 at 5.)

21. KTC supports its dealers so they, in turn, will support the customer who buys the tractor so the customer gets the full value of their purchase. (Killian, CX600 at 9.)

22. [ ]

23. KTC's Training Department conducts classes for dealer sales and service representatives and KTC sales and service representatives regarding proper procedures for service and maintenance of KTC tractors. In addition, the KTC Training Department provides competitive product information to dealers. (Moen, Tr at 1128-29; CX281 at 4.)

24. [

]

25. [

]

26. [

]

27. [

]

28. KTC has spent over 25 years of hard work to develop KTC's reputation for high quality products and efficient service which are symbolized by the United States Kubota trademarks involved in this investigation. (Killian, CX600 at 13.)

29. KTC has invested a significant amount of time, resources, and energy on behalf of its employees, its dealers, and its suppliers in selling, supporting, and building value for KTC products. (Killian, CX600 at 18.)

30. [

]

31. In addition, KTC has invested a great deal of money to provide the best possible training for its service personnel who provide service support for the dealers through seminars, videos, and a variety of other materials. (Killian, CX600 at 19.)

32. KTC has made efforts over the past 25 years to convey to as many customers as possible that KTC sells a high-quality product and that KTC can provide good parts and

service support, trained technicians in dealerships, and informed salesmen at the dealerships who understand the product. (Killian, CX600 at 21.)

33. Complainant Kubota Manufacturing of America Corporation (KMA) is a corporation organized and existing under the laws of the State of Georgia, with an office and place of business at Industrial Park North, 2715 Ramsey Road, Gainesville, Georgia 30501. (Complaint at 2, ¶ 5.)

34. KMA was established in 1988 to produce implements for KTC tractors. (Kinoshita, CX601 at 3.)

35. The total sales of KTC and KMA for the 1995 fiscal year were around[ ]and they employed about[ ]persons. (Kinoshita, CX601 at 3.)

36. [

]

37. [

]

B. Respondents

1. The Walker Respondents

38. Fujisawa is a Japanese Corporation with an office and place of business at No. 44-7, 1-chome, Kotake-cho, Nerima-ku, Tokyo, Japan. (CX239.)

39. Eisho World Ltd. (Eisho) is a Japanese corporation with an office and place of business at 1-9 Ashai-cho, Handa-shi, Aichi-ken, 475 Japan. (Complaint at 6, ¶ 17.)

40. Sanko Industries Co., Ltd. (Sanko) is a Japanese corporation with an office and place of business at 1-10-7 Shinmachi, Nishi-Ku, Osaka, 550 Japan. (Complaint at 6, ¶ 21.)

41. Suma Sangyo (Suma) is a Japanese corporation with an office and place of business at Mitsuta-umadome, Shijimi-cho, Miki-shi, Hyogo-ken, 673-05 Japan. (Complaint at 6, ¶ 23.)

42. Sonica is a Japanese corporation with an office and place of business at Koa Building 3F, 3-20-4 Ueno, Taito-ku, Tokyo, 110 Japan. (Complaint at 6, ¶ 22.)

43. Sonica has been found in default. (Order No. 13: Notice of Commission Determination Not To Review An Initial Determination Finding Three Respondents To Be In Default.)

44. Toyo is a Japanese corporation with an office and place of business at No. 10-21 Imasukita 4-chome, Tsurumi-ku, Osaka, 538 Japan. (Complaint at 7, ¶ 24.)

45. Toyo has been found in default. (Order No. 13: Notice of Commission Determination Not To Review An Initial Determination Finding Three Respondents To Be In Default.)

46. Bay Implement Co. is located at P.O. Box 2001, Red Bay, Alabama 35582. (CX224 at 7.)

47. Darryl Harp, Sr. is the President of Bay. (Harp, RX34 at 1; CX224 at 8.)

48. Bay imports and sells tractors, including KBT tractors, in the United States. (CX224 at 8, 9.)

49. Casteel World Group, Inc. is located at 2896 Highway 3 North, Monticello, Arkansas. (CX222 at 7.) Casteel Farm Implement Co. is a corporation with an office and place of business at 107 Highway 425 South, Monticello, Arkansas 71655. (Complaint at 7, ¶ 25.) Casteel Farm Implement Co. is a corporation with a place of business at 4110 Highway 65 South, Pine Bluff, Arkansas 71601. (Complaint at 7, ¶ 26.) These are referred to as "Casteel."

50. Casteel also has another place of business at Highway 65 North, Conway, Arkansas. (CX222 at 7.)

51. Gregory Casteel is the owner and Chief Executive Officer of Casteel. (CX222 at 8; CX585 at 4.)

52. Casteel imports and sells (through Southern Tractor, another business owned by Mr. Casteel) KBT tractors in the United States. (CX222 at 5, 10; CX299; Casteel, RX32 at 2.)

53. Gregory Casteel owned two other businesses, Greg Casteel Farm Implements and its successor, Casteel Implement Company, which also purchased and sold KBT tractors. (CX585 at 7, 10, 126, 129.)

54. Gamut Trading Co., Inc. (Gamut) is a California corporation with an office and place of business at 13450 Nomwaket Road, Apple Valley, California 92308. (CX226 at 7.) Gamut Imports is a company with an office and place of business at 14354 Cronese Road, Apple Valley, California 92307. (Complaint at 8, ¶ 32.) These are referred to as "Gamut."

55. Ronald A. DePue is the Chief Executive Officer and Chairman of the Board of Directors of Gamut. (DePue, Tr 2410; CX302 at G000436; CX587 at 6.)

56. Darrel J. DuPuy is the Chief Financial Officer, President, and a member of the Board of Directors of Gamut. (CX302 at G000436; CX586 at 5.)

57. Gamut Imports, refurbishes, and sells in the United States tractors, including KBT tractors, and used KBT rotary tillers. (CX226 at 7; DePue, RX33 at 2.)

58. Ronald A. DePue is also the owner of Apple Implement Manufacturing (AIM), a division of Gamut, which has an office and place of business at 13450 Nomwaket Road, Apple Valley, California 92308. (DePue, Tr 2357; DePue, RX33 at 2; CX587 at 42.)

59. AIM is a manufacturer of front end loaders and snow blades for use with agricultural tractors, both new and used, under 40 horsepower. (DePue, Tr 2357; DePue, RX33 at 2; CX302 at G000287.)

60. Ronald A. DePue is also the owner of Homestead Tractor and Feed (Homestead), a company with an office and place of business at 22133 Bear Valley Road, Apple Valley, California. (DePue, Tr 2357; CX587 at 299.)

61. Homestead has been in operation since February of 1996 and is a retail seller of tractors, including KBT tractors, in the United States and obtains its KBT tractors from Gamut. (DePue, Tr 2357; CX587 at 299, 316.)

62. The Tractor Shop is located at 1804 Azalea, Wiggins, Mississippi 39577. (G. Varnado, RX36 at 1; D. Varnado, RX37 at 1.)

63. Gail Varnado and Darris Varnado are co-owners of The Tractor Shop. Darris Varnado is President of the Tractor Shop, and Gail Varnado is Vice President of The Tractor Shop. (CX225 at 8.)

64. The Tractor Shop sells KBT tractors. (CX225 at Ex. A; G. Varnado, Tr at 2026.)

65. Approximately two-thirds of The Tractor Shop's business is wholesale, and approximately one-third is retail. (G. Varnado, RX36 at 3; CX225 at 8, 77.)

66. Respondent Wallace International Trading Co. (Wallace) is located at 1197 Bacon Way, Lafayette, California. (CX227 at 7.) In 1993, Wallace changed its name from Wallace Import Marketing Co. Inc. to Wallace International Trading Co. to reflect the scope of its international business. (CX227 at 7; CX594 at 10.) These are referred to as Wallace.

67. Michael Wallace is the owner of Wallace. (CX227 at 8.)

68. Wallace has imported KBT tractors into the United States and acts as an agent for KBT tractor dealers. (CX240 at 5-12; CX594 at 123.)

2. Other Respondents

69. Lost Creek Tractor Sales (Lost Creek) is a sole proprietorship which is located at 1050 South Nutmeg Street, Bennett, Colorado 80102. (CX234 at 2; CXR47 at 5.)

70. Daniel Monte McCormick is the owner of Lost Creek. (CX234 at 2.)

71. Lost Creek imports and sells KBT tractors in the United States. (CX232 at 8, 10; CXR47 at 22.)

72. MGA, Inc. (MGA) is a corporation with an office and place of business at 28999 Front Street, Suite 203, Temecula, California 92590. (CX230 at 1.)

73. Mark E. Gorin is the President and Chief Executive Officer of MGA. (CX230 at 2.)

74. MGA has acted as an agent for owners of KBT tractors and sold such tractors at its auctions. (CX142 at 1; CX588 at 47, 106-07.)

75. MGA is an auction company specializing in construction and earth-moving equipment. (CX230 at 1.)

76. MGA holds auctions 12-14 times per year (CX588 at 8, 17.)

77. MGA acts as agent for the sellers (believed to be the owners of the equipment) who consign equipment to MGA to be sold at auction. (CX142 at 5.)

78. MGA solicits consignors through direct contact or mail. (CX142 at 3-4; CX145.)

79. Once the auctioneer accepts the most favorable offer, MGA collects the price from the buyer, completes the title work, withholds its commission and other expenses, and pays the net proceeds to the buyer. (CX142 at 4.)

80. Tractor Company is a company with an office and place of business at 8392 Meadowbrook Way S.E., Snoqualmie, Washington 98045. (Complaint at 9, ¶ 40; CX56.)

81. Tractor Company has been found in default. (Order No. 13: Notice of Commission Determination Not To Review An Initial Determination Finding Three Respondents To Be In Default.)

82. Nitto Trading Co. Ltd. (Nitto) is a Japanese corporation with an office and place of business at 1-9-5 Shinmoji Moji-ku Kita-Kyushu-shi, 800-01 Japan. (Complaint at 6, ¶ 19.)

II. Trademarks In Issue

83. The "KUBOTA" trademark was registered by the U.S. Patent and Trademark Office as Registration No. 922,3300 on October 19, 1971 based upon an application filed on March 26, 1970. The trademark is registered for use in connection with, inter alia, engines, farm tractors, garden tractors, power tillers, and other tractor implements. (CX 1). The "KUBOTA" registration has become incontestable under 15 U.S.C. § 1065. (Order No. 40 at 4-5, Unreviewed Initial Determination Finding Trademarks Valid and Incontestable).

84. The stylized version of the word "Kubota" was registered by the Patent and Trademark Office as Registration No. 1,775,620 on June 8, 1993 based upon an application filed on November 22, 1989. The trademark is registered for KBT's use in connection with, inter alia, power-operated tillers, tractors, and agricultural machines, including mowers, combines, backhoes, and dozers. (CX 3).

85. The registrations for each of the asserted trademarks (CX 1, CX 3), indicate that the trademarks are registered to Kubota, Ltd., a Japan Corporation. However, Kubota, Ltd. is the same company as Kubota Corporation, and the difference in names is due to a name change to Kubota Corporation. (Kinoshita, Tr at 148-49).

III. Importation And Sale

86. There are two types of exporters of KBT tractors in Japan, brokers and collectors. Collectors have their own facilities and collect KBT tractors primarily from dealers and sometimes from individual farmers or commercial entities such as dairies and nurseries. Brokers serve as agents who purchase KBT tractors from the collectors and export or sell to importers in the United States. (CX586 at 21.)

87. The Walker respondents import and sell in the United States KBT tractors, originally designed and sold by KBT for the Japanese market and not for the United States market, which bear one or more Japanese trademarks which are identical to the registered United States Kubota trademarks at issue in this investigation. (Order No. 44, 52 and 53.)

88. Many of the exporting respondents have sold KBT tractors to the importing/selling respondents. Eisho has obtained KBT tractors from Sanko, Suma, K&S Exporter, and Sonica. (CX223 at 9, 12.)

89. Eisho has sold tractors to Gamut. (CX223 at 12.)

90. Fujisawa has sold KBT tractors to Bay and Casteel. (CX239.)

91. Sanko has obtained KBT tractors from Eisho, Tomoe Jidousha, Ichikawa Diesel, Suma, and others. (CX221 at 9, 12.)

92. Sanko has exported the following models among others: B6001, B7000, B7000E, B7001, L1500, L1500DT, L1501, L1501DT, L1511, L1801, L1801DT, L1802, L1802DT, L2000, L2000DT, L2002, L2002DT, L2201, L2201DT, L2202, L2202DT, L2200, L2600, L2402, L2402DT, B1400, B1200DT, B1400DT, B1600DT, B15DT, L2402, L2602, L1802, L2601, L3001, L3202DT, L2200. (CX221 at 9.)

93. Sanko has sold KBT tractors to Bay, Gamut and Wallace. (CX221 at 12.)

94. Suma has obtained KBT tractors from Sanko, Eisho, K&S Exporters and Sonica. (CX220 at 9, 12.)

95. Suma has sold KBT tractors to Gamut. (CX220 at 12.)

96. Bay has imported KBT tractors from Sanko Industries Co., Ltd., Howa Corporation, Fujisawa Trading Agency, Hikari Corporation, Chugai Tradewide Boeki

Shokay, Nitto Trading Corp. (CX589 at 74-77; CX149; CX150; CX151; CX152; CX153; CX154; CX224 at 11.)

97. Casteel has purchased approximately 225 KBT tractors from Fujisawa Trading Agency and 60 KBT tractors from Maruman Trading Agency. (CX132; CX133; CX134; CX222 at 9; CX299; CX585 at 28, 45, 47.)

98. Gamut has imported KBT tractors from a number of Japanese entities, some of whom are respondents in this investigation: OTA Trading Co., Ltd., Suma, Ichikawa Store, Eisho, Shibahira Trading Co., Ltd., Tomoe Jidousha Limited Co., Ken Corporation, Nitto Trading Co., and Sanko. (CX555 at 1; CX587 at 18, 22.)

99. On an annual basis, Gamut receives 200 to 300 used tractors from Ota Trading Co. (CX586 at 17.)

100. On an annual basis, Gamut receives about 200 used tractors from Sanko. (CX586 at 17.)

101. On an annual basis, Gamut receives about 400 used tractors from Suma. (CX586 at 17.)

102. On an annual basis, Gamut receives about 100 used tractors from Eisho. (CX586 at 17.)

103. On an annual basis, Gamut receives between 200 and 300 used tractors from Ken Corporation. (CX586 at 17.)

104. Wallace has obtained KBT tractors from Japan from Victory Enterprise Co., Narumi Trading Co., Ltd., Sanko, Suma Sangyo, Eisho, K. S. Enterprises Ltd., Toyo,

Sansho Co., Ltd., J & A Trading, F. Uchiyama & Co., Ltd., Nitto Trading Co., Ltd. (CX195; CX196; CX197; CX227 at 13; CX308; CX528; CX594 at 69-74.)

105. Respondent Bay has been importing and selling KBT tractors since approximately 1991 or 1992. (CX589 at 22.)

106. Respondent Bay has imported and sold at least the following models of KBT tractors: L1500, L1501, L1801, L1802, L2000, L2201, L2202, L2600, L2402, L2601, L3500, L3001, B6000, B1400, L185, L240, L140, L1511, B700E, B7001. (Harp, RX34 at 7; CX149; CX228 at 9; CX243.)

107. Bay sells approximately 92-93% of the KBT tractors it imports to wholesalers. (Harp, Tr at 2081-82; Harp, RX34 at 4.)

108. Casteel has been selling KBT tractors since 1995. (Casteel, Tr at 2159.)

109. Casteel purchases its tractors at individual sales and from sources in Japan. (Casteel, Tr 2128.)

110. Casteel may have bought one load of KBT tractors (12-14 tractors) from Gamut. (Casteel, Tr 2128-29.)

111. Casteel imported and sold at least the following models of KBT tractors: L-2200; L-200; L-280; B-7000; B-5000, B-6000, B-7100, L-1500, L-1501, L-2000, L-2201, L-2202, L-2500, and L-3500. (CX135; CX136; CX222 at 9, 10; CX242 at 7, 11-12; CX299; CX585 at 11.)

112. Mr. Casteel owned two other businesses, Greg Casteel Farm Implements and its successor, Casteel Implement Company, which also purchased and sold KBT tractors. (CX585 at 7, 10, 126, 129.)

113. Gamut has been importing and selling KBT tractors in the United States since 1993. (CX587 at 221.)

114. In 1995, Gamut had total used tractor sales of $3.25 million. (DePue, Tr 2508; CX266 at 14.)

115. Respondent Gamut has imported and sold at least the following models of KBT tractors: L140, L1500, L1501, L1511, L1801, L200, L2000, L2200, L2201, L2002, L2600, L2601, L3001, L1802, L2202, L2402, L2602, L350, L3202, L4202, B5001, B6000, B6001, B7000, B7001, B1200, B1400, B1402, B1500, B1502, B1600, B1702, B1902, B5000, XB-1, and L1-R26. (DePue, Tr 2418; Response to Requests to Admit at 7-8, Q. 17; CX302 at G000035, G000151; CX553 at G000289.)

116. Gamut sells tractors at the wholesale level (DePue, Tr 2358; CPX6A at 383-84; CX587 at 307) and has five sales representatives which are based in Kansas, Ohio, Arkansas, Pennsylvania, and Washington. (CX587 at 287.)

117. Gamut has approximately 90 active dealers who regularly purchase KBT tractors, as well as other dealers which purchase tractors less frequently (once or twice a year). (DePue, Tr 2412.)

118. Gamut's dealers are located in every state except for Florida, North and South Dakota, and Maine. (DePue, Tr 2412.)

119. Respondents Casteel, The Tractor Shop, and Tractor Company have been dealers for Gamut. (CX555 at 2.)

120. Gamut has sold KBT tractors at auctions through Respondent MGA. (DePue, Tr 2440-41; CX586 at 46, 49.)

121. Since 1992, The Tractor Shop has sold 26 different models of KBT tractors. (G. Varnado, Tr 2026-27; CX593 at 56; CX225 at Ex. A.)

122. The Tractor Shop has imported and sold at least the following models of KBT tractors: L1500, L1501, L1511, L1801, L200, L2000, L2200, L2201, L2002, L240, L2600, L2601, L280, L3001, L350, L1802, L2202, L2402, B6000, B7000. (CX593 at 56; CX225 at Ex. A; CX245 at 5-11; D. Varnado, RX37 at 2.)

123. Wholesalers to whom the Tractor Shop has sold gray market KBT tractors include: Lowery Manufacturing, Buddy Manning, Jeff Watts, Gordon Maynard, Rick Terrell, Lonnie Walding, Russell Stevens, Jerry Devine, Bowen Davis and Tommy Riley. (CX593 at 76-77.)

124. Wallace has imported tractors from Japan for several years. (CX308; CX594 at 36.)

125. Wallace acts as an agent for wholesale purchasers of gray market tractors for at least the following models: B-5000, B-5001, B-6000, B-7000, B-7001, B-1200, B-1400, B-1402, B-1500, B-1502, B-1600, B-1702, B-1902, L-140, L-200, L-350, L-1500, L-1501, L-1502, L-1801, L-1802, L-2000, L-2001, L-2002, L-2400, L-2402, L-2600, L-2601, L-3000, L-3001, L-3500, L-3202, L-3602, L-4202, L35, and XB-1. (CX174; CX175; CX176 at K009647-48; CX-178; CX227 at 8, 9; CX240 at 16-17; CX594 at 32-33, 54.)

126. Some of the tractor dealers that have been in Wallace's dealer network at one time or another include: Chippewa Valley, Permian Machinery, North Florida Equip., Beverage Tractor, Mancuso Equip. Co., 27 Equipment, Liftline Machinery, Wraith, Coastal

Ford, Western Material Handling, James Murphy Company, Holcomb Machinery, Liberty Equipment, Speedy Forklift. (CX53; CX174; CX594 at 134, 216-17.)

127. One of Wallace's suppliers which was not named as a respondent in this investigation, K & S, gave Mr. Wallace $2500.00 to help pay his legal bill in the present ITC investigation. (CX177 at 1; CX184; CX594 at 230, 231-32.)

128. At least the following Japanese exporters have offered Wallace lists of inventories: Eisho, Nitto Trading Corporation, Nitto Trading Co. Ltd., Sanko, Suma, and Toyo. (CX227 at 12-13.)

129. Under the Wallace Letter of Subscription, Lost Creek has imported used KBT tractors from J & A Trading and K.S. Enterprise, Ltd. (CX232 at 9; CX234 at 4, 6; CXR47 at 136, 153-54.)

130. Lost Creek has been in operation since 1994 and has been selling KBT tractors since June of 1995. (CX232 at 10, 15; CXR47 at 13, 48-49.)

131. Lost Creek has imported and sold at least the following models of KBT tractors: L1500, L1500, L1501, L1801, L2201, and B7000. (CX232 at 9-10; CX234 at 2-3; CX248 at 4.)

132. Lost Creek has imported KBT tractors under a Letter of Subscription with and the assistance of Wallace. (CX232 at 8; CX234 at 2.) Under the Letter of Subscription, Lost Creek was assigned a territory which includes the northern half of Colorado. (CXR47 at 123.)

133. Lost Creek purchases KBT tractors wholesale from importers such as Jaamco of Checotah, Oklahoma (CXR47 at 41-43, 168-69, 173) and Liberty Tractor, Liberty, Mississippi. (CXR47 at 44, 171, 173-74.)

134. Lost Creek has sold a total of 32-36 used tractors - about 1/3 of which have been KBT tractors. (CXR47 at 50.)

135. Lost Creek sells KBT tractors at the retail level (CX232 at 8) on an "as is" basis. (CX232 at 16; CX234 at 8.)

136. Gamut has consigned KBT tractors to MGA. (CX230 at 3; CX588 at 55-6, 58.) Gamut's owners explained their business to Mr. Gorin by stating that Gamut does business with companies in Japan. (CX588 at 55, 58, 59.)

137. Since January 1, 1994, respondent MGA has auctioned on behalf of a consignor in the United States one or more of the following KBT tractors: L140, L1500, L1501, L1511, L1801, L200, L2000, L2001, L2002, L240, L2600, L2601, L270, L280, L3001, L350, L3500, L1802, L2202, L2402, L2602, L2802, L3202, L3602, L4202, L3002, B5000, B5001, B6000, B6001, B7000, B7001, B1200, B1400, B1402, B1500, B1502, B1600, B1902, or XB-1. (CX142 at 1, Exh. A; CX304; CXR36 at 12-14.)

138. Nitto exports and sells to the United States KBT tractors, originally designed and sold by KBT for the Japanese market and not for the United States market, which bear one or more Japanese trademarks which are identical to the registered United States trademarks at issue in this investigation. (Order No. 51.)

IV. Goods In Issue

139. KBT produces three lines of agricultural tractors which are categorized by horsepower and size. The smallest line is the B series which ranges in PTO horsepower from about 10 to 20. In the middle is the L series, ranging from about 15 to 39 PTO horsepower. The largest is the M Series which ranges from about 42 to 104 PTO horsepower. (Kashihara, CX599C at 6-7).

140. The tractor models produced by KBT and sold in the Japanese market, which are under 50 power take-off horsepower, are primarily KBT tractor models in the B and L series, but also include certain M series models as well as model designations B1, L1, L15, GL, A, AST, GB, X, GT and Z. (CX211 at 3; Kashihara, Tr 742-43).

141. Complainant, in response to the staff's Interrogatory No. 27 (CX211), and duplicated in SX-1, identified twenty-five "known gray market models of Kubota tractors." In addition, complainant identified 19 "equivalent" U.S. model tractors, and the dates of production for each of the tractors, as follows:

JAPAN	DATE	U.S.A.	DATE
B5000	1975-1976		
B6000	1971-1975	B6000	1974-1979
B7000	1974-1975		
B5001	1977-1985	B5100	1978-1987
B6001	1976-1978	B6100	1978-1988
B7001	1976-1978	B7100	1977-1987
B1200(DT)	1979-1984	B6200	1983-1994
B1400(DT)	1979-1982	B7200(DT)	1983-1992

JAPAN	DATE	U.S.A.	DATE
B1500(DT)	1981-1982		
B1600(DT)	1979-1985	B8200(DT)	1981-1992
L200	1968-1971	L200, L210	1969-1972, 1971-1974
L240	1969-1975	L260	1971-1976
L1500	1972-1975	L175	1972-1977
L2000	1972-1975	L255	1973-1977
L2200	1973-1974		
L2600	1974-1975	L285	1975-1979
L1501(DT)	1976-1979	L185(DT)	1976-1983
L1801(DT)	1976-1977		
L2201(DT)	1975-1979	L245(DT)	1976-1986
L2601(DT)	1976-1978	L295(DT)	1978-1983
L3001(DT)	1977-1979	L345(DT)	1978-1988
L1802(DT)	1978-1982	L235(DT)	1981-1988
L2002(DT)	1978-1982	L275(DT)	1981-1988
L2202(DT)	1978-1982		
L2402(DT)	1978-1982		

(SX 1; CX 211; SX-1A). The parties participating at the hearing have entered into the following stipulation regarding SX-1:

> SX 1 lists in column two under the heading 'date' the dates that the tractors listed in column 1 were wholesaled by complainant KBT in Japan. For example, model B5000 was wholesaled by KBT in Japan from 1969-1975.
>
> SX 1 lists in column four under the heading 'date' the dates that the tractors listed in column 3 were wholesaled by KTC in the United States. For

example, the B5100 was wholesaled by KTC in the United States between 1978 and 1987.

(SX1A).

141A. Kashihara testified that a customer could not tell the model year of a KBT or KTC tractor:

Q. Now, did the model sold for the United States bear any indication as to the year the product was manufactured?

A. If you can make judgment, but I think it is rather difficult for regular people, laymen, because at Kubota we put serial numbers, so you can tell which year it was made.

Q. That is Kubota could tell but a consumer couldn't?

A. That is correct.

Q. How about with respect to the products made in Japan, same answer? Made for the Japanese market.

A. The same thing goes.

Q. So a consumer looking at a B-5100 sold to the U.S. market didn't know if it's a '78 or '86, right?

A. As far as the consumers are concerned, no, they could not tell. They cannot tell which year it was made.

(Kashihara, Tr at 723-724).

142. As of December 8, 1995, respondent Gamut Trading Co. was listing the following "Example of Models [sic]" of tractors, each identified as "used:"

MAKE	MODEL	U.S. H.P.	YEAR
KUBOTA	B1200DT 4 W/D	15.5	1985/92
KUBOTA	B1400DT 4 W/D	17	1985/92
KUBOTA	B1402DT 4 W/D	17	1990/-

MAKE	MODEL	U.S. H.P.	YEAR
KUBOTA	B1500DT 4 W/D	18	1958-92
KUBOTA	B1502DT 4 W/D	18	1990/-
KUBOTA	B1600DT 4 W/D	20	1987-92
KUBOTA	B1702DT 4 W/D	22.5	1990/-
KUBOTA	B1902DT 4 W/D	24	1990/-
KUBOTA	B5000DT 4 W/D	14	1976/87
KUBOTA	B6000DT 4 W/D	14.5	1978/87
KUBOTA	B6001DT 4 W/D	15	1984/89
KUBOTA	B7000DT 4 W/D	17	1979/88
KUBOTA	B7001DT 4 W/D	17	1984/88
KUBOTA	XB-1DT 4 W/D	17	1992/-
KUBOTA	L1500	17	1978/88
KUBOTA	L1500DT 4 W/D	17	1978/89
KUBOTA	L1501	17	1982/89
KUBOTA	L1501DT 4 W/D	17	1982/89
KUBOTA	L1511	17	1982/89
KUBOTA	L1511DT 4 W/D	17	1982/89
KUBOTA	L1801	21	1980/86
KUBOTA	L1801DT 4 W/D	21	1980/86
KUBOTA	L1802DT 4 W/D	23	1991/93
KUBOTA	L2000	23	1980/86
KUBOTA	L2000DT 4 W/D	23	1980/86
KUBOTA	L2002	23	1990/94
KUBOTA	L2200	25	1982/88
KUBOTA	L2200DT 4 W/D	25	

MAKE	MODEL	U.S. H.P.	YEAR
KUBOTA	L2201	23	1986/92
KUBOTA	L2201DT 4 W/D	23	1986/92
KUBOTA	L2202	25	1989/-
KUBOTA	L2202DT 4 W/D	25	1989/-
KUBOTA	L2402	27	1989/-
KUBOTA	L2402DT 4 W/D	27	1989/-
KUBOTA	L2600	28	1982/89
KUBOTA	L2601	30	1989/92
KUBOTA	L2601DT 4 W/D	30	1989/92
KUBOTA	L2602DT 4W/D	32	1991/-
KUBOTA	L3001	34	1984/90
KUBOTA	L3001DT 4 W/D	34	1988/92
KUBOTA	L3202	35	1991/-
KUBOTA	L3202DT 4 W/D	35	1991/-
KUBOTA	L4202	45	1992/-

(DePue, Tr 2411-18; CX 553 at G000298). DePue, of respondent Gamut, testified that, based on SX-1, some dates in CX-553 at G000289 were not accurate (DePue, Tr at 2415-17).

143. The KBT tractors imported and sold by respondents range in age from 20 years to as new as 3 years. (Kashihara, Tr 765-66; DePue, Tr 2415-28; CX553 at G000289.)

144. Based on respondents' activities to date, complainants' Kashihara believes that a number of newer KBT models (i.e., models produced from the mid-1980s to the present)

are likely to be imported and sold in the United States by respondents and other parties in the near future. (Kashihara, Tr 409-12; 444-49).

145. A number of KBT tractors which were listed in a 1995 price list of respondent Gamut were 1992 models, and DePue indicated he intended to import tractors of "recent vintage." Thus, DePue testified regarding SX-1 and CX553:

> Q. . . . . there are some models listed here that don't appear in SX 1; is that correct?
>
> A. Yes.
>
> Q. There are several models that don't appear --
>
> A. Yes, sir.
>
> Q. And in fact there's model XB, hyphen, 1 DT, you see that?
>
> A. XB-1 DT.
>
> Q. Do you have any idea when that was sold in Japan?
>
> A. My understanding was from our suppliers, looks like in 1992.
>
> Q. That's a fairly recent model?
>
> A. Yes.
>
> Q. And you're importing those fairly recent used models as well?
>
> A. I have brought two of those tractors.
>
> Q. And L-1's; you also bring those?
>
> A. So far I have brought one L-1, L-1 R 26.
>
> Q. And it seems here you also get L4202?
>
> A. Yes.
>
> Q. Those were fairly recent as well?

A. Yes.

Q. And I believe your witness statement indicated that you've been -- you bring in tractors anywhere from three I think that are 15 to 20 years old?

A. Yes.

Q. You do bring in tractors of more recent vintage?

A. Oh, if I possibly can.

(DePue, Tr 2417-18; CX553 at G000289)(emphasis added).

146. The 25 models of Japanese KBT tractors in SX-1, and the closest corresponding United States KTC, identified by complainant, were selected because they were imported and sold in the greatest quantities. Thus, complainants' Kashihara testified, with respect to SX-1:

> . . . . as far as this list is concerned, this is a list with which we confirm the models that have come in as used models. And these that are listed here are those models that have come in which are over a certain quantity. And, of course, there are other models, used models which are not included in this list which are fewer in quantity, but we have not included these.

(Kashihara, Tr 445; CX211C at 3; Kashihara, CX599 at 17-18; SX1.)

147. Dr. Louis I. Leviticus is a full professor at the University of Nebraska and is head of the Tractor Testing Program at the Nebraska Power Laboratory. He received a B.S. in agricultural engineering in 1960 from Technion Institute of Technology in Israel and a Masters Degree in agricultural engineering from Technion in 1963. Dr. Leviticus received a Ph.D. in agricultural engineering from Purdue University in 1969. After obtaining a Ph.D. at Purdue University in 1964, Leviticus worked at the Transportation Research Group of the Davidson Laboratory of Stevens Institute of Technology in Hoboken, New Jersey. After a

year, he became a Senior Research Engineer at the Lab. Leviticus' activities included research in the area of tire usage of heavy trucks (on road) and testing of wheels for the Lunar Rover under a NASA contract. From the end of 1971 until 1975, Leviticus was jointly employed by Technion in Israel and the Israeli Defense Forces. His involvement included teaching courses in Agricultural Machinery, including tractors, and training in the area of off-road locomotion. Since 1975, Leviticus has been the head of the Tractor Testing Program at the University of Nebraska. This is the only non-industry laboratory of its kind in the United States, and is the only certified third party authority for testing under the OECD rules. In addition to performance testing which is conducted in accordance with United States and international industry standards, Leviticus performed a great deal of research work under field conditions in cooperation with or for other researchers. (Leviticus, CX602 at 1-2; CX297). Leviticus was qualified as an expert for complainants in the area of industry standards, tractor performance and safety issues relating to agricultural tractors. (Leviticus, Tr 1469-70.)

148. Everett C. Williams is a design engineer who was employed with Ford Motor Company from 1965 to 1987 where he held a variety of design, product planning and testing positions for the tractor division. While at Ford, Williams worked closely with a Japanese company named Shibaura, a competitor of KBT. Shibaura manufactured a line of tractors under 50 PTO horsepower for Ford in the United States and also sells a similar line of tractors under its own Shibaura name in Japan. Williams had extensive personal contact with Shibaura in Japan, having traveled there numerous times over the course of a five-year period, and hence is familiar with the Japanese market. (Williams, Tr 1828-32; CX296).

Williams was qualified as an expert in (1) the engineering and design of agricultural tractors, (2) industry standards, and (3) safety issues and requirements for agricultural tractors. (Williams, Tr 1657-58.)

149. Jeffrey C. Maass was employed by complainant KTC for approximately eight (8) years in various positions, including Parts Order Desk and Assistant Manager, Parts Customer Service. As part of his responsibilities as Assistant Manager, Parts Customer Service, he worked with other departments within KTC including the engineering and service departments. (Maass, RX35 at 1-2.) Over the course of his eight years of employment, Maass developed a good understanding of the parts that are used in Kubota brand tractors. As part of his employment, he regularly used parts lists and shop manuals. (Maass, Tr 2201.) Maass was qualified as an expert witness for the Walker respondents in the area of parts for agricultural tractors under 50 power take-off horsepower. (Maass, Tr 2204-06.)

150. Complainants' Kashihara gave the following testimony regarding a comparison of "newer model" KBT and KTC tractors:

> Your Honor, you had explained the possibility of comparing the newer models, and this idea is a fine one as well. However, as far as we are concerned, we felt that the new models had very major differences, had significant material differences between them, even more so than the older models.
>
> And even in the older models, we have significant -- excuse me, correction, we have material differences. So they thought that we should use these older models to demonstrate those differences, so therefore we had chosen these models for that purpose.

(Kashihara, Tr 411-12). Kashihara further testified:

BY MR. SAUNDERS:

Q. Mr. Kashihara, is their any reason why we are not discussing presently in this investigation brand-new tractors that you manufactured and sold in Japan, versus brand-new tractors that are manufactured in Japan for the U.S. market, which are being sold today?

* * *

A. Regarding those tractors that are currentyly being manufactured in Japan to be sold in the Japanese market and regarding those that are being manufactured currently in Japan for the U.S. market, it is quite easy to point out the material differences between those tractors.

* * *

This is quite an easy thing to do. By looking at the parts list, a person can tell relatively easily the differences between the parts. That is, anyone can do so.

(Kashihara, Tr 442-44; Kashihara, CX599C at 17-18). Kashihara did not reference any specific parts lists that would allow such a comparison. Thereafter, Kashihara testified regarding series of models that are not on SX-1:

Q. Mr. Kashihara, Kubota has manufactured models for both the Japanese market and the U.S. market between the period, the latest periods indicated at the bottom of the chart [SX-1] and the present day. Is that true?

A. Yes. That is true.

Q. This is not intended to be a memory test. Can you briefly state, if not specific models, series of models that have been produced in the Japanese market and the U.S. market from these dates, 1992 to 1988, 1985 to 1982, to the present?

* * *

THE WITNESS: Let me start with the B series which are not listed here. Let me cite them in chronological order. After the B series we had B-02 series. Then AST series, A-S-T. AST-E? AST-E series. And now we have Grand B series, or we call it GB series. Then we go

on to the L series. After those we have L-1 series, and L-15 series. Then Grand L series, or GL series, and we have just had a motor change from Grand L series to Grand L plus 1 series.

In between B series and L series, we have somehow intermediate series, and that is called cross series. We write it as a letter X and we call it cross series. Then we have GT series for this cross series.

And if I just limit the series only to the L and below the L series, those are it. But above L series, we have M series too.

* * *

Q. For those models, are there Japanese models and U.S. corresponding models? Does that exist?

A. All the series I had listed were all for the Japanese market, but many of the series I just listed have corresponding models for the U.S. market.

Q. As between the Japanese models series that you just listed, and the corresponding U.S. models, are there material differences between those models, as you have discussed with the models on SX-1?

A. Yes. Actually, it's more than the difference we have talked about in SX-1.

(Kashihara, Tr 740-748). The administrative law judge finds this testimony ambiguous. There is no specific reference to which tractor model numbers are "manufactured currently in Japan for the U.S. market," nor is there any identification of the parts lists referenced by Kashihara. The testimony regarding "material differences" is conclusory, and does not identify what constitutes the alleged material differences between these models not on SX-1.

151. With respect to accused KBT tractors and corresponding KTC tractors produced prior to 1976, Kashihara testified that his personal knowledge was limited:

Q. Okay. If you look at SX-2, Pages 7 to 12, you will see with respect to the following models you're not alleging a material difference, and that is the L-200, 260, 175, 225, 285.

A. I think there are many points of material difference, but I am just talking about the strength.

Q. The strength.

A. When we focus on strength of the material difference, there is some difference in strength for model 175 and 225, but as far as you see, the comparison chart included in exhibit CX-211C, it is not stated very well in this chart, and that is our fault. It was a mistake.

Q. At least as far as the chart's concerned, there is no allegation of material difference with respect to the strength characteristics, with respect to the L-200, 210, 260.

THE INTERPRETER: L-200?

BY MR. STEVENS:

Q. L210, 200, 260, 175, 225, 285.

A. When we prepared this comparison chart for CX-211c, for the comparison of the strength, we mistakenly forgot to put it here. So it's not shown here, but naturally there is a material difference.

* * *

Q. At least as far as the chart's concerned, tractors introduced after '76 are shown as being materially different with respect to the strength characteristic, and that's the yellow?

A. Yes. As far as this chart is concerned, you can say that. But as I stated before, when we prepared this chart was a long time ago. We forgot to put some in it.

Q. And you began doing engineering work on the L series of tractors in 1976, right?

A. That's correct.

Q. You didn't do any, you and your export group didn't do any engineering on the L series tractors before 1976. Right?

A. As far as the development was concerned, we did not do any work, but as far as the tractors that are in the market, we always had many areas

on the tractor and some of them concerned the engineering -- engineering area, so we did hear from the public, or we did hear from the market in that time.

Q. But before '76 you were working in this other group, you weren't working at the design of tractors, right?

A. That's correct.

(Kashihara Tr at 704-706). He testified earlier:

> Well, as far as these U.S. directed tractors that are written here in this document [SX-1] are concerned, I myself have been involved with a number of these tractors' development, and that would be from tractor model number L185 onwards, and various tests were conducted as well in which I was involved with during development stage. And I know firsthand that during this test, for example, whatever that test might be, this broke, and during this other test this other thing broke, and I know that firsthand.
>
> I cannot talk about details today, because there are time constraints. However, I do know very well that there are strength differences, and I can say that with confidence, because that was the work I was involved with.

(Kashihara Tr at 468).

152. DePue of respondent Gamut, testified that each of the KBT tractors in SX-1 that did not have an "equivalent" KTC tractor, viz. the B5000, B7000, B1500(DT), L2200, L1801(DT), L2202(DT), and L2402(DT), were different from KBT tractors that did have an "equivalent" KTC tractor model. Thus he testified:

Q. What do you know about the B5000 in comparison to, say, for example, the B6000? And I mean, how would you compare the B5000 Japanese model with the B6000 Japanese model? Is there any kind of equivalency in your mind?

A. Well, yeah, they're somewhat similar. They do have some similar parts to them. The B5000 is structurally slightly smaller than the B6000. The function of the tractor is the same except the B6000 has a, what we call in this country, reverse PTO that goes counterclockwise. The B5000 has a standard PTO which goes clockwise.

Q. Okay. Now, the B5000, 6000, 7000 Japanese models, are those part of some sort of series?

* * *

Q. But is there some relationship to them, that they're the same tractor, different horsepower? Is there any other generalization you could make?

A. They're very, very similar tractors with different horsepower. There are a lot of parts, a number of parts, I won't say a lot of parts, but a number of parts that are somewhat interchangeable on them. But they are separate tractor, separate tractor models.

Q. Is the B5000 of a smaller horsepower?

A. Smaller horsepower?

Q. Than a B6000.

A. Yes.

Q. And a B7000 has a greater horsepower than the other two?

A. That's correct.

Q. Same question with respect to the B7000. I see it doesn't have a counterpart in the USA column.

A. Yes.

Q. What's the story on the B7000? Is it similar to any of these other tractors?

A. The B7000 has -- many of the parts on the B7000 is very -- well, are the same as some of the parts on the B7001. It's an intermediate between the 6000 and the 7001, as far as size, stature. It's just another in a series of size of tractors.

* * *

Q. I see the B1500 doesn't have a corresponding USA tractor. Is there some similarities -- is there some similarity to the B1400DT, the B1500DT and the B1600DT?

A. Yes, it's a horsepower, progression of horsepower.

Q. Okay. So the 1500 has more horses than the 1400?

A. Yes.

Q. Also the L2200, see how that doesn't have a U.S. counterpart?

A. Yes.

Q. Is the L2200 in any fashion similar to the L2000 or the L2600?

A. It's probably closer to the L2000. They're both three cylinder. Physically they're pretty much -- they're basically the same tractor as far as size and operation. Yes, there are differences. There is differences in each model. But I would say it's closer -- it's a later version of the L2000 and an earlier version of the L2201.

Q. Does the L2200 have more horsepower than the L2000?

A. Yes. I believe it does. I would have to actually check the engine, what engine was in that tractor.

Q. How about the L1801DT? I see that that doesn't have a comparative model either. How does that compare to any of the other Japanese tractors?

A. Well, it's the next progressive step from the 1501. The next model in line going up in horsepower is an 1801.

Q. The same question with respect to the L2202DT and the L2402DT. They're both Japanese models and they don't appear to have a counterpart, at least on this chart.

A. Yes.

Q. How would you compare those to the other Japanese models listed here?

A. There again, it's a progression. When you put a 2 on the end of it, you have a different structure as far as sheet metal is concerned, the body style has changed as far as the configuration of the fenders, the seating, the dashboard or instrument control panel, the shape of the hood. The 2 represents that it's later in the series.

Q. So the L2002 is a later version of the L2000?

A. One.

Q. It's a later version than the L2001?

A. Well, 2201.

Q. I see. How about the L2202? Do you have an understanding that that's a later version of some other tractor?

A. Yeah, that's what I just meant. Maybe I was looking at the wrong one.

Q. Okay. The L2202 is a later version of the L2201?

A. Yes. And the L2002 is a later version of the L2000.

Q. Okay. And how about the L2402?

A. The L2402 is a horsepower and a larger physical tractor than the L2202. The L2402 is a larger tractor.

Q. Do you know if there was larger tractors made of the L275? What I'm getting at here is, there seems to be a progression of these tractors over time, that is, the Japanese model tractors. And when we're looking at the USA tractors, the chart stops at the L275.

A. Yes.

Q. And my question is, do you have an understanding whether that -- we could fill in the blanks there with some later-in-time KTC tractors that were larger, newer, or what have you, and would correspond to the L2202 and the L2402?

A. I don't know if a tractor that had been brought in by KTC, a tractor model for those two tractors or anyplace that you have a blank, I don't know if there is an equivalent tractor that KTC has brought in as a KTC tractor.

(DePue, Tr at 2477-2483).

153. The following table presents the differences between "known gray market models of Kubota tractors" and their "equivalent" U.S. model tractors identified by

complainant in SX-1. A "Yes" indicates a difference between the KBT model made for the Japanese market, or accused grey market tractor, and the identified U.S. KTC model. A "No" indicates that the accused KBT model is identical to the "equivalent" KTC model with respect to that feature. Seven of the KBT tractors in SX-1 do not have an "equivalent" KTC model, and alleged differences for those seven are not included in SX 2.

JAPAN	U.S.A.	Strength	ROPS standard	PTO Shield	Warning Lamps, Hazard Light, Tail Light, Reflector	Hand Throttle Type/ direction	PTO One-way clutch	PTO restrictor	Hydr. Block outlet	Max. Speed	PTO Speeds	Wheel base/ Tread Width
B5000	None											
B6000	B6000	Yes	No	No, prior to 1975.	No	No	No	No	No, prior to 1976	No	No[47]	Yes
B7000	None											
B5001	B5100	Yes	No, prior to 1985.	Yes	No, prior to 1980.	No, prior to 1980.	No	No, prior to 1982	Yes	No	Yes	Yes
B6001	B6100	Yes	No, prior to 1985.	Yes	No, prior to 1980.	No, prior to 1980.	No, prior to 1978	No, prior to 1982	Yes	Yes	Yes	Yes
B7001	B7100	Yes	No, prior to 1985.	Yes	No, prior to 1980.	No, prior to 1980.	No, prior to 1978.	No, prior to 1982.	Yes	Yes	Yes	Yes
B1200(DT)	B6200	Yes	No, prior to 1985.	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
B1400(DT)	B7200(DT)	Yes	No, prior to 1985.	Yes	Yes	Yes.	Yes.	Yes	Yes	Yes	Yes	Yes

[47] PTO speeds differ by 5 rpm or less, which is less than a 1% difference.

JAPAN	U.S.A.	Strength	ROPS standard	PTO Shield	Warning Lamps, Hazard Light, Tail Light, Reflector	Hand Throttle Type/ direction	PTO One-way clutch	PTO restrictor	Hydr. Block outlet	Max. Speed	PTO Speeds	Wheel base/ Tread Width
B1500(DT)	None											
B1600(DT)	B8200(DT)	Yes	No, prior to 1985.	Yes	Yes	Yes.	Yes.	Yes	Yes	Yes	Yes	Yes
L200	L200, L210	No	No	No (Yes for L210)	No	No	No	No	No	No (Yes for L210)	No	No
L240	L260	No	No	Yes	No	No	No	No	No	Yes	No	No
L1500	L175	Yes[48]	No	Yes	No	No	Yes	No	Yes	Yes	Yes	Yes
L2000	L225	No	No	Yes	No	No	Yes	No	Yes	Yes	Yes	Yes
L2200	None											
L2600	L285	No	No	Yes	No	No	Yes	No	Yes	Yes	Yes	No
L1501(DT)	L185(DT)	Yes	No	Yes	No, prior to 1980	No, prior to 1980	Yes	No	Yes	Yes	Yes	Yes

[48] SX-2 indicates no difference, however, Kashihara presented engineering drawings showing differences between the accused KBT L1500 and the authorized KTC L175 during the hearing (Kashihara, CX-599 at 39; Kashihara Tr at 704;CX-611; CX-352).

JAPAN	U.S.A.	Strength	ROPS standard	PTO Shield	Warning Lamps, Hazard Light, Tail Light, Reflector	Hand Throttle Type/ direction	PTO One-way clutch	PTO restrictor	Hydr. Block outlet	Max. Speed	PTO Speeds	Wheel base/ Tread Width
L1801(DT)	None											
L2201(DT)	L245(DT)	Yes	No	Yes	No, prior to 1980	No, prior to 1980	Yes	No	Yes	Yes	Yes	Yes
L2601(DT)	L295(DT)	Yes	No	Yes	No, prior to 1980	No, prior to 1980	Yes	No	Yes	Yes	Yes	Yes
L3001(DT)	L345(DT)	Yes	No, prior to 1985	Yes	No, prior to 1980	No, prior to 1980	No	No	Yes	Yes	Yes	Yes
L1802(DT)	L235(DT)	Yes	No, prior to 1985	Yes	Yes	Yes	No, except single clutch type	No, except single clutch type	Yes	Yes	Yes	Yes
L2002(DT)	L275(DT)	Yes	No, prior to 1985	Yes	Yes	Yes	No, except single clutch type	No, except single clutch type	Yes	Yes	Yes	Yes
L2202(DT)	None											
L2402(DT)	None											

154. KTC has established in the United States a dealership network comprised of more than[ ]authorized dealers. (Killian, CX 600 at 2). Authorized KTC dealers are supplied by KTC with parts and service support for authorized U.S. model tractors, and are required to "maintain facilities, trained service personnel, tools, equipment, current service and technical manuals and an inventory of repair and replacement parts for [KTC tractors] sufficient to enable it to render prompt and efficient service" for KTC tractors. (Killian, CX 600 at 2, 9; CX 273 at 6). The evidence shows that KTC, through its dealership network, has developed substantial goodwill. (Killian, CX 600 at 17, 18).

155. Mr. Fransson owns an authorized KTC dealer, Sound Tractor Company. He has frequently received calls from individuals asking for service for KBT gray market tractors. (Fransson, CX 597 at 1-3).

156. Some KTC dealers, such as Sound Tractor Company and Moen Machinery, will not do routine maintenance work on KBT gray market tractors because they "cannot be sure that parts and quality for KTC tractors will correspond and properly function in Kubota gray market tractors," and also will not assist the owner of a Japanese model KBT tractor in the procurement of parts or service. (Fransson, CX 597 at 3-5; Moen, CX 604 at 3-4).

157. KTC dealers do not have service manuals for gray market tractors. (Fransson CX 597 at 3-4).

158. KTC recommends that its dealer choose not to service gray market tractors because neither KTC nor the dealers have all the parts that were designed to go into the KBT Japanese model tractors. (Killian, CX 600 at 14, 24-25). However, some authorized KTC dealers have chosen to provide parts for gray market tractors. (Killian, CX 600 at 15).

159. KTC has a three year warranty on its tractors. KTC does not warrant its tractors beyond that three year period. (Killian, Tr at 566).

160. Purchasers and prospective purchasers of used agricultural tractors are concerned about the availability of parts and service. (Moen, CX 604 at 4). Purchasers of used accused KBT tractors have relied on the presence of the Kubota dealership network, believing that they could secure parts and service from KTC dealers when the need should arise. (Killian, CX 600 at 18-20). The Kubota dealership network was established by KTC to provide parts and service for Kubota tractors manufactured for sale in the United States. The dealership network was not established to provide support for KBT tractors that were designed for sale in the Japanese market. (Killian, CX 600 at 14).

161. As a practical matter, the Kubota dealers in the United States may be able to assist purchasers of the accused tractors with the purchase of many parts and with the provision of service on routine matters. (Killian, CX 600 at 15). However, not all of the parts that may be necessary for the repair of an accused tractor are available for sale by Kubota dealers, and KTC provides no support to its dealers for the service of the Japanese model tractors. (Killian, CX 600 at 21-22).

162. KTC does not supply its dealers with a certified ROPS device to sell for use on any of the gray market tractors. In contrast, a purchaser of a KTC tractor, no matter how old the tractor, can procure a certified ROPS for the tractor at any KTC dealer. (Kashihara, CX 599 at 27).

163. Some consumers have purchased accused tractors bearing the "KUBOTA" trademark and assumed, wrongly, that they could get parts and service for their tractor from a Kubota dealer. (Killian, CX 600 at 18-20).

164. Eugene Alexander Medeiros is the National Parts Manager at KTC in Torrance, California. He has been employed with KTC for the past 10 years and has worked at various positions, all related to parts. (Medeiros, CXR35 at 1).

165. Medeiros' main responsibility as National Parts Manager is to oversee the forecasting and replenishment of service parts for United States model KTC tractors, engines and implements sold by KTC in the United States. He has many other responsibilities concerning parts and parts distribution, including conducting annual physical inventories of parts at KTC's four parts distribution centers. (Medeiros, CXR35 at 1.)

166. [

]

167. [

]

168. [

]

169. [

]

170. Maass is familiar with KTC's parts database. (Maass, Tr 2312-13; Maass, RX35 at 1.) Maass admitted that it is not common practice for KTC to enter parts numbers for parts which are found only on KBT tractors onto KTC's computerized parts database. (Maass, Tr 2313, 2329-2330.).

171. Maass testified that the tractors with the highest incidence of identical parts, viz. the KTC L185 and the KBT L1501, and the KTC B7100 and the KBT B7001, had only 90 to 95 percent identical parts, and that other tractors would have fewer identical parts. Thus, Maass testified:

> Q. . . . If we were to undertake that exercise of spreading the parts out all over the floor for the comparable models and we were to try to estimate the percentage of identity between the sets of parts, if we were to only include parts that had the same part number and were identical in all respects, my question is do you have an estimate as to what percentage of similarity there would be?
>
> A. Again, it would depend on two compared tractors.
>
> Q. What two tractors would have the highest incidence of identical parts?
>
> A. Again I would say the two we mentioned before, the L185, L1501, B7100, B7001. And those are two that I've done the most extensive studies.

Q. If you would have in your mind the two that would have the highest coincidence of just identical parts and we were limiting ourselves to parts that were, in fact, identical and they had the same part numbers, what would be the percentage of similarity, if you know? If you don't know, that's fine, too.

A. It would be a guess. I would think 90, 95 percent, something like that.

Q. But then, if we were to look at other tractors that aren't so similar, that number would drop considerably?

A. Yes.

(Maass, Tr at 2228 - 2229).

172. When a purchaser of a gray market KBT tractor learns that he cannot get parts and service, he may be disappointed and often blames KTC and its dealers. (Killian, CX600 at 20; Moen, CX604 at 9; Fransson, CX597 at 6; Base, CXR34 at 3-5; Whitener, CX608 at 8.)

173. Norman L. Base is the owner and manager of Equipment Unlimited, an authorized Kubota dealer in Union Gap, Washington. Equipment Unlimited was established in 1981 and incorporated in 1985. Mr. Base has been an authorized KTC dealer since 1986. (Base, CXR34 at 2.)

174. As a dealer, Mr. Base sells a full line of KTC products, including tractors, parts, implements and accessories. In addition, Mr. Base provides service for KTC tractors. Equipment Unlimited's service department has received training from KTC and provides service and repair for KTC tractors. In addition, Equipment Unlimited also services other brands of tractors. Mr. Base and his two mechanics have 68 years experience among them. (Base, CXR34 at 2.)

175. Equipment Unlimited attempted to offer service and parts for gray market KBT tractors for some time. (Base, CXR34 at 3.) Specifically, Base described how he tried to service a KBT tractor owned by a Mr. Whitener as well as other KBT tractors. Base was unable to provide the same parts and service support on accused KBT tractors that he was able to provide for authorized KTC tractors. Thus Base testified:

> Q. Now, you were asked some questions about parts replaceability on gray market tractors and the percentage of parts that are replaceable and what your experiences have been in response to question number 29, and you were asked some questions about that. You say that there's, some parts are different, some of the engine clearances are different, and the drive train is completely different. Can you explain what you meant by that?
>
> A. I think we read into the part where some of the parts were different, we ran into the pistons didn't look the same, and as far as engine clearances there is no specs that we could find on an L-2000, and we basically used our judgment of [sic] our experience to fit these pistons into that engine, as far as honing the cylinders to proper clearance.
>
> Q. Why is it important to know what the clearances are?
>
> A. There's a certain clearance that you need to know; otherwise, the piston wouldn't deliver the proper compression or if it's too tight, it will seize the engine.
>
> Q. How do you know what clearances are on a KTC tractor that you repaired?
>
> A. We have manuals to repair that; it tells us what the clearances are.
>
> Q. Now, you say that the drive train is completely different there in answer to 29. Are there more than one parts, more than one part in the drive train or is it just one part?
>
> A. I think maybe to clarify that drive train parts, when I state they're different, basically I'm talking about like the four-wheel drives, for example, they have an exposed drive shaft which is hazardous to the customer, and that type of thing. More of a safety item than maybe necessarily trying to distinguish one part from another.

Q. There were some questions about what happened -- from Mr. Walker about what happened when Mr. Whitener brought his tractor in and asked you to do the repairs. Did you guarantee your work ahead of time? Did you tell him, I guarantee I can get this thing done?

A. No.

Q. What did you tell him?

A. I told him we could do our best, and do our best, try and see what the end result would be.

Q. Now, if someone brings in a KTC tractor for an overhaul, you guarantee that work?

A. Yes, I do.

Q. Why is it that you can guarantee the work for a KTC tractor and you couldn't for Mr. Whitener's tractor?

A. We have enough technical information and support from Kubota to make that guarantee.

Q. And by technical information and support, what do you mean?

A. Technical service manuals that gave clearances and ratings and quirks, and all the technical data you need to properly do an engine.

Q. Who actually did the work on Mr. Whitener's tractor?

A. My service manager, Dan Mathias.

Q. Okay. Has he ever told you anything about difficulty in servicing or providing parts to those tractors? The gray market tractors?

A. The gray market tractor, yeah. His difficulty was always guesswork with our parts department, which parts to order.

Q. And again, why didn't he know which parts to order?

A. Because of the model of the tractor. We don't have books on that model.

Q. But I thought you testified earlier that Mr. McGavin told you that you could use an equivalent model parts book?

A. That's where we winded up going, is asking Bob to come over and tell us what parts we need to order for that tractor.

Q. So, and was Bob the one that told you to use the L-245 parts book?

(Base, Tr at 2264 - 2267; Base, CXR34 at 5-6.)

176. Base first learned about gray market KTC tractors through the salesman at Seco Equipment in Yakima, Bob McGavin. Over the years, Base had several customers that have brought tractors in for repairs or to buy parts at Equipment Unlimited, which tractors were purchased from Seco Equipment. (Base, CXR34 at 3).

177. Over time, Equipment Unlimited decided not to provide parts or service for gray market KBT tractors because it could not obtain the proper parts or service manuals for those tractors from KTC. Thus, Base testified:

Q. Could you explain why you decided to stop selling parts to the gray market customers?

A. Basically it became a headache, because if a customer came in and had advice from whoever he brought the tractor from that it was equivalent to such a model as a U.S. model, and we order the part, and get it in for them and didn't fight, they would bring it back. And we charge a restocking charge, as Kubota does to us, they will get upset, say we should know what we are doing. And we responded to that that we, you know, we know what we are doing with U.S. models but in a gray market tractor we have no idea. We can only rely on what the people tell us that are involved with the gray market tractor.

(Base, CXR34 at 3, 4.)

178. Whitner purchased a gray market KBT tractor at Seco Equipment, and was not informed that he was purchasing a gray market tractor. At that time he believed "a Kubota was a Kubota." When Equipment Unlimited informed Whitner, that he has purchased a gray

market KBT tractor, and that parts and service may not be available, he felt cheated and frustrated. This was due, in part, to the fact that he could not find out the actual horsepower of the KBT tractor, and in part because of potential future problems getting parts and service support. Thus he testified:

Q. You mentioned in your answer to question 57 that you felt frustrated and cheated. Why don't you review that for just a moment.

A. Yes. That was a stressful time right there. I bought a used tractor that was supposed to be a 20-horsepower tractor that was supposed to drive my speed sprayer. It didn't.

Talking to the Kubota dealer, maybe we're going to have problems getting parts. It's not putting out the horsepower. I tried to contact Kubota USA and basically was told there's nothing we can do to help you.

And I felt like I was caught in between and I wasn't getting a lot of help.

* * *

Q. And you felt that Secco or the place you purchased it from cheated you because they said it was a 20-horsepower tractor?

A. Yes.

Q. In fact, it wasn't, at least for your purposes?

A. As far as I know, it was not.

Q. That had nothing to do the fact that it was a gray market tractor; that had something to do with the fact that it was tired or a lemon?

A. Up to that point, yes, but then when the dealer told me he may have problems in getting the parts to try to overhaul it and so forth, that's where I was really getting frustrated from the standpoint as I didn't know there was a gray market. I didn't know what that meant until the dealer explained it to me. It's just like, to me, a Chevrolet is a Chevrolet. I thought a Kubota was a Kubota.

* * *

Q. But with the third situation, the issue of whether you'd be able to get parts in the future, now that's really something, you felt cheated with respect to the Kubota organization, right?

A. Definitely.

(Whitener, Tr at 1194-1197).

179. As an example of difficulty in obtaining replacement parts for gray market KBT tractors, Base described his experience with obtaining parts for the B7000 gray market KBT model. In particular, Base testified that often parts for the B7100, which is the closest United States model according to Base, would not fit properly and would need to be modified or would not fit at all, making it necessary for Base to actually make the parts himself. Thus, Base testified:

Q. I take it that pilot bearing is not the same in the B-7000 and B-7100?

A. We found it not to be in the ones we opened up.

Q. Even though they weren't the same, could you use a particular pilot bearing from the U.S. model on the gray market model and have it work?

A. We were not able to do that.

(Base, Tr at 2254; Base, CXR34 at 4).

180. In another example of problems with gray market KBT tractors, Base testified about a customer with an L2000 gray market KBT tractor which had a dual loader fitted on it, wherein the mounts for the loader were not manufactured by KBT. As a result, the bolts around the engine to which the loader was attached were constantly breaking. (Base, Tr at 2257.)

181. KTC's reputation is based, in part, on 100% parts and service support, and anything less than 100% parts support is unacceptable to KTC. (Killian, Tr 965-67, 970-71.) Killian believes that consumers expect 100% parts and service support from KTC, and that providing anything less than 100% parts and service support for a tractor would not meet consumer expectations, and would consequently result in harm to KTC's reputation. (Killian, Tr 965-66, 970-71; CX600 at 20.)

182. KTC's Service Department is responsible for providing service support for KTC's over[ ]dealerships throughout the country, including periodic service seminars, videos, and a variety of other materials. (Killian, Tr at 970-71; Killian, CX600 at 19.)

183. Training from KTC's Service Department includes classes for service training at all levels, from novice up through advanced mechanic, on the complete KTC product line. Moen, an authorized KTC dealer, explained that the classes are not all offered at the same time, and that they are designated by the series of tractor, such as B, L or M series. (Moen, Tr 1128-29.)

184. KTC employs Division Service Managers, Service Representatives, Service Engineers all of whom provide service support to authorized Kubota dealers. (Killian, CX281.)

185. KTC conducts classes for Division Service Managers, Service Representatives and Service Engineers regarding proper procedures for the service and maintenance of KTC Kubota tractors. (Killian, Tr 970-71; Killian, CX281.)

186. KTC training of service personnel is constantly updated and refined with the introduction of new KTC products. (Killian, Tr 970-71; Killian, CX281.) The

"centerpiece" of KTC's service training effort for KTC tractors is the over 700 page Training Handbook (CX 342.) (Killian, CX600 at 19.)

187. KTC provides each of its over[ ]with workshop manuals for KTC tractors, free of charge. (CX590 at 68.)

188. KTC has set up a National Dealer Advisory Board, which provides a forum for dealers to discuss with KTC concerns about, among other things, service training. (Moen, CX 604 at 7.)

189. KTC is constantly answering questions of KTC dealers about service for KTC tractors. (Killian, Tr 970-71.)

190. KTC has spent 25 years training its dealers in parts and service of KTC tractors, and has invested "millions" in training over a period of 25 years. In the opinion of Killian, it would cost "millions" for KTC to provide equivalent parts and service support for KBT tractors. Thus, Killian testified:

> Q. Would you explain what you mean by the customer cannot get the parts and service?
>
> A. As I explained earlier, KTC has invested a significant amount of time, resources, energy on our behalf, on behalf of our dealers, their employees and their suppliers in selling, supporting and building value for KTC products. Included in that investment is literally millions of dollars in a system for supplying parts and service for the KTC tractors. To implement a parts and service system for gray market KTB tractors would be an enormous task. It would involve creating hundreds of parts, service and operators manuals, retraining service technicians, re-educating dealers and that would cost millions of dollars.
>
> KTC has invested literally millions of dollars to implement its parts distribution system, which includes warehouses scattered throughout the country and a computerized system for distributing parts from the various warehouses to the dealers quickly and efficiently. To change

> this system to provide parts for gray market tractors would be an enormous task, involving literally hundreds of people and a great deal of expense. Similarly, KTC has invested a great deal of money in providing the best possible training for its service personnel who provide service support for dealers including periodic service seminars, videos and a variety of other materials. Offering service for the gray market tractors would involve retraining these people who would then need to retrain the dealers. And it would be necessary to redesign and reprint all of the service materials, such as our over 700 page Training Handbook Exhibit CX 342. Again, this would all be extremely expensive. I haven't mentioned that we'd need to generate English language operator's manuals for all these gray market tractors, which to my knowledge don't presently exist, and we'd need to reprint and redistribute all of the parts manuals which are provided to dealers and customers. To do all of this would literally cost KTC millions and millions of dollars.

(Killian, CX600 at 18-19; Killian, Tr at 969-71).

191. To service KBT tractors in the same manner as KTC tractors, authorized dealers would require parts manuals, microfiche, service manuals, and service training. (Moen, Tr 1128.). This information would be required to properly supply customers with safety information, operating information, and parts and service (Fransson, Tr at 1021). For example, each tractor has a specific surface torque. Shop manuals inform a mechanic how tight to make the nuts and bolts on each tractor according to the specifications for that particular model. Because they lack the proper shop manuals, KTC dealers do not have any means for determining the correct surface torque for KBT tractors. (Fransson, CX597 at 4.)

192. Sellers of gray market KBT tractors have told consumers that parts and service are available from KTC dealers. (Fransson, Tr 1058.)

193. Consumers are angered when they are led to believe they are buying a KTC tractor for which parts and service will readily be available from an authorized KTC dealer. (Fransson, Tr 1077-78.) Consumers of gray market Kubota tractors are often not informed

by the seller of what they are purchasing. The consumers are disappointed to learn that authorized KTC dealers will not service a tractor having the Kubota name on it. (Fransson, CX 597 at 6).

194. Fransson testified that Sound Tractor, an authorized KTC dealer, unknowingly placed an order for parts for a gray market KBT tractor, and when those parts did not fit the customer became angry. Thus, Fransson testified:

> Q. Has Sound Tractor ever tried to order parts for a Kubota brand gray market tractor?
>
> A. Yes.
>
> Q. Okay. And did Sound Tractor -- strike that. Do you know if those tractors were put into the KBT or Kubota brand gray market tractor?
>
> A. No. Consequently they were not.
>
> Q. And why not?
>
> A. The customer brought us the part numbers given to him by the gray market dealer. We had no idea at the present time, at that present time, that we were dealing with a gray market tractor. Many of our customers will bring in part numbers to us. We ordered the parts in good faith. We gave him the parts -- we sold him the parts, I should say. He brought back the parts the next day, very upset at us, because we had ordered the wrong parts.
>
> It's not always unusual to get the wrong parts, so we ordered them again. We got the identical parts again. He took them home again, tried to install them in his tractor, brought them back again, now very, very angry. We assured him that he had received the right parts that he had ordered. But again, he -- those are parts numbers that were given to him by the gray market dealer.

(Fransson, Tr 1072.)

195. Tomlinson was shocked, confused and mad when he was unable to get parts and service support for a gray market KBT tractor which he purchased from an individual without knowing it was a gray market tractor. Thus, he testified:

> Q. . . . You mentioned you were shocked confused and mad in your witness statement, but then you explained why you were mad, and you said you were mad because you had a Kubota tractor and they wouldn't provide with you parts and service?
>
> A. Yes.
>
> Q. I'd like to ask you, is your answer the same for why you were shocked and confused because you had a Kubota tractor and they wouldn't provide you parts and service?
>
> A. Yes, sir.
>
> Q. I see from your response to question 67 that you didn't know it was a gray market tractor when you purchased it?
>
> A. No, sir.
>
> Q. That's correct, right?
>
> A. Right.
>
> Q. And you didn't buy it from a garage. You just bought it from the owner of the tractor?
>
> A. An individual, yes, sir.

(Tomlinson, Tr at 1161-62).

196. The agricultural tractors involved in this investigation are consumer goods which require periodic parts and service. (Killian, CX600 at 18-19; Fransson, CX597 at 1; Moen, CX604 at 1; Base, CXR34 at 2-3.)

197. The owner of The Tractor Shop testified that some parts for KBT tractors are not available from KTC dealers. For the parts that are unique to KBT tractors, and not

available at KTC dealers, the Tractor Shop procures the parts from sources in Japan. (D. Varnado, Tr at 1946-48).

198. If the Tractor Shop repaints a KBT tractor, or if the decal is bad, the Tractor Shop removes the model number designations from the hood of the KBT tractors it reconditions and replaces those designations with a "Diesel Kubota Diesel" decal which does not indicate the model number. (D. Varnado, Tr 1940-41; G. Varnado, Tr) Thus, the Tractor Shop makes near copies of Kubota decals without the authorization of KBT or KTC and installs its copied decals on reconditioned KBT tractors prior to sale. (G. Varnado, Tr 2011-18).

199. The tractor shop has a KBT L1500 tractor spinning around on top of a 20 foot pole at its Wiggins, Mississippi location (D. Varnado, Tr at 1934).

200. Respondent Casteel has advertised extensively to promote the sale of Kubota brand tractors, including print and television advertisements intended to promote the sale of KBT tractors. (Casteel, Tr 2137, 2141-42; CX140; CXR17 at K012012; CX585 at 103-04; CPX1).

201. One of the print advertisements states in large letters at the top "Kubota Diesel Tractors," and identifies "Casteel Implement Company." (CX140; CXR17 at K012012.) This advertisement does not indicate that the tractors offered for sale by Casteel were Japanese KBT tractors intended for use in Japan. (Casteel, Tr 2137; CX140; CX585 at 103-04; CXR17 at K012012.) Another print advertisement run by Casteel to promote the sale of gray market KBT tractors prominently displays the Kubota name and "Casteel Implement Company." (CX139.) This advertisement does not include any indication that the tractors

were Japanese KBT tractors intended for use in Japan. (CX139; CX585 at 100-01.) Yet another example of a print advertisement run by Casteel to promote the sale of gray market KBT tractors prominently displays the Kubota name and "Casteel Farm Implement Co." (CX141.) This advertisement does not include any indication that the tractors were Japanese KBT tractors intended for use in Japan. (CX141; CX585 at 105.)

202. An example of a television advertisement which was run by Casteel was shown at the Hearing. (CPX1.) The advertisement runs 30 seconds, and opens with a close up of a large sign with bold block letters which say "Casteel Farm Implement Co." followed by a view of a Kubota brand tractor in the Casteel sales lot, which zooms in on the label "Kubota" on the hood of the tractor. This is followed by a view of the Kubota brand tractor set against a large sign with block letters "Casteel Farm Implement Co." These views are accompanied by an announcer stating "Casteel and Kubota, teaming up to give you the most tractor for your dollar." The next scene is a view of the Casteel sales lot, showing a long line of Kubota brand tractors, accompanied by an announcer stating "Casteel Implement Company in Monticello has just received a shipload of pre owned Kubota diesel tractors and is making them available at unbelievable prices." (Casteel, Tr 2141-42; CPX1; CX130.) Casteel gave the following testimony regarding the advertisement in CPX1:

JUDGE LUCKERN:	When you say you're teaming up with Kubota, how are you using this word Kubota?
THE WITNESS:	. . . But to answer your question, it was never - it was just Kubota, the tractor itself, and Casteel teaming up.
JUDGE LUCKERN:	The tractor itself?

THE WITNESS: Yes, it wasn't Kubota U.S.A., wherever their headquarters is at, it was nothing like that.

(Casteel, Tr 2143-44.)

203. Operator's manuals for the accused KBT tractors are printed in Japanese while operators manuals for the authorized KTC tractors are in English. Neither KBT or KTC print English language manuals for the KBT Japanese model tractors. (Kashihara, CX 599 at 35).

204. KTC does not have operator or part manuals for KBT tractors. (Killian, CX 600 at 14).

205. When used Kubota tractors are sold without an operator's manual, some consumers have an expectation that they can purchase a manual from a Kubota dealer if they want one. (CX 54; CX 103). However, Kubota dealers do not have operator's manuals for the accused tractors. (Kashihara, CX 599 at 35).

206. When selling gray market KBT tractors to retail customers, respondent The Tractor Shop provides operator's manuals for what it considers to be corresponding United States model KTC tractors. (G. Varnado, Tr 2002-03; CX593 at 62.) Ms. Varnado of The Tractor Shop admitted that an operator's manual for a tractor is an important item which contains important information regarding proper operation of a tractor. (G. Varnado, Tr 2077.) The operators manual for the KTC L185 - L185DT, which Varnado would provide to the purchaser of a KBT L1501 (G. Varnado, Tr at 2004) states "After reading this manual thoroughly, you will find that you can do many of the regular service jobs quickly and easily. However, when in need of parts or major service, be sure to see your KUBOTA

dealer." (CX413 at K100233) (emphasis added). The Tractor Shop attempts to point out differences in KBT and KTC tractors that they know of (G. Varnado Tr at 1996-2000).

207. Operators Manuals indicate the number of PTO speeds, and what speed the PTO will rotate at for a given engine speed (CX411 at K100061; CX413 at K100234). The PTO speeds indicated in the Operators manual for the KTC L175 are different than the actual PTO speeds for the KBT L1500, and the PTO speeds listed in the manual for the KTC L185 are different than the actual PTO speeds for the KBT L1501 (CX411 at K100061; CX413 at K100234; SX2 at 6, 9).

208. The KBT tractors that Gamut sells are sold without an operator's manual. (DePue, Tr 2380-81; CX226C at 18.)

209. The KBT tractors that Homestead sells are sold without an operator's manual. (DePue, Tr 2380-81; CX587 at 316.

210. After repainting KBT tractors, Gamut applies Kubota name and model number decals that are not made by KBT or KTC (CPX6A). Gamut places on its KBT tractors English language warning labels which state "Read and Understand the Operator's Manual Before Operation." (CPXR1 at 1, Ref. No. 9; CPXR3 at 1; CPX6A at 451-52.)

211. All KBT and KTC tractors contain both instructional labels and warning labels, affixed in various places on the tractor, to instruct the user on proper usage or to warn the user of potential hazards. (Kashihara, CX599 at 33.)

212. Labels for Japanese model KBT tractors are printed in Japanese. Warning labels for United States model KTC tractors are printed in English. (Kashihara, CX599 at 33; CPXR1; CPXR2; CPXR3; CPXR4.) Examples of KBT warning labels are presented in

CPXR2 and CPXR4. Examples of KTC warning labels are presented in CPXR1 and CPXR3.

213. Warning labels are specifically designed for the particular features and applications of the tractor. Therefore, since the features and applications between Japanese model KBT tractors and United States model KTC tractors vary, the content and number of the labels also varies. (Kashihara, CX599 at 33; CPXR1; CPXR2; CPXR3; CPXR4.)

214. Engineers at KBT decide which warning labels are appropriate for a given KTC or KBT tractor, based on the specifications and applications of the tractor and analysis of hazardous conditions which may exist given the uses of the tractor. (Kashihara, CX599 at 33.)

215. Complainants Williams testified that, because a high percentage of the users of these tractors are non-professional weekend farmers, the absence of proper instructional labels in English is a great concern. For example, the tractors Mr. Williams inspected at respondent Gamut's lot did not include any instructional labels such as those to instruct the operator on the direction of the engine speed hand throttle, the function of the transmission, the four-wheel drive, PTO, hydraulic power lift and other controls on the tractor. As a result, the function of these controls would have to be determined by experimentation. (Williams, CX609 at 14.)

216. With regard to warning labels or safety decals, Williams testified that KBT tractors imported from Japan with safety decals in Japanese are obviously not understood by United States users. Williams also noted that some respondents who refurbish Japanese model KBT tractors, such as Gamut, placed English language safety decals on those tractors.

However, the decals were misleading in several ways. For example, the decals recommend operation of the tractors only with ROPS and seatbelt and also advised the user to keep the PTO shield in place at all times: "Kubota recommends the use of a Roll-over Protective Structures (ROPS) and seatbelt in almost all applications" and "Keep PTO shield in place at all times." However, the Japanese model KBT tractors sold by Gamut did not have ROPS, seatbelts or PTO shields. These labels further advised the operator to read and understand the operator's manual. But, operator's manuals in English were not provided by Gamut with these tractors and are not available from KBT or KTC. Mr. Williams concluded, therefore, that the warning labels affixed by Gamut are misleading since the operator is unable to comply with the "warnings" in these labels. (Williams, CX609 at 14; CPXR1; CPXR3.)

217. During reconditioning, the Tractor Shop replaces original Japanese language warning labels with English language warning labels without knowing the content of the original Japanese language warning labels. (G. Varnado, Tr 1998-2000.) The English language warning labels put on reconditioned gray market tractors by The Tractor Shop are intended for use on a 1974 Ford 3000 tractor. (G. Varnado, Tr 2000-02). The Tractor Shop puts the same English language warning labels on each of the gray market KBT tractors it refurbishes, regardless of model number. (G. Varnado, Tr 2000-02.).

218. All of the KTC B series tractors listed in SX-2 are stronger than the comparable accused B series tractors. These differences relate to the strength of the front axle, the front axle bracket, the rear axle, the chassis, and the power train. (SX 2 at 13-19).

219. Many of the KTC L series tractors are stronger than the accused counterpart tractor. (SX 2 at 1-12). However, there is no strength difference indicated in SX-2 between

the accused KBT L2600 and the KTC L285, the accused KBT L2000 and the KTC L225, the accused KBT L1500 and the KTC L175, the accused KBT L240 and the KTC L260, the accused KBT L200 and the KTC L210, or the accused KBT L200 and the KTC L200. (SX 2 at 7-12). Kashihara testified specifically about some of the strength differences between the KBT L1500 and the KTC L175, referencing certain parts engineering drawings. (Kashihara, Tr 397-409.)

220. Kashihara testified that differences in tractor strength cannot be appreciated by consumers merely by a visual inspection of a KBT tractor. (Kashihara, Tr at 337).

221. For at least the KTC B6000 model, Kubota engineers in Japan determined which parts were to be made stronger and those parts were then designed and manufactured for the KTC B6000 model. (Kashihara, CX599 at 20; CX531).

222. Kashihara testified at the hearing that there are various ways in which KBT makes parts stronger. One way is to use stronger parts material and a second way is to make the part larger or thicker. (Kashihara, Tr 340.)

223. Parts which are strengthened in certain KTC tractors include front and rear axles, chassis, axle housings, axle cases and parts contained in the transmission, such as gears. (Kashihara, CX599 at 20; CX328; CX328A; CX352; CX352A; CX531.)

224. Kashihara illustrated differences in strength between KTC tractors and corresponding KBT tractors by referring to parts engineering drawings for the KTC B6000 and KBT B6000, KTC L175 and KBT L1500, KTC B8200 and KBT B1600, and KTC L275 and KBT L2002. (Kashihara, Tr 337-38; Kashihara, CX599 at 37-40; CX328; CX328A; CX352; CX352A.)

225. The transmission gears in the KTC B6000 model have wider teeth and larger modules than the KBT B6000. These differences in tooth width and module size are significant with respect to strength. (Kashihara, Tr 371-77; Kashihara, CX599 at 37-39; CX328 at K013397, K013398; K013401, K013402; CX-611 at K013397, K013398; K013401, K013402.)

226. Leviticus reviewed engineering parts drawings of gears for KBT tractors and the corresponding United States KTC models. Leviticus testified that the radial width of the root of the gear tooth sprocket determines the strength of the tooth, and that there are two things which can happen to a gear tooth during use. First, there is bending due to the forces of one gear against the other. Second, there is surface stress due to the local pressure on the contact points. Increasing the thickness of the sprocket increases the contact area bearing capacity and bending strength, thereby reducing stress and wear. (Leviticus, CX602 at 18-19.)

227. The width of the tooth is larger and some sprockets are thicker in "several" KTC models as compared with corresponding KBT models. Hence, the gears in those KTC models are stronger. (Leviticus, CX602 at 19.)

228. The PTO or power take-off is a drive shaft attached to the transmission of a tractor which is used to supply power to an implement with moving parts, such as a rotary tiller or rotary cutter. All agricultural tractors have a PTO. (Kashihara, CX599C at 5, 23.)

229. The spline is a groove cut into the PTO shaft so that the coupling between the PTO drive shaft and the implement will not slip, enabling power to be transmitted efficiently to the implement. (Kashihara, Tr 382.)

230. The spline module of the PTO shaft on the KTC model B6000 is larger than the spline module on the KBT model B6000. (Kashihara, Tr 381; Kashihara, CX599 at 38; CX328 at K013403, K013404.)

231. The spline length of the PTO shaft on the United States KTC model B6000 is 15 millimeters longer than the spline length of the PTO shaft on the Japanese KBT model B6000. (Kashihara, Tr 380-81; Kashihara, CX599C at 39; CX328C at K013403, K013404.)

232. Differences in spline module size and spline length of the PTO shaft make certain KTC models more durable because these strengthened parts will not wear out as quickly as a PTO shaft with a smaller spline module and a shorter spline length. (Kashihara, Tr 381, 382-83.)

233. The steering assembly for the KTC B6000 has a stronger steering mechanism than the KBT B6000. The KBT B6000 has a worm gear mechanism, whereas the KTC B6000 has a rack and pinion with ball screw. The rack and pinion with ball screw is a stronger system. (Kashihara, Tr 388-89; 394-95; Kashihara, CX599 at 36-37; CX328 at K013410, K013411.)

234. A rack and pinion with ball screw system improves efficiency in the steering mechanism; that is, when the same amount of force is applied to the steering wheel, there is greater output in the steering mechanism of the KTC B6000. (Kashihara, Tr at 395.)

235. The rack and pinion ball screw mechanism of the KTC B6000 is more durable and more accurate than the worm gear mechanism in the Japanese KBT model B6000. (Kashihara, Tr 395.)

236. The front axle support of the KTC L175 is made of thicker steel than on the KBT L1500. (Kashihara, CX599 at 39.)

237. The front axle bracket on a tractor supports the front axle and is, therefore, an important part. If a front loader is used, much force is applied to the bracket (Kashihara, Tr 398.)

238. As between the KTC L175 and the KBT L1500, which are corresponding models, the front axle bracket for the KTC L175 is stronger because it is made of ductile cast iron number 55, which is a stronger raw material that normal cast iron number 25, used for the front axle bracket on the KBT L1500. The front axle bracket on the KTC L175 is more than twice as strong as the front axle bracket on the corresponding KBT L1500. (Kashihara, Tr 397-99, 401; Kashihara, CX-599 at 40; CX352 at K013361, K013362.)

239. The KTC L175 has a stronger rear axle case than the corresponding KBT L1500. The wall thickness of the rear axle case on the KTC L175 is two millimeters thicker than on the KBT L1500, making this part on the KTC model stronger than on the KBT model. (Kashihara, Tr at 402-03; Kashihara, CX-599 at 40; CX352C at K013379, K013380.)

240. The KTC L175 has a stronger PTO shaft than the corresponding KBT L1500. The PTO shaft on the KTC L175 is made of a stronger raw material than the PTO shaft made on the KBT L1500. The difference in strength is due to the length of the shaft which is subjected to heat treatment. Heat treatment makes the steel firmer and stronger than the same steel to which heat treatment has not been applied. On the KTC L175, a section of the PTO shaft of 370 millimeters in length is subjected to heat treatment as compared with only

42 millimeters on the PTO shaft of the L1500. (Kashihara, Tr 403-05; Kashihara, CX-599 at 40; CX352 at K013372, K013373.)

241. The reason for the difference in heat treatment and corresponding increase in strength as between the PTO shafts of the L175 and the L1500 is to accommodate the heavy load placed on the PTO shaft by heavy implements used in the United States, such as the rear cutter, for example. Kashihara testified that technical calculations indicate the strength of the PTO shaft in the KTC L175 is approximately twice the strength of the PTO shaft in the corresponding KBT L1500. (Kashihara, Tr 405, 407-08; Kashihara, CX-599 at 40.)

242. The KTC B8200 has a stronger front axle and rear axle case than its counterpart, the KBT B1600. The KTC B8200 also has a reinforced chassis including the frame clutch housing, a reinforced power train including gears and bearings, a stronger three point linkage system, and a stronger break system than the KBT B1600. (Kashihara, CX-599 at 38; SX-2 at 13)

243. The KTC L275 has a stronger front axle, a stronger front axle bracket and a stronger rear axle than its counterpart, the KBT L2002. Also, the L275 has a reinforced chassis, body, and power train, including the gears and bearings, as compared with the KBT L2002. (Kashihara, CX-599 at 41; SX-2 at 1.)

244. Complainants' Kashihara testified that too much stress on a tractor can result in breakage of front axles. (Kashihara, CX-599 at 40). Kashihara also testified that, during testing of tractors at KBT, failure of the tractors has occurred, including breakage of front axles, because of the application of too much stress to the tractor:

> Depending upon the model and the applications for which the model is designed, strength can be a significant factor in proper performance and

customer satisfaction. We have seen during testing, failure of the tractor, including breakage of front axles because of the application of too much stress to the tractor. Given that the Japanese model tractors are not designed to accommodate heavy implements commonly used in the U.S. such as front loaders, I believe that it is likely that the gray market tractors will fail to perform as expected under U.S. applications because U.S. users will attach U.S. implements to these tractors and use them for typical U.S. applications. However, since the tractors are not designed to withstand the stress of these applications, it is likely that breakage or other failure will result, resulting in customer dissatisfaction.

(Kashihara, CX-599 at 41). While Kashihara had no personal knowledge of any accused KBT tractor failing due to a lack of strength, he based his testimony on his experience with developing tractors for the U.S. market, thus he testified:

Q. With regard to the B and L series tractors made for the Japanese market, do you have any personal knowledge of any tractor, of any of those tractors failing after being imported to the United States.

A. I have not received such information directly from U.S. market. However, based upon my experience as an engineer having been involved in the development of tractor to be used in the U.S. market, I can say that there is a high likelihood as far as engineering is concerned that such a failure could occur.

Q. Mr. Kashihara, isn't it true that you have never been a dealer of these U.S. gray market tractors?

* * *

THE WITNESS: Yes, it is true, if you are only talking about the certain number of tractors which a particular dealer has dealt with, then he has knowledge only pertaining to those tractors he has dealt with. However, if the large number of tractors will be sold in the gray market, if we are talking about the last number of such tractors, then someone like myself, who has been involved in the development of tractors for the U.S. market as well as for the Japanese market, someone like me who knows about the difference of the strength of respective tractors, judging from my experience, I'm saying that there is a high likelihood that such activities would lead to the accident.

* * *

Q. But wouldn't you agree that experience is the best confirmation for a theory?

A. Yes, I believe experience is very important. Therefore, based upon the market research we conducted in the United States, I accumulated lot of knowledge with respect to the application of tractors in the United States. I am making comments based on that experience.

(Kashihara, Tr at 665-69).

245. Maass testified that KTC tractors have stronger or reinforced front axle housings and axle cases, and that both of these parts are important and integral parts of the tractor, since without a front axle housing, or an axle case, the tractor would not operate. Thus, he testified:

Q. Now, is it true that certain model U.S. Kubota tractors, what we've been referring to again as KTC tractors, are built with certain parts that are stronger or reinforced as compared with corresponding Japanese models?

A. That's correct.

Q. Can you name some of these parts for the record?

A. Front axle housings, case axle.

Q. What is a front axle housing?

A. It's the housing that the axle is enclosed in.

Q. Would you consider it to be an important part of the tractor?

A. Yes, I would.

Q. Why would you consider it to be an important part of the tractor?

A. Well, without it, it wouldn't run.

Q. Did you also name a case axle, is that what you said?

A. Yes.

Q. What is a case axle?

A. It houses the axle, it's a case, an enclosure for the axle.

Q. And would you consider that part, a case axle, to be an important part of the tractor?

A. Yes, I would.

Q. Why would you consider it an important part of the tractor?

A. Well, it's an integral part of the tractor. Without it, it won't operate.

Q. How are these parts stronger or more reinforced than their Japanese counterparts?

A. It depends on which part you're speaking of. Some were changed, the material, some were made of thicker material in some cases.

(Maass, Tr 2201-2202.) Respondents' expert Maass gave the following testimony regarding problems that KTC was having with the strength of its tractors:

Q. I'd like to refer you to page 104, line 4, I'd like to read two questions and two answers into the record, if I may. At the deposition I asked you:

"Question: Do you have any understanding of whether or not U.S. equivalent models manufactured by KBT are designed and built with stronger or reinforced parts than their Japanese equivalents?

"Answer: Yes.

"Question: What knowledge do you have on that topic?

"Answer: Well, I first learned of that a few years after I started at Kubota, that certain parts were breaking and they were having problems with them because they had front-end loaders on them and they were heavy and the axle housings were cracking. And they changed the material and made them stronger so that they could carry the load with a loader on it."

Did I accurately read your answer?

A. Yes, you did.

Q. Do you recall my asking you those questions and your responding in that manner?

A. Yes, I do.

Q. Is this answer that you responded in the deposition, is that accurate?

A. I believe so, yes.

JUDGE LUCKERN: It's accurate today?

THE WITNESS: It refreshes my memory and it is my understanding that, yes, that is what happened, but I'm a little foggy on that, because I wasn't present at the time when this occurred. It was, like I said, relayed to me by someone else.

BY MR. SAUNDERS:

Q. To the best of your recollection, though, that answer as it's in the deposition transcript is still accurate today?

A. Yes.

(Maass, Tr 2208-09).

246. Williams testified on the strength issue, based on his experiences with Ford and Shibaura in the design and production of agricultural tractors under 50 PTO horsepower for the United States market, and based upon a review of parts drawings and parts lists for "some" used KTC tractors and corresponding KBT tractors, as well as an inspection of the facilities and tractor inventory of Gamut, one of the respondents in this investigation. He also visited other dealers of KBT tractors. (Williams, Tr 1692-93, 1853-54; Williams, CX609 at 3, 18.)

247. Williams testified that there are higher demands on tractor in the United States market primarily because of the common use in the United States of front loaders, because a

front loader adds significant weight to the tractor (Williams, Tr at 1693). Williams testified that, on a small tractor, such as a 15 horsepower tractor, a front loader can typically add 1,000 to 1,400 pounds on the front axle, which adds a great deal of structural demand, particularly to the front end of the tractor (Williams, Tr 1693-94.) In addition, Williams testified that the forces or loads created by front loaders and other implements are transmitted through the transmission components, also known as the drive train or drive line. This is the portion of the tractor that translates the movement of the gears in the transmission to the rear axle and, in many cases, the front axle. (Williams, Tr 1690-91, 1694; Williams, CX609 at 19.)

248. Williams compared the KBT B7001 with the KTC B7100, and the KBT L1501 with the KTC L185. With regard to the B7001/7100 comparison, Williams concluded that United States consumers would be dissatisfied with the B7001 in terms of transmission life and loosening of the joint between the transmission and the rear axle. With respect to the L1501/L185 comparison, Williams concluded that there are significant differences between the fabricated front support and the cast front support and the cast oil pan because these parts add considerable strength to the structure. Williams concluded that a United States consumer who uses a United States front loader on an KBT L1501 probably is going to experience significant failures of the structure in the front end. (Williams, Tr 1704-06; Williams, CX609 at 18-21.)

249. Larry Fransson is the owner of Sound Equipment, an authorized KTC dealer in Everett, Washington. Fransson testified that the gray market KBT tractors he has seen are not built to hold a front loader and actually work, and that he was aware of one instance

where a gray market dealer installed a front loader on a KBT tractor and both the tractor and the loader broke. (Fransson, Tr 1084-85.)

250. Complainants' Williams testified regarding the strength of a KBT L1501 as follows:

> Q. Now, have you ever known of a 1501 or small tractor, gray market accused tractor with a loader on it being damaged or destroyed by use in a nursery, landscaping nursery?
>
> A. I have no personal knowledge of that.
>
> Q. Now, do you have any personal knowledge of any 1501 tractors being damaged or destroyed by the use of a loader?
>
> A. I have no personal knowledge of one, no.
>
> Q. Do you know of any instance when a tractor was busted in the middle by the use of the loader as your Ford tractor was?
>
> A. I know of an instance.
>
> Q. All right.
>
> A. That involved a yellow tractor some years ago, I don't recall the model, when the front support was pulled away from the engine.
>
> Q. By what?
>
> A. By the loads that were imposed on the -- by the loader through the front axle, it literally pulled the tractor in two.
>
> Q. Now, when and where was that?
>
> A. That was during a test in Minnesota. I can't recall the tractor model. But it occurs on these lightweight tractors, sir.
>
> * * *
>
> Q. In my judgment a U.S. customer will be extremely dissatisfied with the reliability of the L1501 product especially if he intends to install a loader. He probably could expect multiple and possibly catastrophic

failures in the front wheel drive area. Now, what actual experience do you have that you base that catastrophic statement on?

A. Several.

Q. All right.

A. I've known tractors where the engine block breaks due to loads imposed by the loader. I have known tractors where the loads imposed by the loader imposed tortional limits on the structure of the vehicle to the point that, when I ran the loader bucket into the dirt pile and attempted to lift, the engine would die.

The final answer to that was the tortional loads imposed on the structure deflected the engine block to the point that it locked the No. 3 piston up in the cylinder block and so the loads that came through the loader into the chassis of the tractor is a very, very critical element.

* * *

Q. . . . So why did you put that as an answer to question 74?

A. Because in my judgment, if an 800 pound loader is installed on that tractor and he uses it in a fashion that I believe a typical customer would of a 15 and 16 horsepower tractor, that the front end will give way. It's an answer, it's a judgment based upon my experience, an analysis of the differences between the 185 and the 1501.

Q. But with no personal knowledge of the 1501s that have been used in the United States with loaders for ten years?

A. That is correct.

(Williams, Tr at 1719-1724).

250A. DePue testified that no customer had informed him that a tractor had broken due to a lack of strength. Thus, he testified:

A: Oh, yes. I checked the records before I came in. It was something over 3,000.

Q: And have you ever had a complaint or knowledge of a front-end loader breaking the tactor down?

A: No, we have never had anybody call us and tell us that the tractor axle housing, as an example, on the front end broke because of the loader. If they would have, I certainly would have heard it beause then that would mean that the customer would need a replacement for it, and I have never ordered one, I've never handled one. The only front-end axle housing we have ever replaced to one of our dealers for a customer was on a Ford.

(DePue, Tr at 2492, 2493).

251. There is no Finding 251.

252. Agricultural tractors each have a power take-off (PTO) drive shaft which is attached to the transmission of the tractor and is used to supply power to implements. This PTO drive shaft is a standard feature on all agricultural tractors. The PTO drive shaft is a metal rod that turns and which is connected to an implement to power the implement. The PTO drive shaft revolves very fast and can be extremely dangerous if it is not properly guarded. Accidents involved with a PTO shaft can cause very severe injuries. (Kashihara, CX599 at 23; Leviticus, CX602 at 6-10; Williams, CX609 at 5-6.)

253. A PTO shield, depicted in CX9, is a steel plate with three sides which cover the top left and right side of the otherwise exposed PTO shaft. (Kashihara, CX599 at 23; CX9; Leviticus, CX602 at 10; Williams CX609 at 5.)

254. Kashihara testified that the main reason the KBT tractors do not have a PTO shield is the difference in user applications between the Japanese market and the United States market, specifically, in Japan, most farmers who use tractors of the size in issue (under 50 PTO horsepower) will use a rotary tiller as their attached implement. (Kashihara, CX599 at 23-24).

255. Complainants' Williams, testified that, according to the National Safety Counsel, PTO entanglements are the third most prevalent type of machinery accidents that occur on the farm today. (Williams, CX609 at 4; CX574 at 137.)

256. PTO accidents are typically caused by an unshielded PTO shaft snagging loose clothing which may come into contact with the rotating shaft. (Leviticus, CX602 at 6; Williams, CX609 at 5.)

257. According to Williams, the PTO shield is an important safety device because many operators of the types of tractors involved here are not experienced and are not professionals and do not recognize the potential hazards associated with PTO entanglements. (Williams, CX609 at 5.)

258. According to Leviticus, 98% of all accidents involving a PTO occur when a person with loose clothing approaches a rotating shaft. (Leviticus, CX602 at 6.)

259. The photographs in CX566 were collected by a safety expert, Dr. Rollie Schneider, formerly of the University of Nebraska. Dr. Schneider was a long-time safety expert at the University of Nebraska and is well-known nationally in the field of tractor safety. These photographs are used by Dr. Leviticus and other faculty members at the University of Nebraska in conjunction with lectures on agricultural safety to students, farm groups, dealers and others. (Leviticus, CX602 at 9; CX566.) The injuries shown in the photographs which are CX566 occurred on agricultural tractors under 50 PTO horsepower, and occurred in the mid-1980s. (Leviticus, Tr 1643-44; 1649.) The top photograph in

CX566 shows the lower leg of a person who was caught in a universal joint attached to a PTO shaft on a tractor without a PTO shield. The PTO shaft pulled in the person's pant, and then did a great deal of damage to the lower leg. The bottom photograph in CX566 shows another foot that was injured by a PTO shaft that did not have a shield, showing extensive damage to the leg and foot. (Leviticus, CX602 at 9; CX566.) According to Dr. Leviticus, the injuries shown in the photographs in CX566 would probably not have occurred had there been a PTO shield in place because the person depicted in the photographs stepped down from the tractor onto an area close to the PTO in both cases. Had there been a shield, the person would have stepped down onto the PTO shield rather than the rotating shaft. (Leviticus, CX602 at 10.)

260. The potential for injury from a rotating PTO shaft is significantly greater for a tractor without a PTO shield. (Leviticus, CX602 at 8.)

261. PTO shields are recommended to manufacturers by the American Society of Agricultural Engineers. A PTO shield has been standard equipment on most tractors merchandised in North America since 1970. (Williams, CX 609 at 6). The Society of Automotive Engineers (SAE) and the American Society of Agricultural Engineers (ASAE) have had standards recognizing the importance of PTO shields since 1941 (Leviticus, CX602 at 5-6; CX11; CX13; Williams, Tr at 1798-1801; Leviticus, Tr at 1545-1546).

262. None of the accused tractors have a factory installed PTO shield. (SX 2 at 1-19). In contrast, all of the KTC models have a PTO shield, with the exception of KTC's first B series tractor, the B6000, and KTC's first L series tractor, the L200, which had PTO shaft caps rather than PTO shields. (SX 2 at 12 and 19).

263. Varnado, the owner of Respondent The Tractor Shop, testified that he installs PTO shields on certain accused KBT tractors that are different from those installed on KTC tractors. Specifically, Varnado testified:

Q. Now, is it also true that the KBT tractors you import don't have PTO shields?

A. They do not.

Q. And American KTC tractors do have PTO shields, correct?

A. I've seen them both ways.

Q. Do you install PTO shields yourself on tractors?

A. Yes, ma'am.

Q. These PTO shields don't come from KTC, do they?

A. No, ma'am.

Q. Do you make them yourself?

A. No, ma'am. We have a shop there in town that does a lot of work for Dupont, and that man that owns that business came in and looked at our PTO shafts and looked at a shield and went back and fabricated us one to go on our tractors.

Q. But that shop doesn't have any connection with or authorization from KTC, does it?

A. Oh, no, but it does the same job.

Q. And how are those PTO shields attached to the KBT tractors?

A. We weld them to the draw hitch of the tractor.

Q. And the KTC PTO shields are bolted on, correct?

A. Yes, ma'am. They can be taken off.

Q. So you attach them differently?

A. Yes, ma'am. We weld them to the draw hitch.

(D. Varnado, Tr 1939). Mr. Casteel, owner of the Casteel Respondents, testified that he does not believe there would be any problem putting a PTO shield on a KBT tractor. (Casteel, Tr 2153). Further, the videotape deposition of Mr. DePue shows a PTO shield on a KBT tractor at respondent Gamut. (CPX 6 (DePue Videotape)).

263A. Moen testified that he will not install a PTO shield on a used tractor that did not originally have a PTO shield. Thus, he testified:

Q. And you sell used tractors?

A. That's correct.

* * *

Q. And you sell used tractors without PTO shields?

A. The tractors that never came with PTO shields.

Q. You sell without them?

A. (Nodding.)

JUDGE LUCKERN: Correct?

THE WITNESS: That's correct.

(Moen Tr at 1139).

264. The hydraulic block outlet on a KTC tractor enables the user to easily connect an implement such as a front loader to the hydraulic system of the tractor. CX 32 is a photograph of a hydraulic block outlet. (Kashihara, CX 599 at 45; CX 32).

265. None of the accused tractors have a hydraulic block outlet. (SX 2 at 1-19). In order to use the hydraulic system of an accused tractor to operate front-end implements,

the owner of the tractor must find a means of tapping into the hydraulic system of the tractor, which is usually done by cutting into a hose on the tractor. (DePue video deposition, CPX 6). All of KTC's B series tractors sold in the United States have an hydraulic block outlet, with the exception of the B6000s sold between 1974 and 1976. Further, all of KTC's L series tractor sold in the United States after 1976 had a hydraulic block outlet, and several models sold before 1976 had the feature. (SX 2 at 1-19).

266. Because hydraulic implements such as front loaders are not commonly used on tractors under 50 PTO horsepower in Japan, KBT does not manufacture Japanese model KBT tractors with hydraulic block outlets. (Kashihara, CX599C at 45; Williams, Tr at 1820).

267. Williams testified that a hydraulic block outlet was a matter of convenience for someone who wants to use a front end implement, such as a front end loader; and that a garage could tap into the hydraulic supply using a welding torch. (Williams, Tr at 1821-1822).

268. The maximum traveling speed of the accused KBT model L200 is identical to the maximum traveling speed of the KTC model L200 (SX-2 at 12). The maximum traveling speed of the accused KBT B6000 and B5001, is only 0.1 km/hr different from the comparable KTC models, viz. KTC models B6000 and B5100 (SX 2 at 18, 19). The remaining accused KBT tractors in SX 2 are between 1.1 and 7.5 km/hr (SX 2 at 1-17).

269. For early model KTC tractors, the differences in the maximum traveling speeds are due largely to the fact that the Japanese models were equipped with high lug tires when sold new, while KTC tractors were equipped with low lug tires. However, newer

KTC tractors are purposely designed with higher maximum traveling speeds to meet the requirements of the United States market. Thus, Kashihara testified:

> Q. . . . Is the difference in maximum traveling speed explained at least in part by the fact that the Japanese models have got the rice tires, the high lug rice tires and the U.S. models typically have the farm tires?
>
> A. Well, with respect to the earlier models, the difference in speed are largely due to the difference in tires used for the tractors. However, with the exception with those early models, in most of the tractors, we are consciously making tractors for U.S. market with higher maximum traveling speed in order to respond to the requirements of the market.

(Kashihara, Tr 779).

270. Leviticus compared engine horsepower ratings for the KBT tractor models in SX-1 versus the corresponding KTC tractors and determined that, on average, B and L series United States model KTC tractors have 11.9% more engine horsepower than the corresponding gray market models. (Leviticus, Tr 1572-73.)

271. All tractors listed in SX2, including accused KBT tractors and "equivalent" KTC tractors are equipped with variable speed PTOs. (SX2C).

272. If a United States user of a Japanese model KBT tractor accidentally or unknowingly shifts the PTO speed control to a high speed, such as 1400 RPM, he could cause damage to an implement which is designed for use at 540 RPM. Depending upon the implement, this accidental or unintentional operation of the United States implement at nearly three times the recommended speed could cause injury to bystanders because there is a danger that the blade of the implement could crack or shatter under the extreme conditions for which the implement was not designed. (Kashihara, CX599 at 32; Leviticus CX602 at 14.)

273. All KTC tractors at issue in this proceeding have speeds greater than 540 RPM. Indeed, most of the KTC models at issue have speeds of at least 1000 RPM. Some KBT accused models have speeds up to 1400 RPM. However, some KTC models also have speeds up to and exceeding 1400 RPM (SX 2).

274. A PTO restrictor is either a metal plate inserted in the PTO shift area or is a lever. In either case, the PTO restrictor prevents accidental or unintended shifting of the PTO to a high speed. (Kashihara, CX599C at 32.) Although none of the accused KBT L series tractors have the PTO restrictor, the comparable KTC L series tractors likewise do not have the feature, with the exception of the L275 and L235 models sold after 1981. Similarly, although none of the accused B series tractors have the feature, none of the KTC B series tractors sold before 1981 have the feature either. (SX 2; SX 1).

275. To determine the appropriate PTO speed for a particular implement, one would look to the instructional decal on the implement which tells an operator which speed to use. (Leviticus, CX602 at 14.) Leviticus testified that an implement operated at other than the specified PTO speed could cause a safety concern. For example, if an implement which was intended to be operated at 540 RPM were operated at 1000 RPM, the integrity of the implement would be endangered, and as a result, bystanders and the operator would be endangered. This is due to the fact that the forces to which the parts of the implement are exposed upon being attached to the PTO increase with the square of the increase in speed. So if the rotational speed is increased from 540 RPM to 1000 RPM, instead of increasing the forces two times, the forces are increased four times. (Leviticus, CX602 at 14.)

276. One label for the KBT B1600, which is in the Japanese language, indicates the speed of the PTO at various gear settings, viz. gear 1 = 554 rpm, gear 2 = 767 rpm, gear 3 = 1151 rpm. (CPRX2 at Ref. No. 33). The English language labels for the KTC B8200 indicate only two PTO speeds, viz. gear 1 = 540 rpm, gear 2 = 748 (SX2 at 13). With regard to PTO speed, even if the operator knows what the recommended speed is for the implement, there is no way for the operator to determine where that speed is located on the selection lever, because the KBT tractors do not have instructional decals to indicate PTO speed. (Leviticus, CX602 at 6; CX567.)

277. The wheelbase is the distance between the center of the front axle and the center of the rear axle. The treadwidth is the distance between the center of the left tire and the center of the right tire. On some tractor models, the treadwidth is adjustable to accommodate different types of implements or applications. In general, the longer the wheelbase and the wider the treadwidth, the more stable the tractor. (Kashihara, CX599C at 46.)

278. KTC tractors were designed to have longer wheelbases and wider treadwidths than the KBT tractors sold in Japan. Accordingly, with the exception of accused models, L200, L240, and L2600, the accused tractors have shorter wheelbases and/or narrower treadwidths than the U.S. counterpart tractors. (SX 2 at 1-19). The accused KBT model B5001 has the same wheelbase and front axle treadwidth as its KTC counterpart, the B5100, and a wider rear axle treadwidth (SX 2 at 18).

279. In general, the longer the wheel base and the wider the treadwidth, the more stable the tractor. (Kashihara, CX599 at 46; Williams, CX609 at 15). Leviticus testified

that the wheelbase of a tractor affects not only stability, which is a safety issue, but also performance. A larger wheelbase allows an operator to put more weight and more pull on the rear end due to a concept called "weight transfer." As a tractor pulls, a certain amount of weight is transferred from the front to the rear end, thus, one can pull more weight with a longer wheelbase than with a shorter wheelbase. (Leviticus, Tr 1559-61; Leviticus, CX602 at 19.)

280. Williams testified that nine out of the nineteen United States KTC tractor models in SX 2 have superior lateral stability as compared with their gray market counterpart KBT model. He concluded that nine other models would have equal or slightly improved stability. (Williams, CX609 at 16.)

281. KBT tractors typically come with high lug tires, which are specifically designed to give good traction in soft, muddy terrain. (Kashihara, CX 599 at p. 41, ¶160).

282. KTC tractors are typically equipped with low lug or turf tires. (Kashihara, CX 599 at p. 43, ¶161).

283. In some cases, the accused tractors were originally sold with tires that were identical to the tires sold on the KTC counterpart models. For example, the accused L200 model and the KTC L200 model were both sold with the same tires (and when both models were sold new, they had an identical maximum traveling speed). (SX 2 at 12). Some of the accused models were originally equipped with high lug tires and the comparable KTC tractors were equipped with low lug tires (*e.g.*, accused model L1500 and KTC model L175). (SX 2 at 9).

284. In Williams' opinion, differences in tires was not a significant difference between accused KBT tractors and authorized KTC tractors. Thus, he testified:

> it was my judgment that the tires did not represent a big issue. . . .]t's my belief that the tires probably don't represent in my judgment a significant factor to the purchase decision or to the ultimate satisfaction of the consumer And so the life of that tire in this country operaing on hard terrain is going to be short-lived. But, on the other hand, the repercussions or the significance of that short product life of the tires is not tremendously significant. I think you can buy a new tire and, if necessary, if you can find a 22-inch, it really doesn't break the piggy bank all that much to go get a new set of rims.

(Williams, Tr at 1819).

285. A Roll Over Protective Structure (ROPS) is a metal frame for the protection of operators of tractors to minimize the possibility of serious operator injury resulting from accidental upsets. (Kashihara, CX 599 at 26; Leviticus, CX 602 at 10-11; CX 14).

286. The ROPS creates a safety zone that protects the operator in the event of a rollover. (Leviticus, CX 602 at 11, ¶46). In order to remain in that safety zone, an operator must be wearing a seat belt. (, ¶54).

287. ROPS were optional on KTC tractors prior to 1985. Since 1985, tractors sold by KTC in the U.S. have had a ROPS as standard equipment. (Kashihara, CX 599 at 27; Briggs, CX 595 at 4; Killian, CX 600 at 11). KTC currently has a program to add ROPS to KTC tractors that were either originally sold without a ROPS, or had their ROPS removed. Thus, complainants' Killian testified:

> Q. Now, were Kubota tractors or any tractors that were produced prior to 1985 equipped with ROPs?
>
> A. Yes, some tractors that were sold before 1985 were equipped with ROPs.
>
> Q. Were they all?

A. No, sir, I don't believe so.

Q. Including Kubota?

A. Including Kubota.

Q. Now, Kubota also has a ROPs program, does it not, for those older tractors?

A. Yes, sir, we do.

Q. Describe that, please.

A. The program is promoted to our dealers and through them, for example, through direct mail, to purchasers that we know their name and address, telling them the importance of ROPs, advising them that a certified ROPs is available from their authorized dealer and encouraging them to contact that dealer to purchase and have installed on of those ROPs for their safety.

* * *

Q. So again I'll ask the same question, your ROPs program is designed to add ROPs to older Kubota tractors that were sold without ROPs?

A. Either sold without ROPs or for some reason they had the ROPs removed, yes.

Q. And ROPs then can be added if an owner desires?

A. ROPs can be added to a KTC tractor, I know that.

(Killian, Tr at 555-557).

288. On September 1, 1993, KTC instituted a policy whereby KTC's dealers could not sell a new KTC tractor unless a ROPS is actually installed on the tractor. (Briggs, CX 595 at 5).

289. For any model of tractor ever sold by KTC in the U.S. which did not originally have a ROPS, ROPS are available through KTC as a part item. Each of these

ROPS have been designed and certified to meet U.S. industry standards. (Kashihara, CX 599 at 27; Briggs, CX595C at 5; Briggs, Tr 1010).

290. Industry standards, e.g. American Society of Agricultural Engineers (ASAE), or Society of Automotive Engineers (SAE), provide for procedures for the testing and certification of ROPS. (Kashihara, CX 599 at 26). ROPS have to be certified for use on particular units. Certification involves testing of a particular ROPS with a particular model or type of tractor in accordance with applicable industry standards to make sure that the ROPS will perform in the event of a tractor rollover. A licensed engineer undertakes specified tests (including a field upset test) and if he or she concludes that the ROPS equals or exceeds the performance requirements, the engineer will certify that the ROPS can be used with those models or types. An example of such certification is contained in CX 516. (Briggs, CX 595 at 5; Leviticus, CX 602 at 11).

291. Complainants' Williams testified that it is not possible to certify a ROPS for a model of a tractor without conducting one of the three tests provided for in the ASAE and SAE industry standards. According to Williams, the strength of the ROPS and the structural integrity of the tractor must be compatible. Therefore, ROPS must be tested or retested on vehicles where there are structural differences from models on which the ROPS may have been originally tested. (Williams, CX609 at 9.)

292. KBT has not manufactured, tested or certified ROPS for KBT tractors designed for and sold in the Japanese market. (Kashihara, CX-599 at 27.)

293. DePue testified that ROPS which he had in inventory were not certified for KBT tractors because certification would be too expensive. (DePue, Tr 2406 - 2407).

294. Since September 1, 1993, KTC has instituted a policy whereby KTC's dealers could not sell a new KTC tractor unless ROPS is actually installed on the tractor. KTC has also engaged in a promotion campaign to install ROPS on older model tractors sold prior to 1985. Additionally, neither KTC nor its affiliated company, Kubota Credit Corporation, will finance the sale of a used KTC unit unless it is ROPS-equipped. (Briggs, CX595C at 5.)

295. Williams concluded that a ROPS which has been tested and certified for the KTC B7100 "could probably be applied safely on the KBT B7001." He also concluded that ROPS which have been certified and tested for the KTC L185 or the KTC L295 would require retest and possible redesign before installation on the KBT L1501 or the KBT L2601 models. (Williams, CX609 at 9-10.)

296. Kashihara testified that the accused KBT B6000, B1600, and L1500 had identical hydraulic capacity as the authorized KTC B6000, B8200 and L175, respectively. The 4WD authorized KTC L8200 had a hydraulic capacity of 6.0 gallons per minute (gpm), while the 2WD authorized KTC L8200 had a hydraulic capacity of 4.0 gpm, which is the same as the 4.0 gallon per minute hydraulic capacity of the accused KBT B1600. The accused KBT L2002 had a hydraulic capacity of 3.7 gpm, while the authorized L275 had a hydraulic capacity of 6.2 gpm. (CX599 at 44-45).

297. Complainants believe that KTC tractors require a larger operator's space than the operator's space on Japanese model KBT tractors. (Kashihara, CX599 at 40.)

298. The KTC and KBT models listed in SX-1 vary in the amount of operator space from model to model, with each model having its own particular amount of operator space. (Williams, Tr at 1816-17).

299. Williams also found that three out of the seven B Series KTC tractors for the United States market have seat adjustments of at least four inches in order to accommodate the typically larger United States user. This permits the seat to be moved rearwards and provides a more optimum space for the typically larger United States operator. (Williams, CX609 at 22.)

300. Robert F. Killian, Jr. is employed by Kubota Tractor Corporation (KTC). He is the current senior vice president of sales and marketing. He held that position since mid-December 1994. He has worked for KTC since mid-December of 1994. KBT is[ ]one of KTC's suppliers. KBT build the tractors KTC sells. KBT supply tractors of several PTO horsepower ranges including under 50 PTO horsepower, as well as some implements and repair parts for tractors that KTC sells in the United States. After KTC purchases the tractors, the tractors go to one of our[ ]division warehouses and then they are assembled, checked for quality, etc. Thereafter KTC wholesales those tractors to its over[ ]authorized dealers for their resale to end user customers. An authorized dealer is a business entity that has signed a KTC Dealer Sales and Service Agreement authorizing the entity to sell products, provide parts and service support for those products. (Killian CX600 at 1, 2).

301. A July 7, 1995 KTC advertising bulletin to Kubota Tractors dealers re gray market announcements and which Killian approved distribution of stated in part:

> As you are aware through prior communications, Kubota tractors originally sold in Japan are being re-conditioned, imported into this country, and sold to United States consumers by non-authorized dealers. Because these units were not designed for sales in the United States, they do not comply with United States standards in almost all respects and are not ordinarily sold with important safety equipment such as Kubota approved ROPS and seatbelt,

safety decals and United States standard PTO shields. These tractors are often sold without the proper Operator's Manual.

In some parts of the country there is a great deal of gray market activity. We are concerned that consumers know what they are getting (and more importantly, not getting) if they buy a gray market tractor. Some Kubota dealers have placed ads in local papers to alert the consumer. We have had requests from dealers for assistance in this important communication.

Enclosed are several aids to help you combat the gray market:

- A counter card for your Parts Department Counter.
- Ad slicks for you to use in your local newspaper. These ads will be eligible for 50/50 co-op , at least through the end of 1995.
- A pad of 25 mini-flyers. These can be stuffed in statement mailings, or handed out over the counter to customers who inquire. More are available using the following order form.

(CX76; CX600 at 10).

302. Killian testified, with respect to CX-76:

Q. Well, the single sentence then [in CX-76]: Enclosed are several aids to help you combat the gray market. Now, what do you mean by combat the gray market?

A. Okay. A great deal of confusion existed and exists today in the marketplace about these Kubota tractors, the KBT tractors, the gray market tractors. That confusion ends up in many, many cases creating ultimately dissatisfaction with Kubota by the purchaser of that product. That dissatisfaction leads to a loss of our good reputation, we believe our good reputation we have developed. And so, you know, to combat that loss of reputation, we made these available.

Q. Well, now is it to combat the loss of reputation or combat the sale of gray market tractors by the respondents?

A. We believe that, if the consumer understands what he gets and, as this letter also says, what he's not getting, that we believe that the consumer, when provided with all the facts, what he gets from the KTC tractor, the dealer network, and what he expects to get when he buys that tractor with the Kubota name on it, we believe that that customer will make a decision that's in his best interest and a decision that he has to make.

I personally also believe that decision will include the purchase of either a KTC tractor or at least a better understanding of a KBT tractor and understand what he is getting is a tractor with no support and without some of the safety features and difficulty having them installed.

* * *

Q. . . . The purpose had to do in your explanation with trying to influence the buyer, to educate him as to what he's buying so that he wouldn't buy it. Is that incorrect or am I going to have to have your answer.read back?

A. No. Let me rephrase your question. I believe it's a mischaracterization. I believe what I said was that the Buyer Beware program strove to educate or inform the consumers, thereby allowing them to make a more informed decision. If that informed decision results in them not purchasing a gray market tractor, then they don't purchase a gray market tractor.

Q. All right. Then that's the purpose then, to educate them so that they won't buy gray market tractors?

A. Well, if we go back to your first terminology of this entire document which was advertising, the purpose of advertising is educating consumers so that they have the product that best serves their needs as opposed to other products that were out there. The purpose of advertising is to educate and inform and persuade people to try your product. That's what this does I believe.

Q. And persuade to do what?

A. One, the answer to these questions, okay, if the customer goes and gets these questions answered, he will be able to make an informed decision. If the gray market dealer is successful in overcoming those concerns on the part of the customer, the customer may purchase a gray market tractor.

If he's not successful and the customer still thinks he wants a small tractor, a small Kubota tractor that is different from the gray market tractor, then it's our hope that he will seek out a KTC dealer and we're successful selling it to them.

Q. So that's what you're trying to persuade him to do. And it is a function of persuasion to the general consuming public?

A. I've said that part of what advertising does is try to persuade, yes.

Q. And it's to the general public that these ads were taken?

A. Well, if it's that slice of the general public that's interested in a used tractor.

Q. And those who participate in the tractor world or the tractor industry, you're targeting them, boom, with these ads?

A. Yes, sir. We work in the tractor business, we're going to target those people in that industry.

(Killian Tr at 577 to 582).

303. With respect to CX76, Killian testified that by sending the KTC dealers CX76 "[w]e did not expect them to do anything. There's no request for the dealers to do anything or not do anything." (CX600 at 10).

304. Killian, in his direct witness statement on questions posed by complainants' counsel, testified regarding confusion as follows (CX600 at 18):

72. Q. Would you please explain this customer confusion in more detail?

A. Yes. The consumer sees the orange hood, the blue undercarriage, the Kubota name and they say, "Oh, it's a Kubota tractor and this one happens to have Japanese labels. Isn't that cute." They pay their money, they go down the road, they go to get the part, they can't get it and the dealer goes, Where did you get that? Now the customer is mad; he's unhappy. The confusion sometimes happens not on the first step or the second step. It's after the guy goes back home and says, "Whoa, time out. This isn't what I though I had. What I thought I had was one like my neighbor got."

Let me try to give you an example this way: Let's say there are two BMWs on the side of the road. I think they're neat looking. One is a five-something-something-i and one is a five-something-something-e. One may be designed for Germany, one for the U.S. As a fairly unsophisticated buyer, I'm drawn to those two cars because they have a great emblem and because of what I've heard about BMWs. If I buy the one designed for Germany and there were not parts here and it was

a gray market car and I get my BMW worked on, yeah, I am confused when he says, Mr. Killian, I can't help you. And I say, it's a BMW. The dealer says, "Yes, but ... ". That's where we are now. KTC has customers that are hearing from our dealers, "Yes, but ...". And at what point in the transaction does the confusion begin? I think it begins everywhere from -- there are used tractors available, to gee I thought I asked all the questions and I got the answers and I still find out there's differences, and now the customer is confused. The customer is confused about how to get parts as well. They expect parts and service can be supplied by an authorized Kubota dealer, but they find they can't get it.

305. On the buyer beware program, Killian testified (Tr at 877 to 882):

Q. I understand the buyer beware program was an effort to educate the consumers, right?

A. Yes, sir.

Q. And is it your view if this buyer beware information was widely disseminated, that you in fact would educate the consumers and clear up confusion about these gray market tractors?

A. Well, we believed that this would be one part of the process of helping to begin to clear up the confusion. It apparently hasn't worked, at least to this point, in clearing up all the confusion.

Q. Let me ask you this. Is it possible to clear up the confusion caused by the gray market products?

A. I don't believe so.

Q. Well, what's the problem with the confusion?

A. The problem, I guess, really cuts to the core of the Kubota name, the Kubota colors as they are known in this country. Essentially the orange tractor is Kubota. Our industry is not like the automobile industry. Green and yellow tractors are John Deere. Blue and white tractors are Ford, orange tractors are Kubota. So when that customer sees that orange tractor and he sees that Kubota name on it, to him that embodies what is Kubota and what has Kubota been, what is the promise of what he expects to get when he makes that purchase. Among the things he expects to get is a high quality product, parts support and service support. Simply telling customers there are two

orange tractors out there, one of them embodies what you believe it does and another group doesn't, we don't believe that clears up confusion totally. In fact, in some cases, it adds to the confusion because now the customer has to take a step he otherwise didn't think he had to take, which is, I found the orange tractor. Now I've got to figure out which one of them it is. So we think actually that it may not have done what we had hoped it would do.

Q. That's because in that situation the customer might not be able to know which kind of tractor it is just by looking at the tractor, right?

A. It may be because he can't determine by looking at the tractor. It may be that he believes he's done his due diligence, he has asked those questions, didn't either ask them properly or didn't get them answered in the way that he understood, then he brings it to an authorized dealer only to find out then that that support is not available and all of a sudden he's back confused again.

Q. What happens if the consumer was told, this product is not sponsored by Kubota in the United States, this product is not serviced by Kubota in the United States, this product may not have parts available in the United States. If a consumer is told that up front, would it be, in your view -- would in your view there be any confusion in that situation?

A. I think there would be a lot of confusion. I think the first thing the customer would say is why. And I think as I said earlier, any time you have a question why, that suggests to me some confusion.

Q. What if he's told why?

A. Then his question is, well, why is that, well, why aren't they available? To Mr. Walker's question, why don't you get a parts manual?

Q. You earlier discussed the situation of the BMW with the two different model numbers.

A. Uh-huh.

Q. If you were to offer a BMW and the seller was to tell you, this is a product that was sold by BMW in Germany, there may not be parts available, there may not be service available, BMW doesn't stand behind this product, you would pretty much have all the confusion cleared up, wouldn't you?

A. I guess -- I don't think so. I think the confusion would continue to exist. I think the customer still would say, I don't understand it. What's wrong with this picture? And if I take it to his next step, which is, well, there are these two things, I've got to figure out I can look for this information on this tractor, this information on another tractor, I think many consumers would simply say, I'll tell you what, I don't need to do that, I don't need to go to that effort, I may not ask the right questions, I may not get what I'm expected to get, I may not understand the answer right away, I'll just go buy green and yellow ones, they don't have that problem.

Q. But in your experience of the BMW situation, that hasn't been a problem for anybody, has it?

A. Well, the BMW may have been a farfetched example as Mr. Walker pointed out. But consumers know what's going on. One of them is made for Germany and one is made for the United States. And the consumer that gets one that's made for Germany is told it's not sponsored here, may not be parts, may not be manuals, may not be other things available. They know what they're getting into. They're not confused, right?

* * *

THE WITNESS: If I take out the BMW reference and go back to your initial question which was wouldn't that clear up all the confusion, I guess in my mind action I don't believe you can ever clear up all the confusion. I don't think you can clear it up in a way that makes sense to the customer.

306. CX559 are KTC documents associated with KTC's Buyer Beware program. They came into being in late 1994 or about the middle of 1995. Killian approved their use. (Killian Tr at 552, 553).

307. On such documents as shown in CX559, Killian testified (Tr at 568-570):

A. But the point is this ad is targeted at folks that may be interested in buying a used tractor. And we want to make sure that those people understood there are some differences here. And we want to remind them there is no warranty. I think the key part of that sentence is that there is nothing -- no warranty from our dealers, no other responsibility for our dealers or KTC.

Q. Now, do the person -- a person might trade a Kubota tractor, a used KTC tractor in to a John Deere dealer. Is that not common in the industry?

A. It's not common, but it does happen I'm afraid, yes.

Q. Even to a Case dealer?

A. On occasion.

Q. Is there any need to warn those folks that Kubota -- that that tractor has no warranty?

A. I don't know that it's necessary to warn those folks, if that's your question.

Q. Well, why is it necessary to warn the people that are going to buy the KBT tractors, if it's not necessary to warn the other people?

A. I guess my problem with it is your use of the word -- I don't know if it's an adjective or an adverb -- necessary. In our mind this factual statement was included in here along with we think some other very important factors. And this ad was targeted to make sure those consumers understood that there were some differences and hopefully will prompt questions.

Our belief is that an informed consumer makes a better decision. It may not be the decision that we wanted him to make, but I believe he makes a more informed decision. Frankly our feedback from a number of customers before we issued these things was a significant amount of confusion existed.

308. On the Buyer Beware program, Killian testified (Tr at 587 to 588):

Q. Now, did you expect your Buyer Beware program that was so broadly broadcast which you say you didn't expect them to like, did you expect it to have an impact on their sale of gray market tractors to the general public?

* * *

THE WITNESS: I misspoke. I thought earlier I could answer it in one word and I find that I can't answer it in a one-word response.

We expected that, as more and more consumers, expected purchasers of these gray market tractors knew more of the facts, understood what they were getting or not getting in a KTC tractor and a KBT tractor, that we would have less damage to our reputation. The end result of that may be that there were going to be fewer tractors sold.

BY MR. WALKER, SR.:

Q. Gray market?

A. That may be the end result. The purpose of the ad, though, was to educate consumers, not to --

Q. Now, again these are used tractors, the accused tractors, the gray market tractors, they're all used, are they not?

A. Yes, sir.

309. Killian testified as to the effect of a label (Tr at 952 to 953):

JUDGE LUCKERN: . . . But suppose one of the Respondents had a gray market tractor for sale or sold one, but there was a label on the tractor that said this is a certain -- in English, of course -- this is a certain agricultural tractor under 50 power take-off horsepower made by KBT of Japan for use in Japan, it was sold by KBT in Japan from 1971 to 1975 and was used in Japan, period. It does not have, and these differences that were talked about yesterday, or at least the Staff I think may have asked you some questions about this. And then also it had the sentence, This is not a KTC tractor and cannot be serviced as KTC tractors are by KTC dealers, period.

Your testimony still would be there would be likelihood of confusion in connection with the sale of that gray market tractor by one of the Respondents or by any dealer?

THE WITNESS: Yes, Your Honor, I believe there would still be confusion, I think on two counts, or in two cases. One, the Kubota name means something in the marketplace, and that's a set of expectations that the customer has for the tractor, even though it is used. He looks at the Kubota name and the colors, and builds in his mind a set of expectations about what he will get versus this tractor. What he believes that I still -- I think he is confused, even if such a decal existed, in terms of why is that, why don't any of these happen, what is different, why.

> And secondly, I think that, you know, what happens with the subsequent purchaser? What happens if that tractor has been reconditioned, repainted, the decals taken off, the decals fall off? How do we take care of that second, that subsequent purchaser?
>
> KTC tractors we know have a long service life. It may be that a KBT tractor ends up with a long service life. So I think the confusion exists, I think it would continue to exist in the marketplace, Your Honor.

310. In 1991, Billy Tomlinson bought a Kubota tractor (an L2000) from David Craft in the United States. The tractor had instruction labels in Japanese. Later Tomlinson attempted to get parts or service for the tractor from an authorized KTC dealer. It was then that the dealer told Tomlinson it was a gray market tractor, not made for the U.S. market and that the authorized KTC dealer could not provide parts or service. Tomlinson would not have purchased the tractor if he had known it was a gray market tractor and he testified that he would never buy a Kubota tractor again. (CX606 at 2, 3, 8, 11). Tomlinson however, later testified (Tr at 1164-1165):

> Q. If you saw a used tractor and it was a Kubota tractor and it had a little label on it that was a disclaimer that said this tractor wasn't designed for use in the United States and that you couldn't get parts and service but you could get a good deal on that tractor, and maybe it cost you $100 where you thought the tractor was worth a lot more, would you buy that tractor?
>
> A. If it was cheap enough that I could afford to throw the money away, yeah.
>
> Q. And if, a year after that, if you needed parts or service for that tractor and it was a Kubota tractor, said Kubota on there, where would you go?
>
> A. Probably go to the Kubota dealer, see if I could get parts.

Earlier with respect to a label, and in response to questions from the bench, Tomlinson testified (Tr at 1162 to 1163):

JUDGE LUCKERN: If it -- say there was a permanent label on the tractor and said this is a gray market tractor, would you -- when you bought it, would you have looked at that? I mean would you have just bought it anyway because you saw the K, or what, or would you have read the label on there? Do you understand what I'm trying to ask you?

THE WITNESS: Yes sir. If it would have had a label on it that said that, I would have probably questioned before I bought it what that was because I had never heard of that before.

JUDGE LUCKERN: If the label had said this is a tractor made by KBT of Japan for use in Japan and it was sold in Japan in 19 -- five years before you bought it and was used in Japan and it does not have various things, would you still have bought it?

THE WITNESS: I would have called -- I would have checked with the Kubota dealer, made sure I could have got parts for it before I bought it.

311. There is no Finding 311.

312. Leviticus testified (Tr at 1569 to 1571):

JUDGE LUCKERN: What if you -- you talked to dealers, you've seen these tractors. Suppose there is a label on these tractors that said this is a tractor made by KBT of Japan for use in Japan and it only has 20 horsepower and doesn't have the pinion, it doesn't have this or that. Would you still say that the public would be misled if the public bought that tractor --

THE WITNESS: -- if the public were given all the information --

JUDGE LUCKERN: On the label, on a label?

THE WITNESS: On labels, yes. I think he could make a decision then if he would still buy it.

JUDGE LUCKERN: I'm talking about these Kubota tractors, though. Suppose -- we have the orange color and we have the trademark there, so if you have the orange color and you have the trademark there but you also have a label, would you still, in your -- having been associated with dealers or looking at these tractors, would you still take the position that in spite of this label, because of the orange color, the

trademark, et cetera, and the Kubota that the public still would be misled? Do you understand what I'm trying to ask you?

THE WITNESS: Yeah, I -- I think I do. There is no label on tractors.

JUDGE LUCKERN: I know there isn't. I'm assuming there is a label.

THE WITNESS: Okay. Well, if the label would lay out what the tractor really was, I think then we will be fine to buy, because that is sort of truth in advertising, isn't it?

JUDGE LUCKERN: In spite -- how about the orange color and the trademark?

THE WITNESS: The orange color and the trademark make the people believe that it is a legitimate Kubota tractor, which Kubota stands behind, I think. That's what you -- what I would expect if I went to buy a tractor, if I went out -- if it wasn't for this case, I would not have known anything if I would have gone to buy a tractor or a friend of mine, if he would go out and if we see a Kubota tractor, it says Kubota on there and it says Japanese motto, if it's nice and cheap, I buy it, and that is ignorance on my part. That's why I buy it. So I've been misled if I later on I discover.

JUDGE LUCKERN: If it had a label on it, a permanent label was made in Japan for use in Japan and it only had 20 horsepower, et cetera, et cetera, et cetera, would you still say you were misled, you wouldn't bother reading the label?

THE WITNESS: No, I wouldn't -- I wouldn't -- I would not say I was misled. If I still would buy it, then I take the consequences.

Leviticus later, on examination by complainants' counsel, testified (Tr at 1636-1639):

THE REPORTER: "Question: Okay. In your opinion would a consumer, if he were to see a label such as that that indicated exactly what differences there were between that tractor and KTC tractors and indicated that KTC does not stand behind that tractor for parts and service, if there were such a label affixed to a gray market Kubota tractor, in your opinion what would be the consumer's reaction to such a sticker?"

THE WITNESS: I think the consumer would be sort of confused because he sees a Kubota tractor and then it says that Kubota doesn't

stand behind it for parts. I don't think that other things would matter to him so much as seeing a Kubota tractor with a statement that you can't get parts from Kubota. It's not going to a Chevy, to a Chevrolet or a Cadillac, and finding out that the dealer doesn't serve it, doesn't give service.

JUDGE LUCKERN: Is it your opinion that the consumer would still buy that tractor?

THE WITNESS: Well, I don't know if he would buy it, but he certainly would be confused, sir.

* * *

Q. And, if this hypothetical consumer, let's say he decided not to purchase that tractor because he saw the label that indicated exactly what the situation was with that gray market tractor, let's assume that that consumer decided not to purchase that gray market tractor. And let's also assume that later on he sees another tractor, say a KTC tractor that doesn't have such a warning label. In your opinion what would be his impression upon seeing that tractor?

* * *

THE WITNESS: You get all these hypotheses and you start wondering if your answer is hypothetical too.

I would think that the consumer would be even more confused unless he went and -- unless he went to the dealer and made sure, he might be turned away from buying a tractor of that sort because here is one which they service and another they don't service, what's going on here. It's sort of a difficult -- it's sort of a difficult decision to make for a consumer who is not aware of what's going on. Do you understand what I'm saying, sir?

313. Complainants' witness Larry Fransson is an officer and owner of Sound Tractor Company in Everett, Washington. The company has been an authorized KTC dealer since 1973 and Fransson became its owner in 1983. He can recognize a gray market tractor. He frequently receives calls from individuals asking for service for Kubota gray market tractors. KTC does not have a policy as to whether its authorized dealers may sell or service

gray market Kubota tractors but rather leaves the ultimate decision to the dealer. Sound Tractor will not sell, take in on trade, or service gray market tractors. (CX597 at 1, 3).

314. Fransson testified, as to the KTC's buyer beware program and consumer confusion (TR at 1063 to 1066):

Q. In response to question number 39, you indicate that you participated in the buyer beware program.

A. Yes.

Q. And you ran a couple of ads to educate consumers. Do you see that?

A. Uh-huh.

Q. What in your view would fully educate consumers about gray market tractors?

A. Boy, you know, that's a great question. I don't have the answer.

Q. Is it possible?

A. Well, I'm not --

JUDGE LUCKERN: He can't answer that.

THE WITNESS: I can't answer it.

* * *

THE WITNESS: You mentioned, mentioned decals.

MR. STEVENS: You were here for that testimony.

THE WITNESS: If I may, I am being sued today as a dealer because the customer did not read the decals on the tractor.

BY MR. STEVENS:

Q. What kind of decals?

A. It was a decal that says to set the parking brake. There's a decal that says to turn off the engine before dismounting. He did neither. Consequently, he ran over himself with the tractor and today I'm being sued.

Q. So in your view -- well, is it your view that you just simply cannot fully educate consumers because they just don't read everything?

A. They just don't read everything, or they may read it but they don't understand it, or you can hear but you don't listen. You can read but you don't see.

Q. But nonetheless, you run these ads in an attempt to educate the consumer?

A. In an attempt, yes.

* * *

Q. Let me try one more time. If you could give me an answer as to what you believe would most fully educate consumers about the gray market tractors situation?

A. I can't give you an answer, sir.

Q. Well, how about telling them, telling consumers that the tractors aren't sponsored by dealers like you in the United States. Would that go a long way toward educating consumers of gray market tractors?

A. I can't answer that. I don't know, I can't put myself in that position of a consumer to what would turn me on to gray market tractors. Maybe I'm not understanding you properly.

* * *

BY MR. STEVENS:

Q. Just to be sure, you can't put yourself in the place of consumers because you don't know what's going on in their heads?

A. That's correct.

315. Shigeru Kashihara joined Kubota (KBT) in 1970. He is presently manager of its Tractor Engineering Department. He testified in his direct testimony witness statement (CX599) as to Question 185 posed by complainants' counsel:

> 185. Q. Based on you many years as an engineer with Kubota and your review of Gamut, did you come to any conclusions about the activities of Gamut?
>
> A. First, I noted that after the tractors are repainted, Gamut places English language warning labels in various locations on the tractor. I believe this enhances confusion of American consumers because they are more likely to mistakenly believe from the English language warning labels that the tractor has been manufactured for the U.S. market.
>
> Second, I believe that the warning labels placed on the tractor by Gamut are there more for appearance reasons to make the tractor look more like an authorized U.S. model than for true safety reasons. The reason for this belief is that many of the warning labels are not applicable to the tractors on which they are placed. For example, one of the warning labels states: "WARNING TO AVOID PERSONAL INJURY: 1. Keep PTO shield in place at all times; 2. Do not operate the PTO at speeds faster than the speed recommended by the implement manufacturer." However, these tractors did not have a PTO shield which, as I testified earlier, is a very basic safety device. Thus, the caution to the user to make sure the shields are in place is meaningless. Also, most of the tractors which I inspected did not have labels next to the PTO shift lever to indicate to the consumer which position corresponds to what PTO speed. Therefore, warning no. 2 is also inapplicable because the operator does not know what PTO speed he is operating the implement at. Another caution label which Mr. De Pue stated he commonly places on his refurbished Kubota gray market models reads "CAUTION TO AVOID PERSONAL INJURY: 1. Read and understand the operator's manual before operation; and 4. Before allowing other people to use the tractor, have them read the operator's manual." However, as I testified earlier, operator's manuals in English are not available for these units. Also, several tractors had instructional and warning labels in Japanese which Mr. De Pue indicated he did not replace with any English language labels. These instructional labels are important because they advised the user on proper operation of the tractor.

Finally, I believe that their refurbishing process itself is deceptive because the tractors appear to be in much better condition than they truly are. Thus, from the outward appearance, the tractors truly appear as if they are barely used when in fact some of them are very old and may be mechanically unsound.

316. Kashihara testified (Tr at 715-718):

Q. But the substance of your answer in that first paragraph, question number 185 [CX599], is that someone will see a tractor that Kubota manufactured for the Japanese market and they'll see English language labels on it and then think to themselves, because it's got English language labels, they might be mistaken to believe that was made for the U.S. market as opposed to the Japanese market.

That's the substance of your testimony there?

JUDGE LUCKERN: That's the first paragraph. Only just look at the first paragraph.

BY MR. STEVENS:

Q. If not causes the confusion, but at least enhances the confusion; that's the testimony you gave, right?

A. In addition to what I stated earlier, sometimes the tractor's repainted in different colors and then the warning label is placed on that tractor, and such warning labels are similar to what Kubota used for their tractors. However, other labels including instruction labels are all removed, so if such tractors are sold by gray market dealers, unless a dealer himself tells the customers that such tractors are not authorized by Kubota, the users tend to believe that those tractors are identical to the tractors authorized by Kubota.

Q. It's because they see the language in English they might be -- they enhance the possibility of confusion, confusing that tractor for a tractor made in the United States. Right?

A. Well, if I were a user and if I was not told that this tractor was not intended for the U.S. market, I do not think I would have been able to distinguish between the models made for the Japanese market and models made for the U.S. market. It might be different if you would put label stating that this model is made for the Japanese market in English.

Q. Mr. Kashihara, I'm going to read your testimony. I want you to agree, if that is what it accurately says. Does your testimony accurately say, first: I notice, I noted that after the tractors are repainted, Gamut places English language warning labels in various locations on the tractor. I believe this enhances confusion of American consumer because they are more likely to mistakenly believe from the English language warning labels that the tractor has been manufactured for the U.S. market. Did I accurately read your testimony?

A. What is stated here is correct, but I just wanted to add some more so you would understand me.

317. Killian, with respect to competition, testified (Tr at 978 to 980):

Q. You testified that KTC is in the practice of selling new tractors. Do you feel as though KTC is in competition with gray market dealers for the sale of tractors?

A. When you say KTC is in competition with a gray market dealer --

Q. Yes.

A. No, not really. The requirements for a new tractor, the customer who is looking for a new tractor, and the customer who is looking for a used tractor, a gray market tractor or KTC tractor, are different. There's some overlap, but generally you've got difference in price, you've got difference in condition. They are common in that they are both looking for a tractor, but no, we are really not in competition with them.

Q. In response to the previous question, you said that the dealers came to you and asked you to either provide 100 percent parts and service or stop them. What were your concerns -- strike that. You just, in response to the last question, you gave an answer about the competition and whether or not they were in competition with each other.

A. Uh-huh.

Q. If there's no competition, why do you care so much about the sale of these gray market Kubota tractors?

A. It goes back to what I've said a number of times. Kubota's reputation is based on providing a high quality product, designed for this market, with 100 percent parts and service support. Any time that doesn't

happen, any time a purchaser buys a Kubota tractor and doesn't get that, he is dissatisfied.

In many cases, in some cases he explains to us, but that's the tip of the iceberg. Most of the time he doesn't. He tells his neighbor or someone else in conversation. So our reputation is harmed when we're not able to deliver on our commitment. We can deliver on our commitment all the time on a KTC tractor. We can't deliver on our commitment any of the time on the KBT tractor. So every time one of those tractors is purchased, there's another case where we are going to fail to live up to the customer's expectation. What he expects is this 100 percent parts and service support.

318. Respondent Lost Creek on July 17, 1995 had an advertisement which read in part (CX47):

USED TRACTORS
KUBOTA

L 1500 Kubota.....$2,450 or $97.50/month
B 7000 4 WD.....$2,750
L 1500 DT 4 WD.....$3,360
L 1801 DT 4 WD.....$4,300 OR $163/month

319. Respondent Lost Creek, on August 14, 1995, had an advertisement which read in part:

USED TRACTORS
KUBOTA

L 1500, 3pt, PTO, live hyd, great mower tractor, 700 hrs.....$2,550
L 1500 DT 4x4 w/Westendorf loader, 500 hrs.....$6,300
L 1801 DT 4x4 w/Westendorf loader, 360 hrs.....$7,000

(CX47).

320. Respondent Lost Creek, on October 9, 1995, had an advertisement (CX47) which read in part:

TRUCKLOAD SALE
CHECK OUT OUR NEW ARRIVAL OF
KUBOTA'S AND YANMAR'S
COMPARE OUR PRICE TO THEIRS

KUBOTA

18.5 hp 4x4, 3pt, PTO.....$5,800
With New Westendorf
loader 60' bucket.....$8,500
22.5 hp 4x4, 3pt, PTO.....$6,100
With New 1A55 Westendorf
loader 60' bucket.....$8,800
24 hp 4x4, 3pt. PTO.....$6,700
With New 7A111 Westendorf
loader 60' bucket.....$9,700

Their 16 hp 4x4.....$9,500
With loader.....$12,500

Their 21 hp 4x4.....$11,500
With loader.....$14,500

Their 24 hp 4x4.....12,500
With loader.....$15,500

321. Complainants, citing CXR 47 at 116 and CX47, have asserted that there is evidence that the prices for the accused KBT tractors are approximately 65% to 90% lower than the price for comparable KTC tractors (See CPFF947).

322. [

]

323. [

]

324. [

]

325. [

]

326. A flyer of respondent "Tractor Company" (CX56) read in part:

GRAY MARKET TRACTORS
"FACTS KUBOTA CORPORATION WOULD RATHER YOU DIDN'T KNOW"

> Bottom Line: There is an over supply of used diesel tractors in Japan. There is a shortage in the United States. Used Kubota tractors imported from Japan compete with new Kubota tractors. Kubota Corporation doesn't like it.
>
> "Gray Market" tractors were originally marketed, sold, and used in Japan. Kubota Corporation would have you believe these Kubota tractors are inherently different from the ones they sold new in the U.S. They are not. Think about it. If you were a profit oriented business, would you make completely different tractors for the Japanese and U.S. markets? It costs a lot of money to tool up for a different model. A smart manufacturer would sell

the same basic tractor to different markets with a minimum of modifications. Kubota Corporation did exactly that.

327. Many of the exporting respondents have sold KBT tractors to the importing/selling respondents. Eisho has obtained KBT tractors from Sanko, Suma, K&S Exporter, and Sonica. (CX223 at 9, 12.)

328. Sanko has obtained KBT tractors from Eisho, Tomoe Jidousha, Ichikawa Diesel, Suma, and others. (CX221 at 9, 12.)

329. Suma has obtained KBT tractors from Sanko, Eisho, K&S Exporters and Sonica. (CX220 at 9, 12.)

330. Bay Implement has imported KBT tractors from Sanko Industries Co., Ltd., Howa Corporation, Fujisawa Trading Agency, Hikari Corporation, Chugai Tradewide Boeki Shokay, Nitto Trading Corp. (CX589 at 74-77; CX149; CX150; CX151; CX152; CX153; CX154; CX224 at 11.)

331. Casteel has purchased approximately 225 KBT tractors from Fujisawa Trading Agency and 60 KBT tractors from Maruman Trading Agency. (CX132; CX133; CX134; CX222 at 9; CX299; CX585 at 28, 45, 47.)

332. Gamut has imported KBT tractors from a number of Japanese entities, some of whom are respondents in this investigation: OTA Trading Co., Ltd., Suma, Ichikawa Store, Eisho, Shibahira Trading Co., Ltd., Tomoe Jidousha Limited Co., Ken Corporation, Nitto Trading Co., and Sanko. (CX555 at 1; CX587 at 18, 22.)

333. On an annual basis, Gamut receives 200 to 300 used tractors from Ota Trading Co. (CX586 at 17.)

334. Wallace has obtained KBT tractors from Japan from Victory Enterprise Co., Narumi Trading Co., Ltd., Sanko, Suma Sangyo, Eisho, K. S. Enterprises Ltd., Toyo, Sansho Co., Ltd., J & A Trading, F. Uchiyama & Co., Ltd., Nitto Trading Co., Ltd. (CX195; CX196; CX197; CX227 at 13; CX308; CX528; CX594 at 69-74.)

335. Gamut has approximately 90 active dealers who regularly purchase KBT tractors, as well as other dealers which purchase tractors less frequently (once or twice a year). (DePue, Tr at 2412).

336. Gamut's dealers are located in every state except for Florida, North and South Dakota, and Maine. (DePue, Tr at 2412).

337. Many of the consumers who have written to KBT state that they have purchased the tractor in part due to the strong reputation of "Kubota" equipment. (CX54 at 1, 3; CX518 at 7, 10).

338. Several of the respondents have admitted the Kubota name has brand recognition and is known by consumers. (DePue, Tr at 2371-73; Casteel Tr at 2129; CX594 at 124-26; CX586 at 26-27).

339. Several respondents have also admitted that Kubota sells high quality tractors in the United States. (D. Varnado, Tr at 1955; Casteel, Tr at 2129; DePue, Tr at 2361; CX594 at 124-26).

340. Mr. DePue testified that respondent Gamut wants its customers to see the KBT tractors as Kubota brand tractors. (DePue, Tr at 2474). DePue believes that the Kubota name helps to promote Gamut's sales of KBT tractors. (DePue, Tr at 2371-73).

341. Gamut's dealers specifically request the Kubota brand. (CX586 at 26). Gamut's number one selling and number one demanded tractor is the KBT tractor. (DePue, Tr at 2475; CX587 at 38). DePue attributes this fact solely to KTC's marketing efforts in the United States. (DePue, Tr at 2475; CX587 at 38).

342. KBT, KTC and KMA have gathered information about the identity of entities that were or are exporting, importing or selling gray market KBT tractors. Complainants are aware of over eighty-nine (89) entities that engage in the exportation, importation and/or sale of the subject tractors. Such entities are located in Japan and throughout the United States. (Briggs, CX595 at 10; CX202 at E).

343. There are numerous entities that export KBT tractors to the United States from Japan that are not respondents in this investigation. (CX202 at Aff. E).

344. The domestic selling respondents obtain KBT tractors from numerous entities in Japan that are not named as respondents in this investigation. (CX298; CX299; CX302; CX303; CX307).

345. The domestic importing and selling respondents sell KBT tractors to wholesalers and end users located throughout the United States. (CX202 at Aff. E).

346. Bay Implement wholesales KBT tractors to dealers in Louisiana, Mississippi, Alabama, Tennessee, Kentucky, Texas and Georgia. (Harp, Tr at 2081-82). The Tractor Shop has shipped gray market KBT tractors to wholesale customers in Arizona, Illinois, Missouri, Texas and several other states. (D. Varnado, Tr at 1982; G. Varnado, Tr at 2074). Gamut sells to dealers in almost every state. (DePue, Tr at 2412).

347. There is currently a very high demand for KBT tractors in the United States and sales are steadily increasing. (DePue, Tr at 2360).

348. Respondent Gamut's sales of Japanese KBT tractors have increased from 1993 to 1995. (CX587 at 45-46). DePue also believes that competition has increased among dealerships for the sale of KBT tractors in the United States over the past two to three years and that more companies are selling Japanese KBT tractors in the United States than ever before. (CX587 at 71-72).

349. Nitto Trading Co. Ltd. currently has an inventory of KBT tractors intended for resale to purchasers in the United States. (Order No. 51).

350. Fujisawa currently has an inventory of KBT tractors intended for resale to purchasers in the United States. (Order No. 53).

351. Bay, Gamut, Tractor Shop, and Casteel maintain inventories of KBT tractors. (CX222 at 12-13; CX224 at 12-13; CX225 at 12-13; CX589 at 23; CPX6; Williams, CX609 at 7).

352. The Tractor Shop has a significant number of KBT tractors currently available for purchase. As of September 5, 1996, The Tractor Shop had approximately 20 tractors at its shop, 32 tractors at port and 20 tractors en route from Japan, of which approximately 90% are KBT tractors. (G. Varnado, Tr at 1987).

CONCLUSIONS OF LAW

1. The Commission has in rem jurisdiction and subject matter jurisdiction.

2. The Commission has in personam jurisdiction over the Walker respondents, Nitto Trading Co. Ltd., MGA and Lost Creek.

3. There is a domestic industry involving U.S. Registered Trademark No. 922,330 in issue.

4. There are unfair acts in the importation of the subject matter in issue involving infringement of U.S. Registered Trademark No. 922,330 in issue by the Walker respondents, Sonica, Toyo, The Tractor Company, Nitto Trading Co. Ltd., MGA and Lost Creek.

5. There is a violation of section 337.

6. Based on the violation it is recommended that a conditioned general exclusion order, as well as certain conditioned cease and desist orders, should issue.

7. A bond of ninety percent (90%) of the entered value of unlabeled infringing tractors is recommended.

ORDER

Based on the foregoing findings of fact, conclusions of law, the opinion, and the record as a whole, and having considered all of the pleadings and arguments presented orally and in briefs, as well as certain proposed findings of fact, it is the administrative law judge's initial determination that there is a violation of section 337 in the importation into the United States and sale for importation, or the sale within the United States after importation of certain agricultural tractors under 50 power take-off horsepower. Based on the foregoing, it is also his recommendation that a conditioned general exclusion order and conditioned cease and desist orders should issue and a certain bond be imposed.

The administrative law judge hereby CERTIFIES to the Commission his initial and recommended determinations together with the record consisting of the exhibits admitted into evidence and the exhibits as to which objections have been sustained. The pleadings of the parties filed with the Secretary and the transcript of the hearing, including closing arguments, are not certified, since they are already in the Commission's possession in accordance with Commission rules of Practice and Procedure.

Further it is ORDERED that:

1. In accordance with Commission rule 210.39, all material heretofore marked in camera because of business, financial, and marketing data found by the administrative law judge to be cognizable as confidential business information under Commission rule 201.6(a) is to be given in camera treatment continuing after the date this investigation is terminated.

2. Counsel for the parties shall have in the hands of the administrative law judge those portions of the initial and recommended determinations which contain bracketed confidential business information to be deleted from any public version of said determinations, and all attachments thereto, no later than Friday, December 6, 1996. Any such bracketed version shall not be served by telecopy on the administrative law judge. If no version is received from a party it will mean that the party has no objection to removing the confidential status, in its entirety, from this initial and recommended determinations.

3. The initial determination portion of the "Initial and Recommended Determinations," issued pursuant to Commission rule 210.42(h)(2), shall become the determination of the Commission forty-five (45) days after the service thereof, unless the Commission, within forty-five (45) days after the date of such service of the initial determination portion shall have ordered review of that portion or certain issues therein or by order has changed the effective date of the initial determination portion. Any findings and recommendation, made by the administrative law judge in said recommended determination portion, issued pursuant to Commission rule 210.42(a)(1)(ii), will be considered by the Commission in reaching a determination on remedy and bonding pursuant to Commission rule 210.50(a).

Paul J. Luckern
Administrative Law Judge

Issued: November 22, 1996