

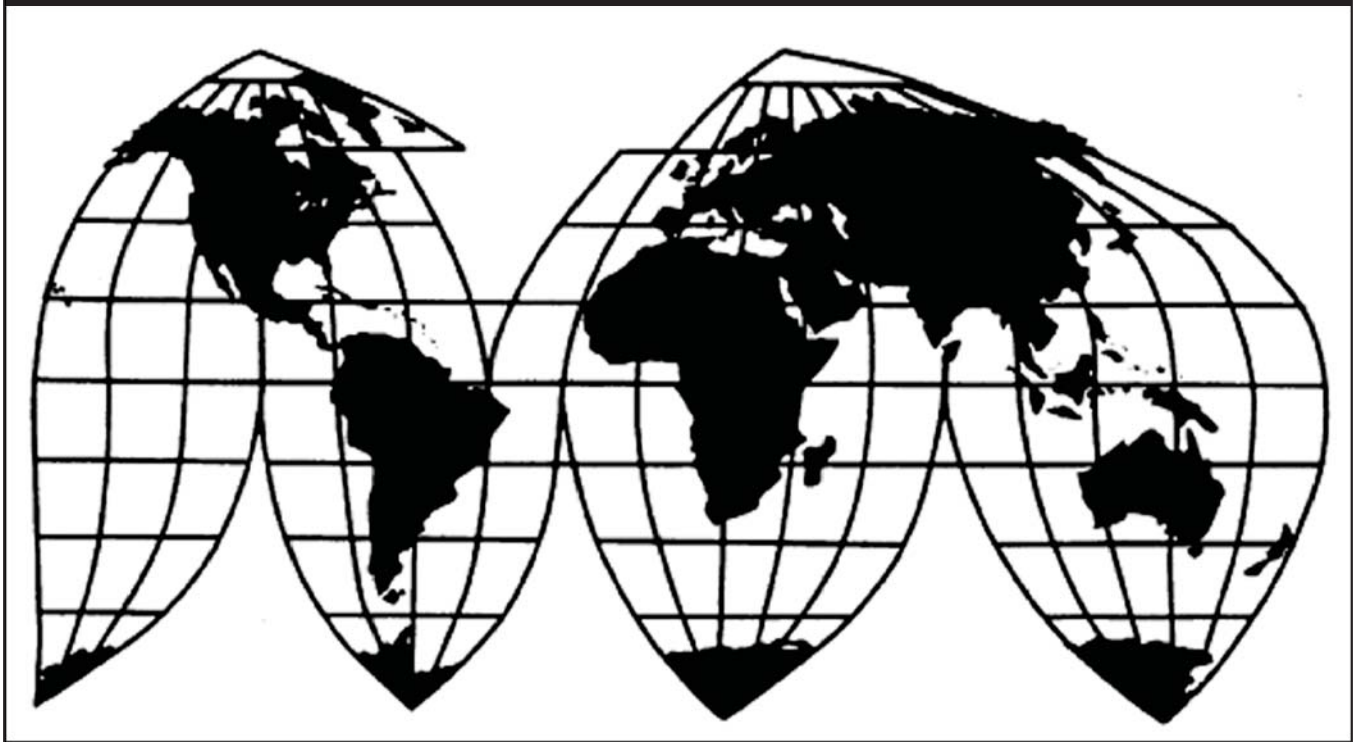
In the Matter of
**Certain Composite Wear Components and
Welding Products Containing Same**

Investigation No. 337-TA-644

Publication 4251

August 2011

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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U.S. International Trade Commission

Washington, DC 20436
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In the Matter of

Certain Composite Wear Components and Welding Products Containing Same

Investigation No. 337-TA-644



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

In the Matter of

**CERTAIN COMPOSITE WEAR
COMPONENTS AND WELDING PRODUCTS
CONTAINING SAME**

Investigation No. 337-TA-644

**NOTICE OF COMMISSION DETERMINATION TO TEMPORARILY RESCIND ITS
LIMITED EXCLUSION ORDER AND CEASE AND DESIST ORDER ENTERED ON
NOVEMBER 24, 2009 PENDING RESOLUTION OF FEDERAL CIRCUIT APPEAL**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to temporarily rescind its exclusion order and cease and desist order entered on November 24, 2009 against respondents AIA Engineering Limited and Vega Industries Ltd. ("AIA") in the subject investigation, pending resolution of the validity of United States Patent No. RE39,998 by the United States Court of Appeals for the Federal Circuit.

FOR FURTHER INFORMATION CONTACT: Jia Chen, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-4737. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on April 21, 2008, based on a complaint filed by Magotteaux International S/A and Magotteaux Inc. ("Magotteaux"). 73 *Fed. Reg.* 22431 (Apr. 25, 2008). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain composite wear components and products containing the same that infringe certain claims of U.S. Patent No. RE39,998. The complaint named Fonderie Acciaiere Rioale S.P.A. ("FAR") and AIA as respondents. FAR was subsequently terminated from the investigation on the basis of a settlement agreement, leaving AIA as the remaining respondent.

On November 24, 2009, the Commission issued a limited exclusion order and a cease and desist order against AIA, who was found by the ALJ to be in default. The limited exclusion order prohibits the unlicensed entry for consumption of composite wear components and products containing the same that are covered by one or more of claims 12-13 and 16-21 of the '998 patent and that are manufactured abroad by or on behalf of, or are imported by or on behalf of, AIA or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns. 74 *Fed. Reg.* 62814 (Dec. 1, 2009). The cease and desist order covers products that infringe claims 12-13 and 16-21 of the '998 patent and is directed to domestic respondent Vega Industries and any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled and majority owned business entities, successors, and assigns. *Id.*

On September 3, 2010, the '998 patent was declared invalid by the District Court for the Middle District of Tennessee in a declaratory judgment action filed by AIA against Magotteaux. On September 28, 2010, Magotteaux noticed an appeal of the district court's decision to the Court of Appeals for the Federal Circuit. On October 5, 2010, AIA filed a petition under 19 U.S.C. § 1337(k) and 19 C.F.R. § 210.76 asking the Commission to rescind its November 24, 2009 exclusion order and cease and desist order in light of the district court's holding invalidating the '998 patent. Complainant Magotteaux opposed the petition on October 15, 2010 and requested that the Commission hold a public hearing. The Commission investigative attorney did not file a formal response, but did provide copies of certain Commission opinions referenced by Magotteaux in its opposition that were unavailable to the parties via the Commission's EDIS database. On October 21, 2010, Magotteaux filed a motion for leave to supplement its October 15, 2010 response. On October 27, 2010, AIA filed a motion for leave to file a reply to Magotteaux's response and supplement response. On November 1, 2010, the Commission granted both motions for leave. On November 11, 2010, Magotteaux moved for leave to file a sur-reply in response to AIA's Reply. On November 19, 2010, AIA opposed the motion. On November 29, 2009, the Commission granted Magotteaux's motion for leave to file a sur-reply, but indicated that no further briefing was expected.

After consideration of the petition and the responses and replies thereto, the Commission has determined to temporarily rescind its limited exclusion order and cease and desist order entered on November 24, 2009 against AIA pending resolution on appeal of the district court's decision by the Federal Circuit. The Commission's remedial orders will become permanently rescinded if the Federal Circuit affirms the district court's judgment with respect to claims 12-13 and 16-21 of the '998 patent, *i.e.*, the claims covered by the Commission's remedial orders, and will be reinstated if the Federal Circuit reverses the district court's judgment with respect to those claims. The Commission has determined to deny Magotteaux's request for a public hearing.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in section 210.76(b) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76(b)).

By order of the Commission.

A handwritten signature in black ink, appearing to read "Marilyn R. Abbott". The signature is fluid and cursive, with the first name being the most prominent.

Marilyn R. Abbott
Secretary to the Commission

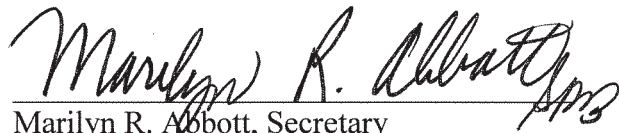
Issued: January 18, 2011

**CERTAIN COMPOSITE WEAR COMPONENTS AND
PRODUCTS CONTAINING THE SAME**

337-TA-644

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF COMMISSION DETERMINATION TO TEMPORARILY RESCIND ITS LIMITED EXCLUSION ORDER AND CEASE AND DESIST ORDER ENTERED ON NOVEMBER 24, 2009 PENDING RESOLUTION OF FEDERAL CIRCUIT APPEAL** has been served by hand upon the Commission Investigative Attorney, David O. Lloyd, Esq., and the following parties as indicated, on JAN 19 2011



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U.S. International Trade Commission
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 Via First Class Mail
() Other: _____

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

In the Matter of

**CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS
CONTAINING SAME**

Investigation No. 337-TA-644

COMMISSION OPINION

On May 22, 2009, complainants Magotteaux International S/A and Magotteaux Inc. (collectively, “Magotteaux”) moved for attorney’s fees and sanctions against defaulting respondents AIA Engineering Ltd. and Vega Industries (collectively, “AIAE”). *See* Motion Docket No. 644-039. On July 17, 2009, the presiding administrative law judge (“ALJ”) (Judge Essex) issued a recommended determination (“RD”) (Order No. 27) recommending that the Commission grant Magotteaux’s motion in part. The Commission has determined to adopt the ALJ’s recommendation to award Magotteaux attorney’s fees, but has determined to reduce the amount requested by Magotteaux. This opinion sets forth the reasons for the Commission’s determination.

I. BACKGROUND

The Commission instituted this investigation on April 25, 2008, based on a complaint filed by Magotteaux. *73 Fed. Reg.* 22431 (Apr. 25, 2008). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain composite wear components and welding products containing the same that infringe

several claims of U.S. Patent No. RE39,998. The complaint named Fonderie Acciaiere Rioale S.P.A. (“FAR”) and AIAE as respondents. FAR was terminated from the investigation on the basis of a settlement agreement, leaving AIAE as the remaining respondents.

Although AIAE filed a response to the complaint on November 26, 2009, AIAE reduced their participation in discovery by February of 2009. *See* RD at 5. As a result, between February 9, 2009 and February 24, 2009, Magotteaux and the Commission investigative attorney (“IA”) filed a series of motions to compel discovery from AIAE. *See* Motion Docket Nos. 644-027 (“Complainants’ Motion to Compel the Appearance of Respondents AIA Engineering Limited and Vega Industries Ltd.’s Witnesses for Deposition”); 644-031 (“Complainants Magotteaux International S/A and Magotteaux, Inc.’s Motion to Compel Production”); and 644-032 (“Commission Investigative Staff’s Motion to Compel Responses to Contention Interrogatories”).

On March 19, 2009, the ALJ issued Order No. 23 granting these motions to compel and ordering AIAE to respond to written discovery and to produce fact and expert witnesses for deposition. AIAE failed to comply with the order and continued to refuse to participate in discovery. On March 23, 2009, AIAE filed a notice informing the ALJ that they would not participate any further in the investigation. *See* Respondents AIA Engineering Limited’s and Vega Industries Ltd.’s Notice of Filing of District Court Action and Statement of Position with Respect to ITC Investigation No. 337-TA-644.

On March 27, 2009, the IA filed a motion requesting an initial determination (“ID”) finding AIAE in default. Magotteaux filed a response supporting the IA’s motion. Motion Docket No. 644-037. On April 13, 2009, Magotteaux filed its own motion for default in which Magotteaux sought adverse inferences against AIAE on importation, infringement, and domestic industry.

Motion Docket No. 644-038. The IA supported Magotteaux's motion. AIAE opposed both motions. On May 8, 2009, the ALJ issued an ID (Order No. 26) finding AIAE in default pursuant to Commission Rules 210.16(a)(2) and 210.17 (19 C.F.R. §§ 210.16(a)(2) and 210.17). The Commission determined not to review the ID and indicated that, in addition to the ALJ's finding of violation pursuant to Commission Rule 210.17, the Commission presumes the facts alleged in the complaint to be true with respect to AIAE. In response to the Commission's notice, Magotteaux, AIAE, and the IA each filed submissions and response submissions concerning remedy, the public interest, and bonding on July 22, 2009 and July 30, 2009, respectively. After examining the record in this investigation, the Commission issued a limited exclusion order and a cease and desist order against AIAE and terminated the investigation.

On May 27, 2009, Magotteaux moved for attorney's fees and sanctions against AIAE. Motion Docket No. 744-039. On June 1, 2009, AIAE filed its opposition to Magotteaux's motion. On June 5, 2009, the IA filed a Response to Complainants' Motion for Attorney's Fees and Sanctions ("IA Response") which supported Magotteaux's motion in part. In the IA's Response, he indicated that Magotteaux should submit detailed billing records to support its motion for attorney's fees and sanctions. IA Response at 13, n.5. As a result, Magotteaux filed a Supplemental Submission to its motion for attorney's fees and sanctions ("First Supplemental Submission") on June 15, 2009. On July 17, 2009, the ALJ issued the subject RD (Order No. 27) granting Magotteaux's motion in part. On October 2, 2009, Magotteaux filed a Second Supplemental Submission to its motion ("Second Supplemental Submission") providing additional information identified by the ALJ.

II. ANALYSIS

Magotteaux requested sanctions in the form of attorney's fees totaling because according to Magotteaux, AIAE's conduct throughout this investigation caused damage to Magotteaux. Complainants' Motion for Attorney's Fees and Sanctions, Memo at 10 and 19. The ALJ stated that monetary sanctions are permitted against AIAE under Commission Rule 210.33(c) because AIAE failed to obey Order No. 23, which directed AIAE to respond to written discovery and to produce fact and expert witnesses for deposition. RD at 8. The ALJ concluded, however, that under Rule 210.33(c), Magotteaux is only entitled to receive attorney's fees associated with activities caused by AIAE's failure to comply with Order No. 23. *Id.* at 9. The ALJ found that as a result of AIAE's failure to comply with Order No. 23, Magotteaux filed a motion for default (Motion Docket No. 644-038) in which Magotteaux sought adverse inferences against AIAE on importation, infringement, and domestic industry; the IA also filed a motion for default (Motion Docket No. 644-037) RD at 9; *see* Motion Docket Nos. 644-037 and 644-038. Accordingly, the ALJ recommended that Magotteaux be compensated for the attorney's fees it incurred for preparing and filing its default motion and its response to the IA's default motion. RD at 9. As for Magotteaux's remaining request for attorney's fees, the ALJ concluded that Magotteaux did not show that these costs were caused by AIAE's failure to comply with Order No. 23. *Id.* at 10.

The ALJ did not identify a particular dollar amount that Magotteaux should receive and indicated that the supporting billing entries were not fully allocated, stating:

The fees incurred may very well be for the requested amount of \$58,398.50 as represented by Magotteaux in its motion. However, given that the billing records [included in Magotteaux's First Supplemental Submission] list costs incurred that are not related to the motions for default combined with those that are, the ALJ believes that Magotteaux is in the best position to point to the specific billing

entries to support its requested fees should the Commission determine that such support is necessary.

Order No. 27 at 13, n. 8. In response, on October 2, 2009, Magotteaux filed its Second Supplemental Submission containing a more detailed billing record and an affidavit from counsel for Magotteaux explaining how it allocated the costs.

We agree with the ALJ that AIAE's conduct during the investigation warrants sanctions.

Commission Rule 210.25 provides generally for sanctions as follows:

Any party may file a motion for sanctions for abuse of process under § 210.4(d)(1), abuse of discovery under § 210.27(d)(3), failure to make or cooperate in discovery under § 210.33 (b) or (c), or violation of a protective order under § 210.34(c).

19 C.F.R. § 210.25. There is some question about which basis Magotteaux relied on for sanctions because Magotteaux argued broadly that AIAE has "(1) taken impermissible liberties with the rules of this Court, (2) implemented a defense based on delay tactics, (3) made false representations of their intent to participate, and (4) otherwise done everything possible to extend, complicate and make this Investigation unnecessarily protracted." Complainants' Motion for Attorney's Fees and Sanctions at 1. The only rules explicitly identified by Magotteaux in support of its motion, however, are Commission Rules 210.25 and 210.33. *See* Complainants' Motion for Attorney's Fees and Sanctions, Memo at 1 ("Complainants . . . for their Memorandum of Points and Authorities in Support of Magotteaux's Motion for Sanctions and Attorneys' Fees pursuant to §§ 210.25 and § 210.33 . . ."). Accordingly, we agree with the ALJ that Magotteaux is seeking sanctions only for "failure to make or cooperate in discovery under § 210.33(b) or (c)." 19 C.F.R. § 210.25; RD at 8.

Magotteaux requested monetary sanctions arising from AIAE's failure to cooperate

throughout the underlying investigation. Complainants' Motion for Attorney's Fees and Sanctions at 10 and 19. Commission Rule 210.33(c) governs monetary sanctions and states:

If a party . . . fails to obey an order to provide or permit discovery . . . the administrative law judge . . . upon motion . . . may require the party failing to obey the order or the attorney advising that party or both to pay reasonable expenses, including attorneys' fees, caused by the failure

19 C.F.R. § 210.33(c).

Therefore, under Commission rule 210.33(c), Magotteaux may only recover those attorney's fees incurred as a result of AIAE's failure to comply with an order to provide or permit discovery. The ALJ issued only one order regarding discovery, Order No. 23. The only actions Magotteaux took in response to AIAE's failure to comply with Order No. 23 were to file its April 13, 2009 motion for default and to respond to the IA's March 27, 2009 motion for default. Thus, Magotteaux is entitled to its fees associated with those filings.

According to Magotteaux, the fees associated with the default motions total \$58,398.50. Complainants' Motion for Attorney's Fees and Sanctions at 18. Magotteaux presented copies of bills relating to these motions to support its request for sanctions, but several of the billing entries cover charges related to the default motions as well as charges related to other tasks in a single "mixed" entry. In response to the ALJ's statement that Magotteaux is in the best position to point to billing entries that support its requested fees, Magotteaux submitted its Second Supplemental Submission explaining how Magotteaux allocated the cost. Specifically, counsel for Magotteaux identified 33 billing entries that are solely related to filing a response to the IA's motion for default and to filing Magotteaux's own motion for default ("default entries"). These 33 entries, according to counsel for Magotteaux's affidavit, alone total \$58,771.50. Counsel for Magotteaux also

identified 18 billing entries that cover fees for the response and/or the motion for default as well as for other work (“mixed entries”). Of these 18 entries, according to the affidavit, \$16,733.17 was allocated to work related solely to the response and/or motion for default. To arrive at this figure, counsel for Magotteaux applied an allocation formula that takes the total number of tasks associated with the response and/or the motion for default as the numerator and the total number of tasks for each entry as a denominator, and multiplies the fees associated with each entry by this fraction. Thus, the total amount of attorney’s fees for filing a response to the IA’s motion for default and for filing its own motion for default, as asserted by Magotteaux, is \$75,504.67.

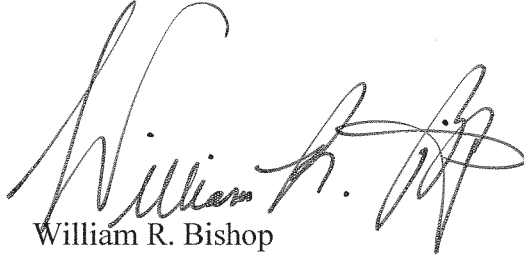
After a detailed examination of Magotteaux’s Second Supplemental Submission, we find that with respect to the mixed entries, Magotteaux did not meet its burden to show what portion of the mixed entry is associated with the default motions. There is no evidence to support the assertion that each task listed in a single mixed billing entry took the same amount of time. Indeed, Magotteaux’s apportionment formula appears to give greater weight to work related to the default motions than seems appropriate. Because we cannot rely on this apportionment methodology and it is not clear how these mixed entries should be apportioned, we cannot award Magotteaux attorney’s fees for the mixed entries. With respect to the default entries, we find that three entries in this category, entries 26, 27, and 29, are mixed entries that do not relate solely to the default motions and thus cannot be relied upon. In addition, we find that three other entries in this category, entries 3, 5, and 6, occurred before Order No. 23 issued and therefore also cannot be relied upon. Accordingly, the Commission finds that Magotteaux is entitled to attorney’s fees in the amount of

the remaining default entries, totaling \$43,366.¹

III. CONCLUSION

For the reasons discussed herein, the Commission has determined to grant Magotteaux's motion in part and award Magotteaux attorney's fees in the amount of \$43,366.

By order of the Commission.



William R. Bishop
Acting Secretary to the Commission

Issued: June 7, 2010

¹ Commissioner Lane respectfully dissents from the award calculated by the majority. Commissioner Lane agrees with the ALJ's determination, and the majority's decision, to award sanctions in the form of attorney's fees for costs incurred by Magotteaux that are directly related to the activities caused by AIAE's failure to comply with the Administrative Law Judge's Order No. 23. These costs include the attorney fees Magotteaux incurred by preparing and filing a response to the IA's motion for default and for Magotteaux's preparing and filing its own motion for default. Commissioner Lane, however, does not agree with the monetary level of the award granted by the majority.

The motion and response filed in this case appear to be fairly routine for experienced practitioners. Thus, reasonable fees for this motion and response should be based upon a value-based services billing model or flat-fee model rather than the hourly rate model involving numerous lawyers and hours of time.

Commissioner Lane determines that a value-based or flat-fee billing for the motion and response at issue would justify an amount much lower than the requested amount and certainly not more than \$20,000.


**CERTAIN COMPOSITE WEAR COMPONENTS AND
PRODUCTS CONTAINING THE SAME**

337-TA-644

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, David O. Lloyd, Esq., and the following parties as indicated, on

June 7, 2010



Marilyn R. Abbott, Secretary
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**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436**

In the Matter of

**CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS
CONTAINING SAME**

Investigation No. 337-TA-644

COMMISSION OPINION

On October 5, 2010, respondents AIA Engineering Limited and Vega Industries Ltd. (collectively “AIA”) filed a petition to rescind the Commission’s limited exclusion order and cease and desist order issued on November 24, 2009. AIA argues that the orders should be rescinded in light of a September 3, 2010 decision by the United States District Court for the Middle District of Tennessee declaring invalid the sole patent covered by the Commission’s orders, United States Patent No. RE39,998 (“the ‘998 patent”). The district court’s decision is currently on appeal by Magotteaux to the Court of Appeals for the Federal Circuit. Complainants Magotteaux International S/A and Magotteaux Inc. (collectively “Magotteaux”) oppose the petition and request that the Commission instead issue a temporary exclusion order and cease and desist order allowing importation under bond.

After consideration of the petition and the responses and replies thereto, the Commission has determined to temporarily rescind its limited exclusion order and cease and desist order against AIA pending resolution of the district court’s decision on appeal. The Commission has further determined to permanently rescind its remedial orders if the Federal Circuit affirms the district court’s judgment of invalidity with respect to the claims covered by the Commission’s remedial orders, *i.e.*, claims 12-13 and 16-21 of the ‘998 patent, and to reinstate its orders if the Federal

PUBLIC VERSION

Circuit reverses the district court's judgment with respect to those claims.¹

I. BACKGROUND

A. Investigation Before the Commission

The Commission instituted this investigation on April 25, 2008, based on a complaint filed by Magotteaux. 73 *Fed. Reg.* 22431 (Apr. 25, 2008). The complaint named Fonderie Acciaiere Rioale S.P.A. ("FAR") and AIA as respondents. On January 30, 2009, FAR was terminated from the investigation on the basis of a settlement agreement, leaving AIA as the remaining respondent.

The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain composite wear components and welding products containing the same that infringe one or more of claims 1-22 of the '998 patent.²

On March 23, 2009, AIA filed a notice informing the ALJ that they would not participate any further in the investigation. *See* Respondents AIA's Notice of Filing of District Court Action and Statement of Position with Respect to ITC Investigation No. 337-TA-644. AIA further informed the ALJ that they intended to seek redress against Magotteaux's allegations of patent infringement in the United States District Court for the Middle District of Tennessee. *Id.* On March 27, 2009, the Commission investigative attorney ("IA") filed a motion requesting an initial determination ("ID") finding AIA in default. Magotteaux filed a response supporting the IA's motion as well as its own motion for default seeking adverse inferences against AIA on

¹ Magotteaux also petitioned the Commission to hold a public hearing regarding Magotteaux's request for temporary relief. The Commission has determined to deny Magotteaux's petition.

² Magotteaux subsequently withdrew its infringement assertions with respect to claims 1-11, 14-15, and 22.

PUBLIC VERSION

importation, infringement, and domestic industry.

AIA opposed both motions. On May 8, 2009, the ALJ issued an ID (Order No. 26) finding AIA in default pursuant to Commission Rules 210.16(a)(2) and 210.17 (19 C.F.R. §§ 210.16(a)(2) and 210.17). In addition, pursuant to the authority to find adverse inferences under Rule 210.17, the ALJ found AIA in violation of section 337 in that (1) the accused products infringe the asserted claims of the '998 patent; (2) AIA imports or sells for importation composite wear components and products containing the same that infringe the asserted claims of the '998 patent; and (3) a domestic industry exists with respect to articles protected by the '998 patent. Order No. 26.

On July 7, 2009, the Commission determined not to review the ID and indicated that, in addition to the ALJ's finding of violation pursuant to Commission Rule 210.17, the Commission presumes the facts alleged in the complaint to be true with respect to AIA. In response to the Commission's notice, Magotteaux, AIA, and the IA each filed submissions and response submissions concerning remedy, the public interest, and bonding on July 22, 2009 and July 30, 2009, respectively. After examining the record in this investigation, the Commission determined that the appropriate relief was a limited exclusion order and a cease and desist order against AIA under section 337(d) and section 337(f), respectively. The limited exclusion order prohibits the unlicensed entry for consumption of composite wear components and products containing the same that are covered by one or more of claims 12-13 and 16-21 of the '998 patent and that are manufactured abroad by or on behalf of, or are imported by or on behalf of, AIA or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns. 74 *Fed. Reg.* 62814 (Dec. 1, 2009). The cease and desist order again covers products that infringe claims 12-13 and 16-21 of the '998 patent and is directed to domestic respondent Vega

PUBLIC VERSION

Industries Ltd. and any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled and majority owned business entities, successors, and assigns. *Id.*

The Commission determined that the public interest factors enumerated in 19 U.S.C. §§ 1337(d) and (f) did not preclude issuance of the aforementioned remedial orders, and that the bonding during the Presidential period of review should be set at 100 percent of the entered value for any covered composite components and products containing same. *Id.*

B. Declaratory Judgment Action Before the Middle District Court of Tennessee

On March 16, 2009, AIA initiated an action against Magotteaux in the District Court for the Middle District of Tennessee, seeking a declaratory judgment that its products do not infringe the '998 patent and a declaration that the '998 patent is invalid and unenforceable. *See* District Court Docket Sheet, Dkt No. 1 (AIA Complaint filed March 16, 2009). Before the district court, AIA moved for summary judgment that Magotteaux improperly recaptured subject matter in the '998 patent surrendered during prosecution of U.S. Patent No. 6,399,176B1 ("the '176 patent"), the original patent from which the '998 patent reissued. *See* District Court Docket Sheet, Dkt Nos. 88 and 97.

On September 3, 2010, the district court issued an order granting AIA's motion for summary judgment of invalidity due to improper recapture. Citing 35 U.S.C. § 251 and relevant decisions from the Federal Circuit, the district court explained that under the "recapture" rule, subject matter surrendered during prosecution of an original patent cannot be claimed again in a reissue patent. *See* Dkt. No. 169 (Memorandum Decision Granting AIA Motion for Summary Judgment of Invalidity due to Improper Capture) at 32. The district court did not specifically address the validity of the dependent claims of the '998 patent under the doctrine of recapture.

PUBLIC VERSION

Nevertheless, it is clear that the district court invalidated *all* claims of the '998 patent under the doctrine. As cited by the district court and as held by the Federal Circuit, "if the reissue claim is as broad as or broader in an aspect germane to a prior art rejection, but *narrower in another aspect completely unrelated to the rejections*, the recapture rule bars the claims." *In re Clement*, 131 F.3d 1464, 1470 (Fed. Cir. 1997) (emphasis added); *see also* Dkt. No. 169 at 32. In its motion for summary judgment, AIA argued that even if there were narrower aspects of the dependent reissue claims, none are related to the surrender of the subject matter at issue. *See* Dkt. No. 88 (AIA Motion for Summary Judgment of Invalidity due to Improper Recapture) at 15. In response, Magotteaux did not contest this particular argument. *See* Dkt. No. 107 (Magotteaux's Opposition to AIA's Motion for Summary Judgment). Moreover, the district court noted that with the finding of impermissible recapture of the subject matter claimed in independent claims 1 and 12, "the Court deems consideration of the parties' other contested patent terms and contentions to be unnecessary." Dkt. No. 169 at 35.

Magotteaux filed a notice of appeal of the district court's summary judgment ruling with the Federal Circuit on September 28, 2010.

C. AIA's Petition to Rescind the Commission's Remedial Orders

On October 6, 2010, AIA filed a petition under section 337(k) and 19 C.F.R. § 210.76 asking the Commission to rescind its exclusion order and cease and desist order entered on November 24, 2009, arguing that the orders must be rescinded because conditions of fact, law, and the public interest have changed since the orders were entered.³ Respondents' Petition to Rescind

³ Counsel for AIA filed the petition before the ALJ, but the petition and related submissions are being treated as if they were filed before the Commission.

PUBLIC VERSION

Exclusion and Cease and Desist Order due to Declaratory Judgment that Patent at Issue is Invalid (“Resp. Pet.”). On October 18, 2010, Magotteaux filed an opposition response to AIA’s petition under 19 C.F.R. § 210.76(a), requesting that (1) the AIA petition be denied; (2) the investigation be reopened; (3) Magotteaux be awarded a temporary exclusion and cease and desist order under bond; and (4) the investigation be stayed until Magotteaux’s appeal rights are exhausted.

Complainant’s Opposition to Respondents’ Petition to Rescind Exclusion and Cease and Desist Order & Petition for Temporary Relief Under Bond and A Public Hearing on Same (“Comp. Opp.”). In addition, Magotteaux petitioned the Commission to hold a public hearing under 19 C.F.R. § 210.76(b). *Id.* at 1. The IA did not take a position on the petition, but provided copies of certain Commission opinions referenced by Magotteaux in its opposition response that were unavailable to the parties via the Commission’s EDIS database.

On October 21, 2010, Magotteaux moved for leave to supplement its opposition response in light of the Commission opinions provided by the IA. Complainant’s Supplement Opposition to Respondents’ Petition to Rescind Exclusion and Cease and Desist Order (“Comp. Supp. Opp.”). On October 27, 2010, AIA moved for leave to file a reply to Magotteaux’s response and supplemental response. Respondents’ Reply in Support of Petition to Rescind Exclusion and Cease and Desist Order Due to Declaratory Judgment that Patent at Issue is Invalid (“Resp. Reply”). On November 1, 2010, the Commission granted both motions for leave. On November 11, 2010, Magotteaux moved for leave to file a sur-reply. Complainant’s Memorandum in Support of its Motion for Leave to File a Sur-Reply to Respondents’ Petition to Rescind Exclusion and Cease and Desist Order (“Comp. Sur-Reply”). On November 19, 2010, AIA filed an opposition to Magotteaux’s motion. Respondents’ Opposition to Magotteaux’s Motion for Leave to File

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Sur-Reply. The Commission granted Magotteaux's motion on November 29, 2010, but indicated that no further briefing was expected.

III. THE PARTIES' ARGUMENTS

AIA argues in its petition that the Commission does not have statutory authority to maintain an exclusion or cease and desist order based on an invalidated patent, and that the Commission has the authority to rescind any such order as soon as the patent's invalidity is brought to its attention. Resp. Pet at 6. AIA also argues that the district court's final judgment of invalidity is binding on the Commission and that the judgment is issue preclusive, notwithstanding Magotteaux's appeal to the Federal Circuit. *Id.* at 6-11 (citing, *inter alia*, *SSIH Equip. S.A. v. U.S. Int'l Trade Comm'n*, 718 F.2d 365, 370 (Fed. Cir. 1983) and *Certain Personal Computers*, Inv. No. 337-TA-352, Order No. 25).

Magotteaux argues in response that instead of completely rescinding the remedial orders, the Commission is authorized under statute and case law to rescind the orders and to reopen the investigation and to reissue the same relief to Magotteaux under bond, pending outcome of the Federal Circuit appeal. Comp. Opp. at 6. According to Magotteaux, the situation here is "on all fours" with the facts in *Certain Steel Rod Treating Apparatus and Components Thereof*, 337-TA-97 ("*Steel Rod*"). In that investigation, due to an invalidity ruling by the district court in a parallel action, the Commission revoked its prior exclusion order and issued a new order allowing importation under bond pending final determination of the district court's ruling. *Id.* at 6. Magotteaux urges the Commission to grant the same relief in the instant investigation in order to maintain the status quo. Comp. Supp. Opp. at 2. Magotteaux also argues that the equities in the present matter weigh in favor of granting Magotteaux relief under bond. Comp. Opp. at 10.

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Magotteaux further argues that AIA's reliance on *Certain Personal Computers* is misplaced because there was no outstanding remedy involved when the district court invalidated one of the patents in that investigation. *Id.* at 11.

AIA argues in reply that Magotteaux has not made the requisite showing for temporary relief under bond pursuant to 19 U.S.C. § 1337(e)(3) and Commission Rule 210.52, and that Magotteaux's reliance on *Steel Rod* is misplaced. Resp. Reply at 5-13. AIA adds that although Magotteaux seeks entry of a new temporary exclusion order, it does not ask for a new cease and desist order against Vega Industries Ltd. and that none should issue. *Id.* at 14. In its sur-reply, Magotteaux argues that AIA has mischaracterized Magotteaux's request for issuance of a new order, and that its request to maintain the status quo is directed at both AIA Engineering Limited and Vega Industries Ltd. Comp. Sur-Reply at 3-4.

III. ANALYSIS

Section 337(k)(1) explains that any exclusion order or cease and desist order continues in effect until the conditions that led to the order no longer exist. 19 U.S.C. § 1337(k)(1). Section 337(k)(2) specifically allows the Commission to modify or rescind a remedial order when the Federal Rules of Civil Procedure "would permit relief from a judgment or order." 19 U.S.C. § 1337(k)(2)(B); *see also* 19 C.F.R. § 210.76(a)(2). Such relief may be available under the Federal Rules of Civil Procedure when there are changed conditions subsequent to a judgment. According to the Second Restatement of Judgments, a judgment may be set aside or modified if:

- (1) The judgment was subject to modification by its own terms or by applicable law, and events have occurred subsequent to the judgment that warrant modification of the contemplated kind; or
- (2) There has been such a substantial change in the circumstances that giving continued effect to the judgment is unjust.

PUBLIC VERSION

RESTATEMENT (SECOND) OF JUDGMENTS § 73 CHANGED CONDITIONS. The district court's invalidity ruling for the '998 patent occurred subsequent to the Commission's issuance of the remedial orders and has substantially changed the circumstances under which the orders were issued. *See SSIH*, 718 F.2d 365 (Fed. Cir. 1983). Thus, the Commission has determined that the remedial orders should be rescinded pending resolution of the appeal at the Federal Circuit. The Commission has not permanently rescinded the remedial orders at this time to take into account the possibility of the reversal of the district court's invalidity finding. *See Certain Large Video Matrix Display Systems*, Inv. No. 337-TA-75, Comm'n Action and Order at 2 (Aug. 10, 1981) (modifying an exclusion order to suspend two of the three patents on which the order was based after a district court declared the two patents invalid during the Presidential review period for the order), *aff'd*, *SSIH Equip. S.A. v. U.S. Int'l Trade Comm'n*, 718 F.2d 365, 370 (Fed. Cir. 1983). Nevertheless, the orders will be permanently rescinded if the Federal Circuit affirms the district court with respect to the claims of the '998 patent covered by the Commission's remedial orders, *i.e.*, claims 12-13 and 16-21, and will be reinstated if the Federal Circuit reverses the district court with respect to those claims. 19 U.S.C. § 1337(k).

We deny Magotteaux's request that we allow temporary relief in the form of importation under bond. Magotteaux has not satisfied the requirements for temporary relief imposed under section 337(e), which applies the preliminary injunction standard of the federal courts to temporary relief granted by the Commission:

The Commission may grant preliminary relief under this subsection or subsection (f) of this section to the same extent as preliminary injunctions and temporary restraining orders may be granted under the Federal Rules of Civil Procedure.

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19 U.S.C. § 1337(e)(3). For a federal court to grant a preliminary injunction, it must assess several factors including: (1) the likelihood of the patentee's success on the merits; (2) irreparable harm if the injunction is not granted; (3) the balance of hardships between the parties; and (4) the public interest. *Procter & Gamble Co. v. Kraft Foods Global, Inc.*, 549 F.3d 842,847 (Fed. Cir. 2008). The Federal Circuit has held that a preliminary injunction cannot be granted unless the movant establishes *both* of the first two factors, *i.e.*, likelihood of success on the merits and irreparable harm. *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1350 (Fed. Cir. 2001). In addition, with respect to the first factor, the patentee seeking a preliminary injunction in a patent infringement suit must show that it will likely prove infringement, and that it will likely withstand challenges, if any, to the validity of the patent. *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1376 (Fed. Cir. 2009).

In the instant investigation, Magotteaux has not shown before the ALJ or before the Commission that it will likely prove infringement and survive invalidity challenges to the '998 patent. Indeed, the ALJ found AIA in default and did not reach the merits of the case. Magotteaux did not even address its likelihood of success in proving infringement and surviving invalidity challenges to the '998 patent in its response and sur-reply to AIA's petition to rescind the remedial orders. Thus, the Commission finds that temporary relief under 337(e) is not appropriate.

Magotteaux largely focuses on the Commission's action in *Certain Steel Rod Treating Apparatus and Components Thereof*, Inv. No. 337-TA-97, where the Commission revoked its remedial order but issued temporary relief to complainants under a 100% value bond. Comp. Opp. 6-8. According to Magotteaux, the Commission in *Steel Rod* found its mandate as directed by Congress was to maintain the status quo once a violation has been found. Comp. Supp. Opp. at 3.

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The Commission disagrees with Magotteaux's application of the case to the instant investigation.

In *Steel Rod*, the sole patent that supported the Commission's original exclusion order was declared invalid by a South Carolina district court during the order's Presidential review period. Responding to a motion by respondents to stay or suspend the exclusion order, the ITC revoked its exclusion order but issued a new exclusion order under the then-existing section 337(e), providing for entry under a 100% bond "until such time as the Commission shall render a final determination as to permanent relief under section 337(d) or section 337(f)." Inv. No. 337-TA-97, Comm'n Action and Order (Jan. 15, 1982) at 3. In the accompanying opinion, the Commission emphasized that the investigation was unusual in that it was an expedited investigation that centered on a particular sale of a particular apparatus for a particular act of importation, and that if the Commission suspended the exclusion order without any protective measures, the possibility of preventing that particular importation would be lost if the district court's invalidity decision were overturned. Inv. No. 337-TA-97, Comm'n Op. (Jan. 15, 1982) at 9-10. The Commission also pointed out that there was a direct conflict between the Commission's determination and the district court's decision regarding the validity of the patent and that the conflict turned on differing interpretations of the law of obviousness and patent fraud, which were to be resolved by the Federal Circuit. Comm'n Memo. Op. (May 17, 1982) at 3. Accordingly, after revoking the prior exclusion order, the Commission determined to reopen the investigation and issued temporary relief to complainants under section 337(e) pending resolution of the patent's validity by the Federal Circuit. Inv. No. 337-TA-97, Comm'n Op. (Jan. 15, 1982) at 12-13.

Unlike the facts in *Steel Rod*, the instant investigation was not an expedited investigation in which the ALJ had reached the merits of the case. Rather, the ALJ found AIA in default for

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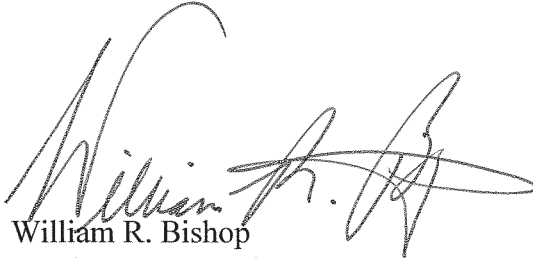
“failure to make or cooperate in discovery” under Rule 210.16(a)(2) and took adverse inferences under Rule 210.17 that AIA violated section 337. Order No. 36. The ALJ specifically noted that while Magotteaux’s request for adverse inferences against AIA was justified, it was not necessary to make specific, detailed findings against AIA relating to importation, infringement, and domestic industry. *Id.* at 16. Thus, unlike *Steel Rod*, there is no contradiction between the Commission and the district court’s interpretation of law or fact in the instant investigation. Moreover, the statutory standard for granting temporary relief has changed since *Steel Rod*; the 1988 Amendments to section 337 added the federal court preliminary injunction standard to paragraph (3) of section 337(e). Accordingly, the Commission finds that the situation in *Steel Rod* is distinguishable from the instant investigation.

III. CONCLUSION

For the reasons discussed herein, the Commission has determined to temporarily rescind its limited exclusion order and cease and desist order entered on November 24, 2009 against AIA pending resolution on appeal of the district court’s decision by the Federal Circuit. The Commission’s remedial orders will become permanently rescinded if the Federal Circuit affirms the district court’s judgment with respect to claims 12-13 and 16-21 of the ‘998 patent, *i.e.*, the claims covered by the Commission’s remedial orders, and will be reinstated if the Federal Circuit reverses the district court’s judgment with respect to those claims. The Commission has determined to deny Magotteaux’s request for a public hearing.

PUBLIC VERSION

By order of the Commission.




William R. Bishop
Hearings and Meetings Coordinator

Issued: February 10, 2011

PUBLIC CERTIFICATE OF SERVICE

I, James R. Holbein, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon, the Commission Investigative Attorney, David O. Lloyd, Esq., and the following parties as indicated on **February 10, 2011**.


James R. Holbein, Acting Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

**On Behalf of Complainants Magotteaux International S/A
and Magotteaux, Inc.:**

John J. Gresens, Esq.
VEDDER PRICE P.C.
222 North La Salle Street, Suite 2600
Chicago, IL 60601-1003

- Via Hand Delivery
 Via First Class Mail
 Via Overnight Delivery
 Other: _____

**On Behalf of Respondent Vega Industries and AIAE
Engineering Ltd.:**

David Lieberworth, Esq.
GARVEY, SCHUBERT & BARER
1191 Second Avenue, 18th Floor
Seattle, WA 98101

- Via Hand Delivery
 Via First Class Mail
 Via Overnight Delivery
 Other: _____

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

In the Matter of

**CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS
CONTAINING SAME**

Investigation No. 337-TA-644

**NOTICE OF ISSUANCE OF LIMITED EXCLUSION ORDER AND CEASE
AND DESIST ORDER; TERMINATION OF INVESTIGATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: The United States International Trade Commission hereby provides notice that it has determined to issue a limited exclusion order and cease and desist order and terminate the investigation.

FOR FURTHER INFORMATION CONTACT: Michael K. Haldenstein, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3041. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: This investigation was instituted on April 25, 2008, based on a complaint filed by Magotteaux International S/A and Magotteaux, Inc. (collectively, "Magotteaux"). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain composite wear components and products containing the same that infringe claims 12-13 and 16-21 of U.S. Patent No. RE 39,998 ("the '998 patent"). The complaint named Fonderie Acciaierie Rioale S.P.A. ("FAR"), AIA Engineering Ltd., and Vega Industries (collectively, "AIAE Respondents")

as respondents. FAR was subsequently terminated from the investigation on the basis of a settlement agreement, leaving the AIAE Respondents as the only remaining respondents.

On May 8, 2009, the ALJ issued an ID finding the AIAE Respondents in default pursuant to Commission Rules 210.16(a)(2) and 210.17, 19 C.F.R. §§ 210.16(a)(2) and 210.17. On July 7, 2009, the Commission determined not to review the ID and indicated that, in addition to the ALJ's finding of violation pursuant to Rule 210.17, the Commission presumes the facts alleged in the complaint to be true with respect to the AIAE Respondents. The Commission also determined to waive Commission Rule 210.42(a)(ii), which, unless the Commission orders otherwise, requires that the ALJ issue a recommended determination on remedy and bonding in conjunction with any final initial determination concerning violation of section 337. The Commission encouraged the parties to the investigation, interested government agencies, and any other interested parties to file written submissions on the issues of remedy, the public interest, and bonding. The parties to the investigation and the IA filed submissions and response submissions concerning remedy, the public interest, and bonding on July 22, 2009, and July 30, 2009, respectively. No other parties filed submissions.

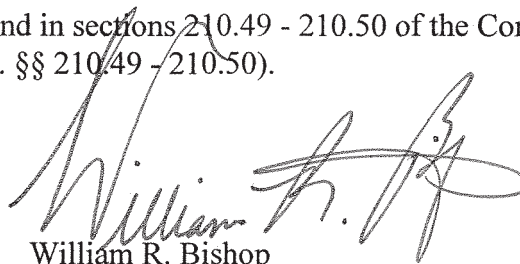
Having examined the record in this investigation, including the submissions on remedy, the public interest, and bonding and responses thereto, the Commission has determined that the appropriate form of relief is a limited exclusion order and a cease and desist order.

The limited exclusion order prohibits the unlicensed entry for consumption of composite wear components and products containing same that are covered by one or more of claims 12-13 and 16-21 of the '998 patent and that are manufactured abroad by or on behalf of, or are imported by or on behalf of, AIA Engineering Limited or Vega Industries or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns. The cease and desist order covers products that infringe claims 12-13 and 16-21 of the '998 patent and is directed to defaulting domestic respondent Vega Industries and any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority owned business entities, successors, and assigns.

The Commission has also determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) and (f) do not preclude issuance of the afore-mentioned remedial orders, and that the bond during the Presidential period of review shall be set at 100 percent of the entered value for any covered composite wear components and products containing same.

The authority for the Commission's determinations is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.49 - 210.50 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.49 - 210.50).

By order of the Commission.


William R. Bishop
Acting Secretary to the Commission

Issued: November 24, 2009

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

In the Matter of

**CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS
CONTAINING SAME**

Inv. No. 337-TA-644

LIMITED EXCLUSION ORDER

The Commission has determined pursuant to Commission Rule 210.17 that there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the unlawful importation, sale for importation, and sale after importation by AIA Engineering Ltd. and Vega Industries of composite wear components and products containing same that infringe claims 12-13 and 16-21 of U.S. Patent No. Re. 39,998 (the '998 patent). Additionally, the Commission has determined that AIA Engineering Limited and Vega Industries are in default pursuant to Commission Rule 210.16 for failure to make and cooperate in discovery.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined that the appropriate form of relief is a limited exclusion order prohibiting the unlicensed entry of composite wear components and products containing same that infringe one or more of claims 12-13 and 16-21 of the '998 patent and are manufactured abroad by or on behalf of, or imported by or on behalf of AIA Engineering Limited or Vega Industries. The Commission has also determined that the appropriate form of relief includes a cease and desist order against Vega Industries.

The Commission has determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) do not preclude issuance of the limited exclusion order or cease and desist order, and that the bond during the Presidential review period shall be in the amount of 100 percent of the entered value of the articles in question.

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

1. Composite wear components and products containing same that are covered by one or more of claims 12-13 and 16-21 of the '998 patent and that are manufactured abroad by or on behalf of, or are imported by or on behalf of, AIA Engineering Limited or Vega Industries or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns, are excluded from entry for consumption into the United States, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption, for the remaining term of the patent, except under license of the patent owner or as provided by law.

2. Products that are excluded by paragraph 1 of this Order are entitled to entry for consumption into the United States, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption, under bond in the amount of 100 percent of the entered value of such articles pursuant to subsection (j) of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337(j), and the Presidential Memorandum for the United States Trade Representative of July 21, 2005 (70 *Fed. Reg.* 43251), from the day after this Order is received by the United States Trade Representative and until such time as the United States Trade Representative notifies the Commission that this action is approved or disapproved but, in any event, not later than sixty (60) days after the date of receipt of this action.

3. At the discretion of U.S. Customs and Border Protection (“CBP”) and pursuant to the procedures it establishes, persons seeking to import composite wear components and products containing same that are potentially subject to this Order may be required to certify that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the products being imported are not excluded from entry under paragraph 1 of this Order. At its discretion, CBP may require persons who have provided the certification described in this paragraph to furnish such records or analyses as are necessary to substantiate the certification.

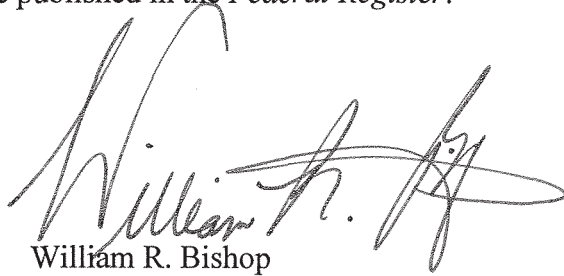
4. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to composite wear components and products containing same that are imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.

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

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

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

By Order of the Commission.

A handwritten signature in black ink, appearing to read "William R. Bishop". The signature is fluid and cursive, with a large loop at the end.

William R. Bishop
Acting Secretary to the Commission

Issued: November 24, 2009

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

In the Matter of

**CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS
CONTAINING SAME**

Inv. No. 337-TA-644

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT Vega Industries cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), and soliciting U.S. agents or distributors for, composite wear components and products containing same that infringe one or more of claims 12-13 and 16-21 of U.S. Patent No. Re. 39,998 (“the ‘998 patent”) in violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337.

I.

Definitions

As used in this Order:

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

(B) “Complainants” shall mean Magotteaux International S/A, Rue A. Dupont, Vaux-sous-Chèvremont, RPM Liege, Belgium, 405,785,543; and Magotteaux, Inc., 725 Cool Springs Boulevard, Franklin, Tennessee 37076.

(C) “Respondent” shall mean Vega Industries, 330 Franklin Road, Suite 135-180, Brentwood, Tennessee 37072.

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

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

(G) The terms "import" and "importation" refer to importation for entry for consumption under the Customs laws of the United States.

(H) The term "covered products" shall mean composite wear components and products containing same that infringe one or more of claims 12-13 and 16-21 of the '998 patent.

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 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 the Respondent in the United States is prohibited by the Order. For the remaining term of the patent, Respondent shall not:

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

- (B) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation), in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

IV.

Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the '998 patent licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

V.

Reporting

For purposes of this reporting requirement, the reporting periods shall commence on January 1 of each year and shall end on the subsequent December 31. However, the first report required under this section shall cover the period from the date of issuance of this Order through January 1, 2010. This reporting requirement shall continue in force until such time as Respondent will have truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission (a) the quantity in units and the value in dollars of covered products that

the Respondent has (i) imported and/or (ii) sold in the United States after importation during the reporting period, and (b) the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

Respondents filing written submissions must file the original document and two copies with the Office of the Secretary. Any respondent desiring to submit a document to the Commission in confidence must file the original and a public version of the original with the Office of the Secretary and serve a copy of the confidential version on complainant's counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

VI.

Record Keeping and Inspection

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

¹ Complainant must file a letter with the Secretary identifying the attorney to receive the reports or bond information. The designated attorney must be on the protective order entered in the investigation.

(B) For the purposes 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 office during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, 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 importation, marketing, distribution, or sale of imported covered products 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 has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the date of expiration of the '998 patent.

VIII.

Confidentiality

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

IX.

Enforcement

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75, including an action for civil penalties 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.

XI.

Bonding

The conduct prohibited by Section III of this Order may be continued during the sixty (60) day period in which this Order is under review by the United States Trade Representative pursuant to section 337(j) of the Tariff Act of 1930, 19 U.S.C. § 1337(j), and the Presidential Memorandum for the United States Trade Representative of July 21, 2005 (70 *Fed. Reg.* 43251), subject to Respondent posting a bond in the amount of 100 percent of the entered value of the composite wear component or product containing same. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered products imported during the period of Presidential review are subject to the entry bond as set forth in the limited exclusion order issued by the Commission, and are not subject to this bond provision.

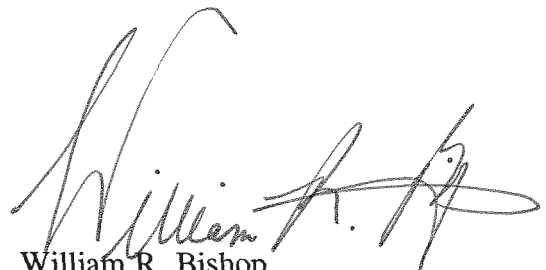
The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. See Commission Rule 210.68, 19 C.F.R. 210.68. The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this order. Upon acceptance of the bond by the Secretary, (a) the Secretary will serve an acceptance letter on all parties and (b) the respondent must serve a copy of the bond and any accompanying documentation on complainant's counsel.²

² Complainant must file a letter with the Secretary identifying the attorney to receive the reports or bond information. The designated attorney must be on the protective order entered in the investigation.

The bond is to be forfeited in the event that the United States Trade Representative approves, or does not disapprove within the Presidential review period, this Order, 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 United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the United States Trade Representative, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By Order of the Commission.



William R. Bishop
Acting Secretary to the Commission

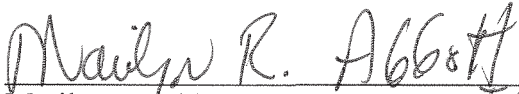
Issued: November 24, 2009

**CERTAIN COMPOSITE WEAR COMPONENTS AND
PRODUCTS CONTAINING THE SAME**

337-TA-644

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF ISSUANCE OF LIMITED EXCLUSION ORDER AND CEASE AND DESIST ORDER; TERMINATION OF INVESTIGATION** has been served by hand upon the Commission Investigative Attorney, David O. Lloyd, Esq., and the following parties as indicated, on November 24, 2009.


Marilyn R. Abbott, Secretary *JWG*
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

**On Behalf of Complainants Magotteaux International
S/A And Magotteaux, Inc.:**

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**On Behalf of Respondents Vega Industries and AIA
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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of

**CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS
CONTAINING SAME**

Inv. No. 337-TA-644

COMMISSION OPINION

BACKGROUND

On March 24, 2008, complainants Magotteaux International S/A and Magotteaux, Inc. (collectively, “Magotteaux”) filed a complaint alleging, *inter alia*, that Respondents AIAE Engineering Limited and Vega Industries (collectively, “the AIAE Respondents”) and respondent Fonderie Acciaierie Roiale S.p.A. (“FAR”) violated section 337 by reason of the importation and sale of certain composite wear components and products containing same that infringe one or more of claims 1-22 of U.S. Patent No. RE 39,998 (“the ‘998 patent”). The investigation was instituted on April 25, 2008, by publication of a notice of investigation in the *Federal Register*. See 73 *Fed. Reg.* 22431 (April 25, 2008). On February 13, 2009, FAR was terminated from this investigation based on a settlement agreement.

On March 27, 2009, the Commission Investigative Attorney (“IA”) moved for a finding that the AIAE Respondents were in default pursuant to Commission Rule 210.16(a)(2) and in violation of section 337 based on adverse inferences drawn from their failure to make or cooperate in discovery and failure to file a pre-hearing brief pursuant to Commission Rule 210.17. 19 C.F.R. §§ 210.16(a)(2) and 210.17. On April 13, 2009, Magotteaux also moved for a finding of default and for adverse inferences. The AIAE Respondents did not oppose a finding

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of default under Commission Rule 210.16(a)(2), but opposed a finding of violation and the entry of adverse inferences under Commission Rule 210.17.

On May 8, 2009, the ALJ granted the outstanding motions, made certain adverse inferences, and found the AIAE Respondents in default and in violation of Section 337 pursuant to Commission Rules 210.16(a)(2) and 210.17. *See* Order No. 26. On May 19, 2009, the AIAE Respondents petitioned for review of Order No. 26. Magotteaux and the IA opposed this petition. On July 7, 2009, the Commission determined not to review Order No. 26, thus adopting the ALJ's findings that AIAE Respondents are in default, that they are in violation of section 337, that they import or sell for importation articles covered by the asserted claims of the '998 patent, and that a domestic industry exists with respect to the articles protected by the '998 patent. Order 26; 74 *Fed. Reg.* 33472 (July 13, 2009). However, due to the procedural posture of the investigation, and the uncertainty regarding whether the initial determination ("ID") was a final ID, the ALJ did not issue a recommended determination on remedy and bonding ("RD"). The Commission determined to waive Commission Rule 210.42(a)(ii), which, unless the Commission orders otherwise, requires that the ALJ issue an RD in conjunction with any final ID concerning violation of section 337. *Id.* The Commission solicited briefs on remedy, the public interest, and bonding. *Id.*

On July 22, 2009, Magotteaux and the IA filed initial briefs and proposed remedial orders. The IA filed a reply brief on July 30, 2009. This investigation is now before the Commission for its determinations on remedy, the public interest, and bonding.

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DISCUSSION

I. REMEDY

A. Exclusion Order

1. Statutory Background and Criteria for Exclusion Orders

Section 337 provides that, “[i]f the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States” 19 U.S.C. § 1337(d)(1). This statutorily mandated exclusion is achieved, as appropriate, through either a limited exclusion order or a general exclusion order. *See Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1356 (Fed. Cir. 2008). A general exclusion order is not, however, at issue in this investigation as neither Magotteaux nor the IA have requested that the Commission consider issuing a general exclusion order.

We note that section 337(d)(1), rather than the default provision (section (g)(1)), governs the issuance of a limited exclusion order in this investigation. Section 337(g)(1) applies to instances when the respondent “fails to respond to the complaint and notice or otherwise fails to appear to answer the complaint and notice.” The AIAE Respondents answered the complaint and subsequently were found in default pursuant to Commission Rule 210.16(a)(2) for failure to cooperate in discovery. Order No. 26 at 12. *See Certain Sildenafil or any Pharmaceutically Acceptable Salt Thereof, such as Sildenafil Citrate, and Products Containing Same*, Inv. 337-TA-489, Comm. Op. at 4 (Feb. 2004) (issuance of exclusion order governed by section 337(d)

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rather than section 337(g) because one respondent answered the complaint and contested allegations in the investigation).

2. Parties' Submissions

Complainant Magotteaux and the IA agree that a limited exclusion order is appropriate in this investigation given the Commission's determination that the AIAE Respondents have violated section 337. Magotteaux Brief on Remedy, the Public Interest and Bonding ("Magotteaux Br.") at 3; IA Brief on Remedy, the Public Interest and Bonding ("IA Br.") at 4-5.

3. Commission Determination

We determine that it is appropriate to issue a limited exclusion order covering claims 12-13 and 16-21 of the '998 patent. The limited exclusion order is directed against the products of the two defaulting AIAE Respondents.

B. Cease and Desist Orders

1. Statutory Background and Criteria for Issuance of Cease and Desist Orders

The Commission may, in lieu of or in addition to an exclusion order, issue a cease and desist order directing persons found to have violated section 337 "to cease and desist from engaging in the unfair methods or acts involved." 19 U.S.C. § 1337(f). Cease and desist orders are warranted with respect to domestic respondents that maintain commercially significant U.S. inventories of the infringing product. *See, e.g., Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293, USITC Pub. 2391 at 37- 42 (June 1991). Domestic respondents who have defaulted are presumed to maintain significant inventories of infringing products in the United States and are thus subject to cease and desist orders. *Certain Video Game Systems*, Inv. No.

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337-TA-473, Comm'n Op. at 2 (December 2, 2002); *Certain Agricultural Tractors*, Inv. No. 337-TA-380, USITC Pub. 3026 at 32, n.124 (March 1997).

2. Parties' Arguments

Magotteaux seeks imposition of cease and desist orders against both the domestic respondent Vega Industries and its foreign parent AIA Engineering, Ltd. of India. Magotteaux Br. at 4-5. Magotteaux asserts that it has been unable to obtain the discovery necessary to demonstrate that Vega Industries and AIA Engineering have commercially significant inventories in the United States. *Id.* at 5. Given that the AIAE Respondents have defaulted, Magotteaux maintains that the Commission should presume that the AIAE Respondents have commercially significant inventories in the United States. *Id.* at 6.

Magotteaux also argues that it is appropriate to issue a cease and desist order to the foreign parent respondent AIA Engineering, Ltd. because it has been found in violation and its subsidiary Vega Industries imports and sells the infringing articles on consignment. *Id.* at 5-6. Magotteaux notes that, in *Certain Abrasive Products Made Using a Process for Powder Preforms, and Products Containing Same*, 337-TA-449 (2002) ("*Certain Abrasive Products*"), the Commission issued a cease and desist order to a foreign respondent. Magotteaux maintains that, absent a cease and desist order directed to it, AIA Engineering, Ltd., may be able to impermissibly sell inventory currently held by Vega Industries. *Id.* at 6 n.3.

The IA argues that a cease and desist order directed only to the domestic respondent Vega Industries is appropriate. He maintains that the Commission generally does not issue cease and desist orders to foreign respondents due to the difficulty in enforcing such orders against foreign

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companies. IA Reply on Remedy at 4. He also maintains that the cease and desist order directed to Vega Industries will prevent it from transferring the infringing articles for potential sale through another distributor in the United States. *Id.* at 5. Thus, according to the IA, Magotteaux's concern is unwarranted. *Id.*

3. Commission Determination

We determine to issue a cease and desist order to the defaulting domestic respondent, Vega Industries. Magotteaux has alleged that Vega Industries maintains commercially significant inventories of infringing articles in the United States, and the AIAE Respondents may not contest that allegation due to their default. It is therefore appropriate for the Commission to find that Vega Industries maintains commercially significant inventories and issue a cease and desist order directed to it. Such a finding is consistent with Commission practice as domestic respondents who have defaulted are presumed to maintain significant inventories of infringing products in the United States and are therefore subject to cease and desist orders. *Certain Video Game Systems*, Comm'n Op. at 2; *Certain Agricultural Tractors*, Inv. No. 337-TA-380, USITC Pub. 3026 at 32, n.124 (March 1997).

We decline, however, to issue a cease and desist order to the foreign respondent, AIA Engineering, Ltd. The Commission's practice is to decline to issue cease and desist orders to foreign respondents. See *Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. No. 2949, Comm'n Op. at 22-23 (1996) ("A cease and desist order is typically an *in personam* order directed to a party in the United States and enforced by the Commission in U.S.

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district courts. Thus, unless a party in the United States can be compelled to do some act or to refrain from doing some act by a U.S. Court a cease and desist order is inappropriate.”¹

As the IA notes, the cease and desist order to domestic respondent Vega Industries will prohibit it from “aid[ing] or abet[ting] other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.” This language addresses Magotteaux’s concern that Vega Industries may transfer the covered products to another company that would sell the covered products on AIA Engineering’s behalf. We therefore issue a cease and desist order directed to only the defaulting domestic respondent, Vega Industries.

II. THE PUBLIC INTEREST

A. Statutory and Regulatory Standards

The Commission’s authority to issue any exclusion order is conditioned on consideration of the public interest. 19 U.S.C. §§ 1337(d). Specifically, the statute indicates that the Commission shall issue an exclusion order unless:

after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

19 U.S.C. § 1337(d).

¹ As Magotteaux notes, the Commission has issued a cease and desist order to a foreign respondent when it had jurisdiction over the respondent and the respondent had a non-respondent agent in the United States holding significant inventory. *Certain Abrasive Products*, Comm. Op. at 6. Because the agent was not a respondent, the Commission could not issue a cease and desist order to the company holding the inventory and was only able to grant relief to complainant by directing the order to the foreign respondent and its agents.

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Similarly, the Commission may not issue a cease and desist order if it finds that such an order would be contrary to the public interest. 19 U.S.C. § 1337(f). The public interest analysis does not concern whether there is a public interest in issuing a remedial order, but whether issuance of such an order will adversely affect the public interest.

Certain Agricultural Vehicles, Inv. No. 337-TA-487, Comm. Op. at 17.

B. Parties' Arguments

Magotteaux asserts that in virtually all investigations, the issuance of remedial orders has been found consistent with the public interest. *Magotteaux Br.* at 6-7. It argues that the products and technology at issue, which concern metal and ceramic composite wear materials used in products designed to crush and grind rocks, present no public interest concerns because these products are not related to the preservation of the public health and welfare. *Id.* at 7. Magotteaux also contends that it has sufficient production capacity to meet demand for products refused entry and notes that because the exclusion order is limited to the AIAE Respondents, other competitive articles will not be excluded. *Id.* at 7.

The IA argues that there is no evidence that U.S. demand for composite wear products cannot be met by other entities, including Magotteaux. Moreover, he maintains that there are many other types of wear products on the market, and composite wear products are not the types of articles that raise particular public interest concerns. *IA Br.* at 9.

C. Commission Determination

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There is no evidence in the record to indicate that the issuance of a limited exclusion order and cease and desist order in this investigation would be contrary to the public interest, nor is the Commission aware of any such issues. We therefore determine to issue the remedial orders.

III. BOND DURING PERIOD OF PRESIDENTIAL REVIEW

A. Bonding During the Presidential Review Period

During the 60-day period of Presidential review, imported articles otherwise subject to a remedial order are entitled to conditional entry under bond, pursuant to section 337(j)(3). 19 U.S.C. § 1337(j)(3). The amount of the bond is specified by the Commission and must be an amount sufficient to protect the complainant from any injury. *Id.*, 19 C.F.R. § 210.50(a)(3). The Commission typically attempts to set the bond during the period of Presidential review based on the price differential between the domestic and imported products, or based on a reasonable royalty. *See, e.g., Certain Power Supply Controllers and Products Containing Same*, Inv. No. 337-TA-541, Comm. Op. at 11 (Aug. 29, 2006).

B. Parties' Arguments

Magotteaux asserts it was unable to obtain pricing information due to the AIAE Respondents' failure to cooperate in discovery, and therefore bond in the amount of 100 percent of entered value is appropriate. Magotteaux Br. at 8. The IA agrees, arguing that it is appropriate in the case of default when evidence is lacking to set bond in the amount of 100 percent of entered value. IA Reply on Remedy at 6 (citing *Certain Video Game*

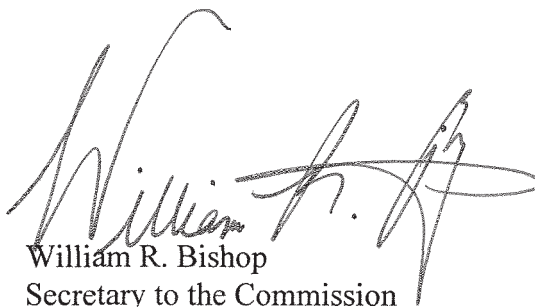
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Systems, Comm. Op. at 5 (2002)). Hence, Magotteaux and the IA are of the view that, in the absence of evidence concerning price differentials between Magotteaux's products and the infringing imports due to the AIAE Respondents' refusal to cooperate in discovery, a bond of 100 percent of entered value should be entered. *See Magotteaux Br.* at 8; IA Reply on Remedy at 6.

C. Commission Determination

In this particular investigation, the AIAE Respondents failed to cooperate in discovery and were found in default pursuant to Commission Rule 210.16(a)(2) based on this lack of cooperation. Thus, Magotteaux was precluded from obtaining the relevant pricing information from AIAE Respondents through discovery, and the record contains no information concerning the price differences between the domestic products and the infringing products. When the pricing information is absent, as is often the case when respondents have defaulted, the Commission has set the amount of the bond at 100 percent of entered value. *See Neodymium Magnets*, Inv. No. 337-TA-372, USITC Pub. 2694 (May 1996), Comm. Op. at 15; *Certain Video Game Systems*, Comm. Op. at 5. We therefore determine to set the bond at 100 percent of the entered value of infringing products to prevent any harm to Magotteaux during the 60-day period of Presidential review.

By order of the Commission.



William R. Bishop
Secretary to the Commission

Issued: November 24, 2009

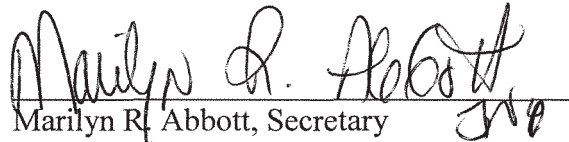
**CERTAIN COMPOSITE WEAR COMPONENTS AND
PRODUCTS CONTAINING THE SAME**

337-TA-644

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, David O. Lloyd, Esq., and the following parties as indicated, on

November 24, 2009



Marilyn R. Abbott, Secretary
U.S. International Trade Commission
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Washington, DC 20436

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

In the Matter of

**CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS
CONTAINING SAME**

Investigation No. 337-TA-644

**NOTICE OF COMMISSION DETERMINATION NOT TO REVIEW
AN INITIAL DETERMINATION FINDING RESPONDENTS
AIAE ENGINEERING LTD. AND VEGA INDUSTRIES IN DEFAULT
AND FINDING A VIOLATION OF SECTION 337**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: The United States International Trade Commission hereby provides notice that it has determined not to review an initial determination (“ID”) (Order No. 26) issued by the presiding administrative law judge (“ALJ”) finding respondents AIAE Engineering Limited and Vega Industries in default and finding a violation of section 337.

FOR FURTHER INFORMATION CONTACT: Paul M. Bartkowski, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-5432. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission’s electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: This investigation was instituted on April 25, 2008, based on a complaint filed by Magotteaux International S/A and Magotteaux, Inc. (collectively, “Magotteaux”). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain composite wear components and products containing the same that infringe all of the claims of U.S. Patent No.

RE 39,998 (“the ‘998 patent”). The complaint named Fonderie Acciaierie Rioale S.P.A. (“FAR”), AIA Engineering Ltd. (“AIAE”), and Vega Industries (“Vega”) as respondents. FAR was subsequently terminated from the investigation on the basis of a settlement agreement, leaving AIAE and Vega (hereinafter referred to collectively as “AIAE”) as the remaining respondents.

On May 8, 2009, the ALJ issued the subject ID, granting a motion filed by the Commission investigative attorney (“IA”) for issuance of an initial determination finding AIAE in default and granting in part a motion filed by Magotteaux for issuance of an initial determination finding respondents in default and requesting adverse inferences on importation, infringement, and domestic industry. AIAE filed a petition for review of the ID, which was opposed by the Magotteaux and the IA.

The Commission has determined not to review the subject ID finding AIAE in default pursuant to Rule 210.16(a)(2) and presumes the facts alleged in the complaint to be true with respect to AIAE, in addition to the ALJ’s finding of violation pursuant to Rule 210.17. The Commission also determines to waive Commission Rule 210.42(a)(ii), which, unless the Commission orders otherwise, requires that the ALJ issue a recommended determination in conjunction with any initial determination concerning violation of section 337.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease-and-desist orders that could result in the respondent being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease-and-desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission’s action. See Presidential Memorandum of July 21, 2005, 70 *Fed. Reg.* 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined

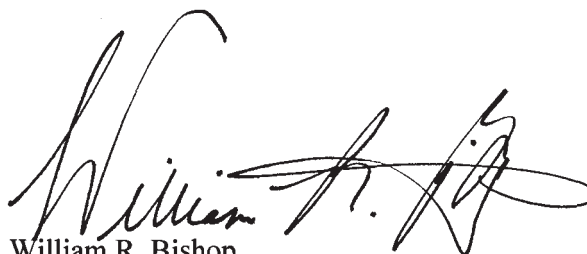
by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: The parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Complainants and the IA are also requested to submit proposed remedial orders for the Commission's consideration. Complainants are also requested to state the dates that the patents expire and the HTSUS numbers under which the accused products are imported. The written submissions and proposed remedial orders must be filed no later than close of business on July 22, 2009. Reply submissions, if any, must be filed no later than the close of business on July 30, 2009. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Any person desiring to submit a document to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 C.F.R. § 201.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in section 210.42 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.42).

By order of the Commission.
Marilyn R. Abbott, Secretary



William R. Bishop
Acting Secretary


Issued: July 7, 2009

**CERTAIN COMPOSITE WEAR COMPONENTS AND
PRODUCTS CONTAINING THE SAME**

337-TA-644

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF COMMISSION DETERMINATION NOT TO REVIEW AN INITIAL DETERMINATION FINDING RESPONDENTS AIAE ENGINEERING LTD. AND VEGA INDUSTRIES IN DEFAULT AND FINDING A VIOLATION OF SECTION 337** has been served by hand upon the Commission Investigative Attorney, David O. Lloyd, Esq., and the following parties as indicated, on July 7, 2009.


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U.S. International Trade Commission
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**ON BEHALF OF RESPONDENTS VEGA
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PUBLIC VERSION

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

In the Matter of

**CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS
CONTAINING SAME**

Inv. No. 337-TA-644

**ORDER NO. 26: INITIAL DETERMINATION FINDING RESPONDENTS AIAE
ENGINEERING LIMITED AND VEGA INDUSTRIES IN
DEFAULT AND FINDING A VIOLATION OF SECTION 337**

(June 8, 2009)

On March 27, 2009, the Commission Investigative Staff (“Staff”) filed a motion for issuance of an initial determination finding respondents AIAE Engineering Limited and Vega Industries (collectively “AIAE”) in default, attached hereto as Attachment A. (Motion Docket No. 644-037.) On April 8, 2009, complainant Magotteaux International S/A and Magotteaux, Inc. (collectively “Magotteaux”) filed a response in support of the motion and further stated that it would be filing its own motion seeking adverse inferences on importation, infringement and domestic industry. On that same day, AIAE filed a response arguing that it should only be found in default pursuant to 19 C.F.R. § 210.16 for “failure to make or cooperate in discovery” and that it opposed a finding of default under 19 C.F.R. § 210.17 based on adverse inferences.

On April 13, 2009, Magotteaux filed a motion for issuance of an initial determination finding respondents in default and request for adverse inferences on importation, infringement and domestic industry, attached hereto as Attachment B. (Motion Docket No. 644-038.) Magotteaux seeks adverse inferences in addition to Staff’s proposed adverse inferences, namely that AIAE has imported, sold for importation or sold after importation the accused products; that the accused products infringe the asserted claims of U.S. Patent No. RE 39,998 (“the ‘998

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Patent”); that a domestic industry exists; and that the ‘998 Patent is not subject to the arbitration clause in the Settlement Deed. Magotteaux further outlined detailed, specific findings of fact on infringement of the ‘998 Patent and on the technical prong of the domestic industry requirement. (See Memorandum of Points and Authorities ISO Motion for Issuance of an Initial Determination Finding Respondents in Default and Request for Adverse Inferences on Importation, Infringement and Domestic Industry (“Magotteaux’s Memo”) at 13-15, 17-18.)

On April 12, 2009, Staff filed a response in support of the motion to the extent it seeks an initial determination finding AIAE in default and seeking an adverse inference of violation pursuant to Rule 210.16(a)(2) and 210.17(e). Staff further stated that it did not oppose Magotteaux’s request for adverse inferences as to importation, infringement and domestic industry, although the inferences need not be as specific as set forth by Magotteaux.

On that same day, AIAE filed a response opposing the motion.¹ AIAE argues that its request for reconsideration or interlocutory appeal of the ALJ’s decision to deny their motion to terminate based on arbitration clause should be granted and that such a ruling would render Magotteaux’s motion moot. AIAE further argues that any finding of default should be based on Rule 210.16(a)(2) and that adverse inferences are a “wasteful attempt” to “circumvent” any independent factual finding by a District Court and an improper attempt at asking the ALJ to make “sweeping and unjustified” findings of fact and conclusions of law.

PROCEDURAL HISTORY

On March 24, 2008, Magotteaux filed a complaint alleging, *inter alia*, that AIAE violated Section 337 by reason of the importation and sale of certain composite wear components and products containing same that infringe one or more of claims 1-22 of the ‘998 Patent. (See

¹ The certificate of service originally filed with AIAE’s response was dated April 8, 2009. On April 27, AIAE filed a corrected certificate of service reflecting the date upon which its response was actually served, *i.e.*, April 23, 2009.

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Complaint ¶¶ 29-43.) The investigation was instituted on April 21, 2008, and the Notice of Investigation was published in the Federal Register on April 25, 2008. (*See* 73 Fed. Reg. 22431 (April 25, 2008).)

On May 15, 2008, respondent Vega Industries moved for an extension of time to respond to the Complaint and Notice of Investigation, which the ALJ granted. (*See* Order No. 3)². On May 22, 2008, instead of filing a response to the Complaint and Notice of Investigation, AIAE filed a motion to stay this investigation based on pending injunction suit that they had obtained as part of the court case between the parties in High Court of New Delhi in India (“the Indian Court Action”). (*See* Motion Docket No. 644-004). Thereafter, AIAE essentially refused to participate in discovery and in this investigation.³

² Respondent AIAE Engineering did not join in the motion.

³ As explained in Order No. 12, respondent AIA Engineering and Magotteaux are involved in a lawsuit in India involving Magotteaux’s Indian patent that is the counterpart of the patent at issue in this Investigation. AIA sought a permanent injunction against Magotteaux in the High Court of Delhi to prevent Magotteaux from proceeding with this Investigation and was granted interim injunctive relief from the Indian court on May 13, 2008. (*See* AIA Engineering Ltd.’s Motion to Stay These Proceedings Pending a Determination by the Indian Court of Whether to Issue a Permanent Injunction Against Magotteaux at 1-2.) During this time, the High Court of Delhi also ordered Magotteaux to file a motion to stay the instant investigation. (*See* Magotteaux’s Memo ISO its Motion to Extend Certain Dates in the Procedural Schedule at 3.) Magotteaux appealed this injunction, which the Indian Appellate Court overturned. (*See* Magotteaux’s Memo ISO of its Opposition to AIAE’s Motion for Termination of the Investigation Pursuant to 19 U.S.C. § 1337 (c) and 19 C.F.R. §210.21 at 7.) Magotteaux ultimately withdrew its complaint in the High Court of Delhi. (*Id.* at 7.)

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On October 3, 2008, the ALJ denied the motions for stay and extended the target date. (*See* Order Nos. 12, 13) (October 3, 2008). The ALJ ordered the parties to submit a new procedural schedule in light of the extended target date, including “deadlines for AIA Engineering and Vega Industries for events whose deadlines have already passed.” (Order No. 12, at 3 n.3.)⁴ On October 14, 2008, Magotteaux, respondent Fonderie Acciaierie Roiale S.p.A. (“FAR”), and Staff submitted a new joint procedural schedule, which the ALJ granted. (*See* Order No. 14) (October 16, 2008). AIAE did not respond or participate in setting the new procedural schedule. (*Id.*; *see also* Joint Proposed Procedural Schedule (October 14, 2008).)⁵

On November 14, 2008, Magotteaux filed a motion for a default against AIAE based on their failure to answer the Complaint and Notice of Investigation. (Motion Docket No. 644-015). AIAE filed a response opposing the motion for default, specifically stating that they “must participate and defend themselves here, and they fully intend to do so.” (*See* AIAE Response to Motion for a Default, at 2). On November 26, 2009, AIAE filed responses to the Complaint and Notice of Investigation and began to participate in discovery to a certain degree. (*See* AIAE Engineering Limited’s Response to Amended Complaint and Notice of Investigation and Vega Industries’ Response to Amended Complaint and Notice of Investigation.) On February 3, 2009, the ALJ denied Magotteaux’s motion for a default because AIAE had responded to the Complaint and Notice of Investigation and had begun to actively participate in the investigation and in discovery. (*See* Order No. 18).

⁴ While AIAE refused to participate, discovery continued with FAR, Magotteaux and Staff.

⁵ On February 13, 2009, FAR was terminated from this investigation based on settlement agreement. (*See* Order No. 19.)

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However, immediately following the ALJ's denial of default motion, AIAE drastically reduced its participation in discovery. AIAE refused to produce both fact and expert witnesses for deposition, refused to respond substantively to Magotteaux's and Staff's written discovery, and refused to respond substantively to the Staff's contention interrogatories. (*See* Motion Docket Nos. 644-027 ("Complainants Motion to Compel the Appearance of Respondents AIA Engineering Limited and Vega Industries Ltd.'s Witnesses for Deposition"); 644-031 ("Complainants Magotteaux International S/A and Magotteaux, Inc.'s Motion to Compel Production"); 644-032 ("Commission Investigative Staff's Motion to Compel Responses to Contention Interrogatories"); and 644-033 ("Commission Investigative Staff's Motion to Preclude Expert Testimony or to Compel Deposition of Expert").)

On February 12, 2009, AIAE filed its motion to terminate this investigation in whole based on an arbitration agreement contained in a Settlement Deed dated February 16, 2000 (the "Settlement Deed") between AIAE and Magotteaux. (Motion Docket No. 644-028.) On February 25, 2009, Magotteaux and Staff filed responses in opposition to AIAE's motion to terminate.

On February 12, 2009, Magotteaux filed a motion for summary determination of a violation by AIAE. (Motion Docket No. 644-029.) On February 25, 2009, AIAE filed a response opposing the motion in its entirety and, on February 27, 2009, Staff filed a response supporting in part and opposing in part the motion for summary determination.⁶ Based on the ALJ's ruling herein, Motion No. 644-029 is MOOT.

⁶ On February 18, 2009, the parties filed a joint stipulated motion seeking extensions of time for their responses to the motion for summary determination, which the ALJ granted via e-mail on February 19, 2009.

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On March 5, 2009, the ALJ issued an order denying AIAE's motion to terminate, and the ALJ also struck AIAE's expert witness because AIAE named their expert witness out of time and, further, refused to produce their expert witness for deposition. (*See* Order Nos. 20 and 21.)⁷ Pursuant to the procedural schedule, Magotteaux and Staff filed their pre-hearing statements on March 17 and March 25, respectively. AIAE, however, failed to file a pre-hearing statement and failed to submit or serve any exhibits or witness statements. Rather, on March 13, 2009, AIAE filed a motion for reconsideration or interlocutory appeal. (Motion Docket No. 644-035.) On March 23, 2009, Magotteaux filed a response opposing the motion for reconsideration and interlocutory appeal and, on March 25, 2009, Staff also filed a response opposing the motion.

On March 16, 2009, AIAE filed a declaratory judgment action against Magotteaux in the U.S. District Court for the Middle District of Tennessee ("the District Court Action").

On March 19, 2009, the ALJ granted the outstanding motions to compel (Motion Nos. 644-027, 644-031, and 644-032) ordering AIAE to respond to written discovery by March 23, 2009, and to produce its fact and expert witnesses for deposition. The ALJ further warned AIAE that "[t]he ALJ will not hesitate, either *sua sponte* or in response to a motion, to make adverse inferences against AIAE should they refuse to cooperate and participate in discovery nor will the ALJ refrain from making the appropriate findings based on the adverse inferences, which includes a finding of default." (Order No. 23, at 4-5).

Ignoring the ALJ's specific order to comply and participate in discovery, AIAE

⁷ In Order No. 21, the ALJ warned AIAE that "[c]ooperation in discovery, compliance with the Rules of the Commission, and compliance with the ALJ's Ground Rules and orders, including procedural schedules, are essential for the smooth and quick resolution of Section 337 investigations. AIAE respondents have failed to cite to any case or rule that supports the unilateral actions such as AIAE has imposed on the Staff and Magotteaux, nor is the ALJ aware of any... AIAE respondents should not be permitted to unilaterally disrupt discovery and dictate such matters in callous disregard of the time schedules imposed by the Commission and this ALJ. AIAE respondents' delay in naming its expert, their continued failure to cooperate and participate in discovery, and their unilateral decisions to cancel fact witness depositions and its expert witness deposition is without justification and has hampered both Magotteaux and Staff's ability to prepare for the evidentiary hearing. This failure to comply with the rules and orders of this ALJ and the Commission appears both willful and without justification." Order No. 21 at 3.

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continued to refuse to participate in discovery, failed to serve responses to the written discovery and failed to produce their witnesses for deposition. Rather, on March 23, 2009, AIAE filed a document entitled “Respondents AIA Engineering Limited’s and Vega Industries Ltd.’s Notice of Filing of District Court Action and Statement of Position with Respect to ITC Investigation No. 337-TA-644” (“Statement of Position”), wherein AIAE informed the ALJ of the District Court Action and argued that it “will be in a position to seek relief from Magotteaux’s allegations in a forum in which they can fully and fairly develop and present their substantial defenses”; “reserved” its right to appeal any decisions by the ALJ or the Commission; and gave notice that it “will not participate any further in this investigation.” (Statement of Position at 1-2).

As set forth *supra*, on March 27, 2009, Staff filed Motion No. 644-037 for issuance of an initial determination finding AIAE in default and request for shortened response time. Staff argued that AIAE should be found in default pursuant to 19 C.F.R. §§ 210.16 and 210.17 for failure to file a pre-hearing brief, exhibits or witness statements; failure to participate in discovery, including complying with Order No. 23; and based on their statement of intention to no longer participate in this investigation. In addition, Staff argued that given AIAE’s conduct in this investigation, an adverse inference that AIAE has violated Section 337 was warranted.

Both Magotteaux and AIAE filed a response to the Staff’s motion, despite AIAE’s statements to the contrary in its Statement of Position. Magotteaux supported Staff’s motion and AIAE opposed it to the extent the finding of default was based on adverse inferences. AIAE argued that a finding of default under Rule 210.17 is “unnecessary”, “inappropriate” and “wasteful” because (1) this dispute is governed by the Settlement Deed⁸; (2) the basis for finding

⁸ AIAE maintains its position that the dispute in this investigation is governed by a Settlement Deed entered into by Magotteaux and Mr. Bhadresh Shah, the principal shareholder of the company that would become AIA Engineering.

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AIAE in default will not affect the result for Magotteaux, namely that AIAE is in default; and (3) any adverse inference is contrary to the evidence before the ALJ. AIAE also argued that its request for reconsideration or interlocutory appeal of the ALJ's decision to deny their motion to terminate based on arbitration clause should be granted and that such a ruling would render Staff's motion moot.⁹

Based on the foregoing, the ALJ determined good cause existed to stay the evidentiary hearing scheduled to begin on April 13. (*See* Order No. 24) (March 31, 2009). Specifically, the ALJ cited AIAE's statements that they will no longer participate in this investigation, which presumably included attending and participating in the evidentiary hearing, and failure to file a pre-hearing brief; the dispositive nature of Staff and Magotteaux's motions for issuance of an initial determination finding AIAE in default; and the stated positions of Magotteaux and Staff in their pre-hearing briefs that a violation of Section 337 has occurred.

On April 13, Magotteaux filed Motion No. 644-038 seeking the additional adverse inferences set forth *supra* and Staff filed a response in support of the motion. AIAE again filed a response despite its representations in its Statement of Position and in response to the Staff's motion that it would no longer participate in this investigation. AIAE again opposed a finding of default based on adverse inferences.

APPLICABLE LAW

Commission Rule 210.16(a)(2) states that “[a] party may be found in default as a sanction for abuse of process under § 210.4(c), or failure to make or cooperate in discovery, under § 210.33 (b).”¹⁰ 19 C.F.R. § 210.16(a)(1). The Commission has found non-cooperative

⁹ The ALJ has contemporaneously denied AIAE's motion for reconsideration. *See* Order No. 25 (May 8, 2009).

¹⁰ Commission Rule 210.33(b) limits sanctions to cases in which the party has failed to comply with an order compelling discovery, including “an order for the taking of a deposition or the production of documents, an order to answer interrogatories, [or] an order issued pursuant to a request for admissions.” 19 C.F.R. § 210.33(b). In such

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respondents in default for failure to participate in discovery in previous investigations. *See, e.g., Certain Ink Cartridges and Components Thereof*, Inv. No. 337-TA-565, Order No. 51, at 2 (Jan. 13, 2009) (“*Ink Cartridges*”) (unreviewed initial determination finding a respondent in default pursuant to Rule 210.16(a)(2)); *Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-643, Order No. 17, at 4-5 (Jan. 9, 2008) (“*Cigarettes*”) (unreviewed initial determination finding a respondent in default pursuant to Rules 210.16(a)(2) and 210.17); *Certain Ink Markers and Packaging Thereof*, Inv. No. 337-TA-522, Order No. 28 (June 1, 2005) (unreviewed initial determination making adverse inferences based on failure to cooperate in discovery); *Certain Automotive Measuring Devices, Products Containing Same, and Bezels for Such Devices*, Inv. No. 337-TA-494, Order No. 18 (April 7, 2004) (unreviewed initial determination finding a respondent in default pursuant to Rule 210.16(a)(2)); *Certain Bearings and Packaging Thereof*, Inv. No. 337-TA-469, Order No. 104 (Jan. 14, 2003) (same).

Commission Rule 210.17 states, in relevant part, that “[f]ailures to act other than the defaults listed in § 210.16 may provide a basis for the presiding administrative law judge or the Commission to draw adverse inferences and to issue findings of fact, conclusions of law, determinations (including a determination on violation of section 337 of the Tariff Act of 1930)...[s]uch failures include, but are not limited to

....

(e) Failure to file a brief or other written submission requested by the administrative law judge or the Commission during an investigation or related proceeding;

....

(g) Failure to file a brief or other written submission requested by the administrative law judge or the Commission;

....

cases, a party may move for a default, or the Judge may enter a default *sua sponte*. 19 C.F.R. § 210.16(b)(2).

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The presiding administrative law judge or the Commission may take action under this rule sua sponte or in response to the motion of a party.”

19 C.F.R. § 210.17. The Commission has also found respondents in default under Rule 210.17 and has made adverse inferences based on their failure to act. *See Certain Electrical Connectors and Products Containing Same*, Inv. No. 337-TA-374, Order No. 38 (Feb. 9, 1996) (unreviewed initial determination finding respondent in default under 19 C.F.R. § 210.17 for failure to respond to a motion for summary determination and making an adverse inference of a violation); *see also, e.g., Cigarettes*, Order No. 17, at 4-6 (unreviewed initial determination finding a respondent in default pursuant to Rules 210.16(a)(2) and 210.17); *Certain Agricultural Vehicles and Components Thereof*, Inv. No. 337-TA-487, Order No. 45, at 4 (Oct. 1, 2003) (unreviewed initial determination finding respondents in default pursuant to 19 C.F.R. §§ 210.16 and 210.17).

Commission Rule 210.16(a)(2)

AIAE’s conduct in this investigation clearly warrants a finding of default based on Rule 210.16(a)(2). Upon resolution of the Indian Court Action, AIAE began to cooperate and participate in this investigation, including filing a response to the Complaint and Notice of Investigation and participating in discovery. Based on AIAE’s conduct, the ALJ denied Magotteaux’s motion for an order to show cause and for a finding of default. However, once AIAE filed its motion to terminate based on arbitration clause in the Settlement Deed, it unilaterally decided that it would no longer participate in discovery and argued that the ALJ and Commission lacked authority to compel or demand discovery. (*See Respondents’ Memorandum in Opposition to Commission Investigative Staff’s Motion to Preclude Expert Testimony or to Compel Deposition of Expert at 3* (“[T]he ALJ lacks authority to demand or compel discovery where the Settlement Deed between the parties expressly requires arbitration of the disputes in a forum other than the ITC.”); *see also Id.* at 1, 2 (“Respondents’ decision not to present their

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expert for deposition is and remains justified because the issues raised in this investigation arise out of and touch upon the Settlement Deed between the parties that contains a license to Respondent AIA to manufacture and export from India product containing the technology at issue and that provides that issues touching this license must be resolved in an arbitral forum other than the ITC.”;“Pending the ALJ and Commission rulings on this Motion, Respondents maintain their position that discovery of any kind, including the deposition of their expert, is without authority and is unduly burdensome and oppressive.”); Respondents’ Memorandum in Opposition to Complainants’ Motion to Compel the Appearance of Respondents’ Witnesses for Deposition at 1-2 (“Because this investigation must be terminated in whole as a result of the provisions of written Settlement Deed, there is no authority to demand or compel depositions of Respondents’ employees or any other discovery, and the depositions are unduly burdensome and oppressive.”).)

Rather, AIAE unilaterally cancelled scheduled depositions, refused to substantively respond to Staff’s contention interrogatories, refused to respond to Magotteaux’s requests for admission, and refused to produce documents in response to Magotteaux’s requests for the production of documents and things. (*See* Order No. 23. at 1-2; *See also* Complainants’ Motion to Compel the Appearance of Respondents AIAE Engineering Limited and Vega Industries Ltd.’s Witness for Deposition, Exhibit C; and Commission Investigative Staff’s Motion to Compel Responses to Contention Interrogatories, Exhibit G.) As a result, Staff and Magotteaux each filed separate motions to compel AIAE to respond to its discovery requests. In response, AIAE again argued that its decision to no longer participate in discovery was justified since it had filed a motion to terminate based on an arbitration clause. (*See supra.*) However, as the ALJ explained in his order compelling AIAE to produce discovery:

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AIAE's continued reliance on its motion to terminate as a basis for refusing to cooperate and participate in discovery is in error. Ground Rule 3.8 specifically states that "[n]o motion stops discovery except a timely motion to quash a subpoena." The basis for this rule is to ensure that discovery continues, especially given the fast pace of Section 337 investigations, regardless of any pending motions. [. . .] The ALJ's Ground Rule 3.8 is unambiguous and clear: discovery is to continue, regardless of any motion filed, except for a motion to quash a subpoena. There is no exception for a motion to terminate and, further, AIAE has failed to cite to any authority that supports their position that they may unilaterally refuse to participate in discovery once a motion to terminate has been filed. Indeed, Commission precedence has indicated that the appropriate action would be to file a motion to stay the procedural schedule pending the motion to terminate. The filing of a motion to terminate in and of itself does not provide a valid basis to refuse to cooperate in discovery. AIAE has not filed any motion to stay the procedural schedule pending a ruling on the motion to terminate and, instead, has chosen to blatantly disregard the ALJ's and the Commission's rules and authority in favor of its own unilateral decision as to how and where this investigation should proceed.

(*Id.* at 3-4) (internal citations omitted). In response to Order No. 23, AIAE filed its Statement of Position where it specifically stated its intention to continue to refuse to participate in this investigation, including ignoring Order No. 23. AIAE filed no other response to Order No. 23 nor did it take any affirmative steps in an attempt to resolve the matter. The ALJ finds that such conduct is sufficient to find AIAE in default for "failure to make or cooperate in discovery" under Rule 210.16(a)(2).

AIAE in effect concedes that its conduct in this investigation warrants a finding of default based on Rule 210.16(a)(2). Indeed, in both responses to Staff's and Magotteaux's motions for default and violation, AIAE states that "if any order against Respondents is to be entered, then Respondents submit that 19 C.F.R. § 210.16(a)(2) controls." (Respondents' Memo in Response to Commission Investigative Staff's Motion for Issuance of an Initial Determination Finding Respondents in Default and Request for Shortened Response Time at 2; Respondents' Memo in Response to Complainants' Motion for Issuance of an Initial Determination Finding Respondents

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in Default and Request for Adverse Inferences on Importation, Infringement and Domestic Industry at 2.)

Based on the foregoing, the ALJ finds that respondents AIA Engineering Limited and Vega Industries are in default pursuant to Rule 210.16(a)(2).

Commission Rule 210.17

While AIAE effectively concedes that it should be found in default pursuant to Rule 210.16(a)(2), it argues that adverse inferences are not warranted. However, based on AIAE's conduct thus far in this investigation, the ALJ finds that adverse inferences are justified. First, AIAE has failed to file a pre-hearing brief per Order Nos. 6 and 14, which itself is sufficient for a finding of default and adverse inferences under the enumerated instances set forth in Rule 210.17. Notwithstanding the former basis, AIAE's conduct throughout this investigation has been so inconsistent, egregious and disruptive that it provides an independent basis for a finding of default and adverse inferences.

AIAE asserts that this dispute should more appropriately be settled in arbitration rather than through litigation and that the ALJ and the Commission lack the authority to govern the dispute based on the arbitration clause. However, as noted in the ALJ's Order No. 20 where he denied the motion to terminate, AIAE's actions are inconsistent with their stated intention to seek resolution through arbitration. Indeed, less than one week after the ALJ denied AIAE's motion to terminate, AIAE filed a declaratory judgment action in the Middle District of Tennessee. This recently filed complaint combined with AIAE's litigious actions in the Indian Court Action (where AIAE did not assert its right to seek arbitration despite the fact that the Settlement Deed was raised in that action) contradicts AIAE's representations that the "correct" and/or "appropriate" forum for resolving this dispute "lies solely with the arbitrators in London."

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Indeed, there is no indication or evidence that AIAE has even contacted or notified Magotteaux of its intention to exercise this “right.” Rather, AIAE has determined, yet again, that the “correct” forum is not with the arbitrators in London but through litigation in the District Court in Tennessee. Furthermore, when AIAE was notified of the instant investigation in April 2008, it did not immediately seek termination of the investigation based on arbitration nor did it seek termination once it did begin to actively participate in this investigation in November despite knowing of the Settlement Deed and the arbitration clause contained therein from the Indian Court Action. Rather, AIAE waited nearly 4 months from the time it began to actively participate in this investigation to assert the arbitration clause in the Settlement Deed.¹¹

AIAE’s basis for filing in the District Court of Tennessee appears to be little more than forum shopping. Indeed, in its Statement of Position, AIAE stated that “it had been limited as a practical matter in their ability to conduct discovery and otherwise prepare their defense for the hearing in this investigation” and that in the District Court Action “Respondents will be in a position to seek relief from Magotteaux’s allegations in a forum in which they can fully and fairly develop and present their substantial defenses which, as more fully explained below, they are not in a position to do here.” In explaining their position, AIAE argues that (1) the Indian Court matter prevented it from participating in the instant investigation, which gave Magotteaux an advantage in discovery; (2) that FAR’s settlement out of the investigation just days before the start of expert discovery severely injured AIAE; and (3) that all of this may have been avoided had the ALJ granted AIAE’s motion to terminate. If AIAE was truly concerned about “fully and fairly meet[ing] all of the allegations of Magotteaux’s complaint, or to prepare and present its substantial dense of, *inter alia*, non-infringement and invalidity,” then the proper recourse should

¹¹ The period extends to nearly 11 months if one were to take into consideration the date on which AIAE became aware of this investigation, April 2008.

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have and could have been to notify the ALJ of their concern and supposed disadvantage. The ALJ could have worked with the parties to amend the procedural schedule such that AIAE would have the opportunity to fully develop their arguments and conduct discovery. (See Order No. 23.) However, AIAE had never notified the ALJ of its purported disadvantage. Instead, AIAE repeatedly cited its pending motion to terminate as a basis for its lack of participation. The first mention of its purported disadvantage came only after it had filed its District Court Action. Rather than properly seek appropriate remedial action from the ALJ and Commission, AIAE chose to simply stop “participating” in this investigation and file a declaratory judgment action in the District Court in Tennessee where AIAE, no doubt, begins with an advantage having collected discovery from Magotteaux without having to produce any itself.

Moreover, despite AIAE’s representations that it would no longer participate in this investigation, it has continued to intermittently “participate” by filing responses and oppositions to motions. Again, AIAE’s actions are inconsistent with their statements to this ALJ and to the Commission that it would no longer participate in this investigation. Rather, AIAE has, again, unilaterally and arbitrarily decided when, where and how it will participate in this investigation. In fact, its decision to no longer participate had certain “exceptions,” which AIAE unilaterally decided were appropriate.¹² Such conduct is disruptive, unfair and disrespectful to Magotteaux,

¹² In their Statement of Position, AIAE set several “conditions” on their decision to no longer participate, *i.e.*, AIAE reserved the right to participate and respond to certain things:

Respondents submit this Notice and Statement without prejudice to the position taken in their Motion for Termination of the Investigation Pursuant to 19 U.S. C. § 1337 (C) and 19 C.F.R. § 210.21 (A)(2) (“Respondents’ Termination Motion”), their Motion for Reconsideration or Interlocutory Appeal of Decision Denying Motion for Termination of the Investigation (“Motion for Reconsideration or Appeal”), their opposition to and denial of Complainants Magotteaux International S/A and Magotteaux, Inc.’s (collectively, “Magotteaux”) Motion for Summary Determination, their opposition to and denial of Magotteaux’s allegations in this investigation, and to any appeals from any rulings by the Administrative Law Judge (“ALJ”) and/or any final determinations of the Commission (including without limitation challenges to the timing or substance of any exclusion order with Magotteaux may seek). They also submit this Notice and Statement without prejudice to any proceedings that AIA and/or Vega may choose to pursue (or continue to pursue) in the Indian court(s). The latter includes (but may not be limited to) an action

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Staff, the ALJ and the Commission. Whether AIAE shall participate and when it shall participate should not be a guessing game nor should such participation lie solely within AIAE's discretion. (See Fed. Rules Civ. Proc R 37; see also *Adriana Int'l Corp. v Thoeren*, 913 F.2d 1406 (9th Cir. 1990); *Adolph Coors Co. v. Movement against Racism & Klan*, 777 F.2d 1538 (11th Cir. 1985); *Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602 (2nd Cir 1964); *United States v. 49,000 Currency*, 330 F.3d 371 (5th Cir. 2003); see also 19 C.F.R. §§ 210.11, 210.12, 210.13, 210.14.). Therefore, the ALJ finds that based on AIAE's conduct in this investigation, adverse inferences are justified.

In its motion, Magotteaux seeks specific, detailed findings against AIAE relating to importation, infringement and domestic industry and lists nearly 130 findings of fact. (See Motion No. 644-038 at 9-24 and Attachment 2.) The ALJ finds that while the request for adverse inferences is warranted and justified, it need not be as detailed or as specific as set forth by Magotteaux.

Therefore, pursuant to Rule 210.17, the ALJ finds that AIA Engineering Limited and Vega Industries are in violation of Section 337 in that (1) the Accused Products infringe the asserted claims of the '998 Patent; (2) AIA Engineering Limited and Vega Industries import or sell for importation composite wear components and products containing same that infringe the asserted claims of the '998 Patent; and (3) a domestic industry exists with respect to the articles protected by the '998 Patent.

that AIA expects to initiate in India regarding the consequences of Magotteaux's unconditional withdrawal of Magotteaux's patent infringement suit against AIA in India.

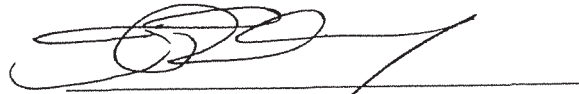
Subject to all of the forgoing, Respondents hereby give notice that AIA and Vega will not participate any further in this investigation, except in connection with appeals or other challenges to the denial by the ALJ of Respondents' Termination Motion or other challenges to the ALJ's rulings on appeals to the Commission or elsewhere, or to any actions taken by the Commission (all including without limitation challenges to the timing or substance of any exclusion order Magotteaux may seek).

Statement of Position at 1-2.

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

SO ORDERED.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Theodore R. Essex
Administrative Law Judge

ATTACHMENT A

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

Before the Honorable Theodore R. Essex
Administrative Law Judge

In the Matter of

CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS
CONTAINING SAME

Inv. No. 337-TA-644

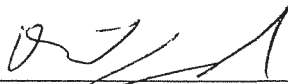
COMMISSION INVESTIGATIVE STAFF'S MOTION FOR ISSUANCE OF AN
INITIAL DETERMINATION FINDING RESPONDENTS AIA ENGINEERING
LIMITED AND VEGA INDUSTRIES IN DEFAULT AND REQUEST FOR
SHORTENED RESPONSE TIME

The Commission Investigative Staff ("Staff") respectfully moves pursuant to Commission Rules 210.16 and 210.17 for an order finding Respondents AIA Engineering Limited and Vega Industries (collectively "Respondents" or "the AIAE Respondents") in default. As discussed in the accompanying memorandum of law, a default is appropriate under 19 C.F.R. §§ 210.16(a)(2), (b)(2), for failure to make and cooperate in discovery. In this respect, the AIAE Respondents have failed to comply with Order No. 23, which directed them to respond to written discovery and produce witnesses for deposition, and have stated that they will not participate further in this investigation. A default is also appropriate under 19 C.F.R. § 210.17(e) for failure to file a brief or other written submission requested by the Administrative Law Judge. In this respect, the AIAE Respondents have failed to file a pre-hearing statement and have thus waived their right to contest any issues in the investigation. (*See* Ground Rule 8(f)). Under the circumstances, the Staff submits that the Judge should issue an initial determination finding the AIAE Respondents in default and making an adverse inference that they have violated Section 337.

In addition, because the hearing in this matter is scheduled to begin on April 13, 2009, the Staff requests that the Judge shorten the time to respond to this motion such that any responses are due in one week, *i.e.*, on April 3, 2009. This will allow for the briefing to be completed and for the Judge to rule on the motion before the beginning of the evidentiary hearing, if the Judge determines that this would be appropriate.

Pursuant to Ground Rule 3.2, the Staff has contacted the other parties concerning this motion. Complainants have indicated that they will "join this Motion and/but ask for an opportunity to separately brief the Motion and further move the Court for adverse inferences on the outstanding issues in the Investigation." Respondents have indicated that they will oppose the motion.

Respectfully submitted,



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Anne Goalwin, Supervisory Attorney
David O. Lloyd, Investigative Attorney

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March 27, 2009

CERTIFICATE OF SERVICE

The undersigned certifies that on March 27, 2009, he caused the foregoing **COMMISSION INVESTIGATIVE STAFF'S MOTION FOR ISSUANCE OF AN INITIAL DETERMINATION FINDING RESPONDENTS AIA ENGINEERING LIMITED AND VEGA INDUSTRIES IN DEFAULT AND REQUEST FOR SHORTENED RESPONSE TIME** to be filed with the Secretary (original and six copies), served by hand upon Administrative Law Judge Theodore R. Essex (2 copies), and served upon the parties (1 copy each) in the manner indicated below:

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

Before the Honorable Theodore R. Essex
Administrative Law Judge

In the Matter of

CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS
CONTAINING SAME

Inv. No. 337-TA-644

COMMISSION INVESTIGATIVE STAFF'S MEMORANDUM IN SUPPORT
OF MOTION FOR ISSUANCE OF AN INITIAL DETERMINATION
FINDING RESPONDENTS AIA ENGINEERING LIMITED AND VEGA
INDUSTRIES IN DEFAULT AND REQUEST FOR SHORTENED RESPONSE TIME

I. INTRODUCTION

The Commission Investigative Staff ("Staff") respectfully submits this memorandum in support of its motion for issuance of an initial determination finding Respondents AIA Engineering Limited and Vega Industries in default. As discussed further below, Respondents have failed file a pre-hearing brief, exhibits, or witness statements, have failed to meet their discovery obligations, have failed to comply with an order compelling discovery, and have announced that they will not participate any further in this investigation.¹ Respondents should therefore be found in default pursuant to Commission Rules 210.16 and 210.17, 19 C.F.R. §§ 210.16, 210.17. In addition, because the hearing in this matter is scheduled to begin on April 13, 2009, the Staff respectfully requests that the response time for this motion be shortened to April

¹ The Staff notes that despite this statement of non-participation and the fact that there can be no dispute that Respondents have failed to comply with Order No. 23 and have failed to file a pre-hearing brief, Respondents have nonetheless indicated that they will oppose this motion.

3, 2009 (*i.e.*, the parties would have one week to respond to the motion), so that the issue of a default can be resolved before the hearing, if possible.²

II. BACKGROUND

In the Complaint, filed on March 24, 2008, Complainants Magotteaux International S/A and Magotteaux, Inc. (collectively “Magotteaux”) allege, *inter alia*, that Respondents AIA Engineering Limited and Vega Industries (collectively “Respondents” or “the AIAE Respondents”) have violated Section 337 by reason of the importation and sale of certain composite wear components and products containing same that infringe one or more of claims 1-22 of U.S. Patent No. Re. 39,998 (“the ‘998 patent”).³ The Commission voted to institute an investigation on April 21, 2008, and the Notice of Investigation was published in the Federal Register on April 25, 2008. *See 73 Fed. Reg. 22431* (April 25, 2008).

On May 15, 2008, Respondent Vega Industries moved for an extension of time to respond to the Complaint and Notice of Investigation. (*See Order No. 3*). On May 22, 2008, however, rather than file responses to the Complaint and Notice of Investigation, the AIAE Respondents moved to stay this investigation based on an antisuit injunction that they had obtained as part of the court case between the parties in India. (*See Motion Docket No. 644-4*). After filing the motion for a stay, the AIAE Respondents essentially refused to participate in the investigation.

² AIA Engineering Limited and Vega Industries are the only remaining Respondents in the investigation. Moreover, Complainants are requesting only a limited exclusion order, not a general exclusion order. (*See, e.g., SX-2C*, at 10 (responses to contention interrogatories)). Thus, if a default is found, no evidentiary hearing will be necessary.

³ The investigation has been terminated as to a third Respondent based on a settlement agreement. (*Order No. 19; Commission Decision Not to Review, March 11, 2009*).

On October 3, 2008, the Judge denied the motion for stay, but did extend the target date. (Order Nos. 12, 13). The Judge requested that the parties submit a new procedural schedule, including “deadlines for AIA Engineering and Vega Industries for events whose deadlines have already passed.” (Order No. 12, at 3 n.3). A new procedural schedule was subsequently entered. (Order No. 14). The AIAE Respondents nonetheless did not participate in the investigation.

On November 14, 2008, Complainants moved for a default against the AIAE Respondents based on their failure to answer the Complaint and Notice of Investigation. (Motion Docket No. 644-15). The AIAE Respondents opposed the motion for default, specifically representing to the Judge that they “must participate and defend themselves here, and they fully intend to do so.” (AIAE Response to Motion for a Default, at 2).⁴ The AIAE Respondents subsequently responded to the Complaint and Notice of Investigation and began to participate in discovery, at least to some degree. On February 3, 2009, the Judge denied the motion for a default. (Order No. 18).

Immediately following the denial of the motion for a default, the AIAE Respondents ceased participating in discovery. They refused to produce their fact and expert witnesses for deposition, refused to respond substantively to Complainants’ written discovery, and refused to respond substantively to the Staff’s contention interrogatories. (Motion Docket Nos. 644-27, 644-31, 644-32, 644-33). Respondents also did not file a pre-hearing statement and did not serve any exhibits or witness statements.

⁴ Based on the representation that the AIAE Respondents would participate in the investigation, the Staff also opposed the entry of a default.

On March 5, 2009, the Judge struck Respondents' untimely identification of their expert witness. (Order No. 21). On March 19, 2009, the Judge granted the outstanding motions to compel, ordering responses by March 23, 2009, and specifically warned the AIAE Respondents that "[t]he ALJ will not hesitate, either *sua sponte* or in response to a motion, to make adverse inferences against AIAE should they refuse to cooperate and participate in discovery nor will the ALJ refrain from making the appropriate findings based on the adverse inferences, which includes a finding of default." (Order No. 23, at 4-5).

The AIAE Respondents nevertheless did not serve responses to the interrogatories and requests for admission, did not produce their witnesses for deposition, and thus did not comply with Order No. 23. Instead, Respondents filed a document entitled "Respondents AIA Engineering Limited's and Vega Industries Ltd.'s Notice of Filing of District Court Action and Statement of Position with Respect to ITC Investigation No. 337-TA-644" ("Statement of Position") This document, while purporting to reserve the AIAE Respondents' rights to appeal any decisions by the Judge or the Commission, states that "Respondents will not participate any further in this investigation." (Statement of Position at 2, 5).

III. DISCUSSION

A. Respondents Should Be Found In Default Pursuant to Commission Rules 210.16(a)(2) and 210.16(b)(2)

First, the Staff respectfully moves pursuant for an order finding Respondents in default for failure to make and cooperate in discovery. *See* 19 C.F.R. §§ 210.16(a)(2), (b)(2).⁵ The

⁵ Under these Rules, it is not necessary to issue an order to show cause before entering a default. *See* 19 C.F.R. § 210.16(b)(2); *see also Certain Ink Cartridges and Components Thereof*, Inv. No. 337-TA-565, Order No. 51, at 2 (Jan. 13, 2009) ("*Ink Cartridges*").

Commission Rules provide that “[a] party may be found in default as a sanction for abuse of process, under § 210.4(c), or failure to make or cooperate in discovery, under § 210.33(b).” 19 C.F.R. § 210.16(a)(2) (emphasis added). Rule 210.33(b), in turn, limits sanctions to cases in which the party has failed to comply with an order compelling discovery, including “an order for the taking of a deposition or the production of documents, an order to answer interrogatories, [or] an order issued pursuant to a request for admissions.” 19 C.F.R. § 210.33(b). In such cases, a party may move for a default, or the Judge may enter a default *sua sponte*. 19 C.F.R. § 210.16(b)(2). The Staff submits that although a default for a failure to make or cooperate in discovery should be a last resort, the facts of this investigation more than justify this result.

Here, Respondents have failed to make and cooperate in discovery and have failed to comply with an order compelling discovery. Respondents have been given multiple opportunities to participate in this investigation and defend their interests. (*See supra* at § II). However, they have not done so. Instead, as soon as Complainants’ original motion for a default was denied, Respondents ceased participating in discovery at all. (*Id.*). In Order No. 23, the Judge directed Respondents to comply with the outstanding discovery requests, including producing witnesses for deposition, responding to interrogatories, and answering requests for admissions. (*See* Order No. 23, at 5-6). Indeed, Respondents were specifically warned that failure to comply with the Order could result in the imposition of sanctions, including a default. (Order No. 23, at 4-6). Respondents nonetheless did not comply with Order No. 23 and did not provide the requested discovery. Instead, they served a “Statement of Position,” announcing that they had filed a declaratory judgment action in U.S. District Court and that they “will not participate any further in this investigation.” (Statement of Position at 2, 5). The Staff therefore

submits that Respondents have not merely failed to cooperate in discovery, but have willfully disobeyed the Judge's Order in this respect. Moreover, given the late date (the hearing is approximately two weeks away), it is effectively impossible to remedy Respondents' failure to comply with their discovery obligations.

Under Commission precedent, this course of behavior warrants a finding of a default. *See, e.g., Ink Cartridges*, Order No. 51 (unreviewed initial determination finding a respondent in default pursuant to Rule 210.16(a)(2)); *Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-643, Order No. 17, at 4-5 (Jan. 9, 2008) ("*Cigarettes*") (unreviewed initial determination finding a respondent in default pursuant to Rules 210.16(a)(2) and 210.17); *Certain Ink Markers and Packaging Thereof*, Inv. No. 337-TA-522, Order No. 28 (June 1, 2005) (unreviewed initial determination making adverse inferences based on failure to cooperate in discovery); *Certain Automotive Measuring Devices, Products Containing Same, and Bezels for Such Devices*, Inv. No. 337-TA-494, Order No. 18 (April 7, 2004) (unreviewed initial determination finding a respondent in default pursuant to Rule 210.16(a)(2)); *Certain Bearings and Packaging Thereof*, Inv. No. 337-TA-469, Order No. 104 (Jan. 14, 2003) (same). The Staff therefore requests that its motion be granted, that the Judge issue an initial determination finding Respondents in default under 19 C.F.R. §§ 210.16(a)(2), (b)(2), and that this matter be sent to the Commission for immediate entry of relief.

B. Respondents Are In Default Pursuant to Commission Rule 210.17(e)

Second, the Staff respectfully moves pursuant to Commission Rule 210.17 for an order finding Respondents in default for failure to file a pre-hearing brief. *See* 19 C.F.R. § 210.17. The Commission Rules state that "[f]ailures to act other than the defaults listed in § 210.16 may

provide a basis for the presiding administrative law judge or the Commission to draw adverse inferences and to issue findings of fact, conclusions of law, determinations (including a determination on violation of section 337 of the Tariff Act of 1930), and orders that are adverse to the party that fails to act.” *Id.* These failures to act include “[f]ailure to file a brief or other written submission requested by the administrative law judge or the Commission during an investigation or a related proceeding.” 19 C.F.R. § 210.17(e). The Judge may take action under this Rule either *sua sponte* or in response to a motion by a party. 19 C.F.R. § 210.17. The Staff submits that the circumstances of this investigation warrant making an adverse inference that Respondents have violated Section 337 and thereby holding Respondents in default.

Specifically, Respondents have not only failed to comply with their discovery obligations, but they have also failed to submit a pre-hearing brief, as well as exhibits and witness statements, and have determined not to participate any further in this investigation. (*See supra* at § II). By failing to file a pre-hearing brief, Respondents have waived any arguments that they may have had concerning the issues of the investigation. (*See* Ground Rules 8(e), (f)). Under the circumstances, a default and an adverse inference of violation are fully appropriate. *See Certain Electrical Connectors and Products Containing Same*, Inv. No. 337-TA-374, Order No. 38 (Feb. 9, 1996) (unreviewed initial determination finding respondent in default under 19 C.F.R. § 210.17 for failure to respond to a motion for summary determination and making an adverse inference of a violation); *see also, e.g., Cigarettes*, Order No. 17, at 4-6 (unreviewed initial determination finding a respondent in default pursuant to Rules 210.16(a)(2) and 210.17); *Certain Agricultural Vehicles and Components Thereof*, Inv. No. 337-TA-487, Order No. 45, at 4 (Oct. 1, 2003) (unreviewed initial determination finding respondents in default pursuant to 19

C.F.R. §§ 210.16 and 210.17). The Staff therefore requests that its motion be granted, that the Judge issue an initial determination containing an adverse inference that Respondents have violated Section 337 and finding Respondents in default under 19 C.F.R. § 210.17(e), and that this matter be sent to the Commission for immediate entry of relief.

IV. CONCLUSION

For all of the above reasons, the Judge should issue an initial determination finding Respondents AIA Engineering Limited and Vega Industries in default.

Respectfully submitted,



Lynn I. Levine, Director
Anne Goalwin, Supervisory Attorney
David O. Lloyd, Investigative Attorney

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March 27, 2009

CERTIFICATE OF SERVICE

The undersigned certifies that on March 27, 2009, he caused the foregoing **COMMISSION INVESTIGATIVE STAFF'S MEMORANDUM IN SUPPORT OF MOTION FOR ISSUANCE OF AN INITIAL DETERMINATION FINDING RESPONDENTS AIA ENGINEERING LIMITED AND VEGA INDUSTRIES IN DEFAULT AND REQUEST FOR SHORTENED RESPONSE TIME** to be filed with the Secretary (original and six copies), served by hand upon Administrative Law Judge Theodore R. Essex (2 copies), and served upon the parties (1 copy each) in the manner indicated below:

**For Complainants Magotteaux International S/A
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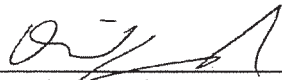
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ATTACHMENT B
(PUBLIC)

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC

Before the Honorable Theodore R. Essex
Administrative Law Judge

In the Matter of

CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS
CONTAINING SAME

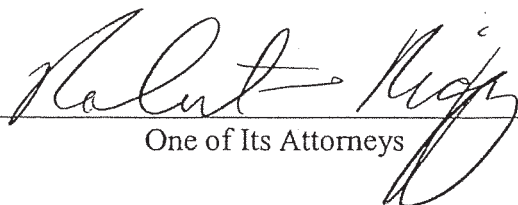
Investigation No. 337-TA-644

**COMPLAINANTS MAGOTTEAUX INTERNATIONAL S/A AND MAGOTTEAUX
INC.'S MOTION FOR ISSUANCE OF AN INITIAL DETERMINATION FINDING
RESPONDENTS IN DEFAULT AND REQUEST FOR ADVERSE INFERENCES ON
IMPORTATION, INFRINGEMENT AND DOMESTIC INDUSTRY**

Complainants Magotteaux International S/A and Magotteaux, Inc., (collectively "Magotteaux") by and through their counsel, Vedder Price P.C., respectfully submit their Motion for Issuance of an Initial Determination Finding Respondents in Default and Request for Adverse Inferences on Importation, Infringement and Domestic Industry. This Motion is in addition to and supplements the ITC Staff's similarly titled motion for an Initial Determination by requesting adverse inferences and specific findings of fact as permitted under § 210.16 and § 210.17 of the Commission Rules. The basis for the adverse inferences and the specific findings of fact are fully supported by the record and are demonstrated in the accompanying Memorandum of Points and Authorities.

Respectfully submitted,

MAGOTTEAUX S/A and MAGOTTEAUX,
INC.

By: 
One of Its Attorneys

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Dated: April 13, 2009

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

**Before the Honorable Theodore R. Essex
Administrative Law Judge**

In the Matter of

CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS
CONTAINING THE SAME

Inv. No. 337-TA-644

**COMPLAINANTS' MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT
OF ITS MOTION FOR ISSUANCE OF AN INITIAL DETERMINATION FINDING
RESPONDENTS IN DEFAULT AND REQUEST FOR ADVERSE INFERENCES ON
IMPORTATION, INFRINGEMENT AND DOMESTIC INDUSTRY**

I. INTRODUCTION

Complainants Magotteaux International S/A and Magotteaux, Inc. ("Complainants") have joined the Commission Investigative Staff's ("Staff") Motion for Issuance of an Initial Determination Finding Respondents in Default. Complainants are in substantial agreement with the Staff's Brief on this matter wherein the Staff has requested an adverse inference that AIA Engineering Limited and Vega Industries (collectively "Respondents" or "AIAE") have violated Section 337.

In addition to joining the Staff's Motion, Complainants have now moved for added adverse inferences given the record in this matter.

Specifically, Complainants request an adverse inference that Respondents have imported, sold for import, or sold after importation based on admissions made by AIA Engineering and Vega Industries in their respective Answers to the Amended Complaint and united responses to the Staff's discovery.

[REDACTED]

Complainants further request an adverse inference that the products imported and sold by AIA Engineering and Vega Industries infringe at least claims 12-13, 16-18 and 20-21 of U.S. Reissue Patent No. 39,998 given the Faber Witness Statement and CTL/McCrone laboratory analysis of AIA Engineering products.

Complainants request an inference adverse to Respondents that a Domestic Industry exists based on the activities of Magotteaux Inc. as reflected in the Taylor Witness Statement and various hearing exhibits cited and relied upon therein.

Finally Complainants request an adverse inference and finding of fact that U.S. Patent No. RE 39,998 is not subject to the arbitration clause included in the Settlement Deed.

The context in which the present Motion is brought presents this Investigative Body with a full and complete record. Beyond findings which support an adverse inference of a violation under § 337, there is evidence of importation, infringement and Domestic Industry. There is also a failure to provide sufficient information regarding an alleged license to the asserted '998 Patent. The record as presented, supports findings and, in turn, adverse inferences on these four issues.¹

At the same time, Respondents will oppose this Motion as they did the Motion put forth by Staff. As the ALJ knows, Respondents unilaterally "cut off" discovery in this Investigation and have placed at least three pleadings in the record stating that they would no longer participate in this Investigation. Respondents took this action only after answering the Complaint. At that time Respondents told the ALJ they would investigate and respond to certain Staff discovery. Respondents' moved to terminate this Investigation, claiming a prior settlement deed between the partners granted them rights to the technology claimed in the '998 patent and

¹ Complainants' proposed Findings of Fact are included with this Memorandum as attachment 2.

[REDACTED]

that the action belonged in arbitration or was more properly heard back in India. Respondents' Motion to Terminate was denied. Respondents moved for reconsideration of the Motion to Terminate, and simply repeated the same unpersuasive argument. The Motion for Reconsideration remains pending (see below).

Somewhere in the midst of all this, Respondents sued Magotteaux in Tennessee Federal Court, alleging noninfringement and invalidity of the patent-in-suit that is the subject of this Investigation. At the same time, Respondents were ordered to produce discovery in the form of witnesses for deposition, documents and answers to interrogatories. They have not.

Respondents' behavior presents a compelling record for action by the ALJ. Spurning the province of the ALJ, the Respondents have tactically withdrawn from the ITC claiming the dispute should be the subject of arbitration or otherwise decided in India while at the same time re-filing in the Federal Courts. Having been ordered to act, the Respondents have made a tactical decision not to do so, thereby handicapping the Staff's and Magotteaux's ability to complete the Investigation. All the while, Respondents have maintained their opposition to Motions for Default while placing all participants on notice of their intent to appeal.²

Respondents are literally holding Staff and Complainants hostage in this Investigation while moving on to Tennessee in an effort to extend the delay and expense to Magotteaux in enforcing its patent rights.

II. THE PENDING MOTIONS

Order No. 24 noted the motions now pending before this Court.³ At this time,

² Complainants placed Respondents on notice of its intent to seek attorneys' fees.

³ In Order No 24, the ALJ references among other things the pendency of Complainants Motion for Summary Judgment. Complainants believe that the Summary Judgment motion is moot. Respondents' unilateral declaration on February 5, 2009 that they would no longer participate in
(cont'd)

[REDACTED]

Complainants have responded to the Motion for Reconsideration or Interlocutory Appeal of decision denying Motion for Termination of Investigation. Respondents' renewed motion presents neither new facts or law. In its Motion for Reconsideration, Respondents have done nothing more than reargue the same issues previously presented, rely on inapplicable and misplaced Indian law while feigning to take the controversy back to New Delhi. Yet, Respondents have filed a District Court action in Tennessee on the very issues they claim are the subject of an arbitration provision.

Respondents' Motion for Reconsideration should be denied.

III. BACKGROUND

Complainants are in substantial agreement with the Background provided by Staff in its Memorandum in Support of the instant Motion. Complainants add the following information.

Complainants have now placed before the Commission as hearing direct exhibits CX-1 through CX-42 and hearing physical exhibits CPX-1 through CPX-3. These exhibits support Complainants requested findings of fact and stand unrebutted as Respondents failed to file a hearing brief or submit exhibits either direct or rebuttal as part of the pre-hearing procedure and as noted by the Staff in its brief, are precluded from participating in the hearing.

(cont'd)

discovery including refusing to answer interrogatories, requests to admit, failing to make their expert available for deposition, and failing to file Pre-Hearing Exhibits and Statement, as well as their later position paper essentially confirming their refusal to participate except with respect to selected issues that they deem necessary provides more than enough basis for disposal of this Investigation pursuant to Commission Rules 210.16 and 210.17 through default and adverse inferences.

[REDACTED]

Certain of these Exhibits are subject to objection by Staff. The list of hearing exhibits is found herein as Attachment I. Also found herein as Attachment II are Proposed Findings of Fact and Conclusions of Law.

Complainants join the Staff in moving for default against the Respondents and requesting an adverse inference of violation under Section 337. Further, Complainants request an adverse inferences on each of the issues of domestic industry, importation, infringement and the lack of a license against Respondents. Exhibits and Proposed Findings of Fact support the requested adverse inferences.

The pattern of conduct pursued by Respondents is clear. Respondents have done everything possible to delay action in this Investigation. When that was no longer possible, Respondents engaged to avert default in November of 2008. As soon as it was apparent that the Investigation was not moving forward as Respondents' desired, they unilaterally "cut off" discovery and moved to terminate the Investigation.

Even still, while feigning removal of the controversy to India and refusing to comply with the ALJ's Order compelling production, the Respondents filed a second action in Tennessee.

Now the Respondents have come forth stating that they would accept a default of these proceedings but arguing against further adverse inferences.

Despite numerous violations of the Court ordered schedule, an immediate and intentional decision to disregard Court ordered discovery, failure to file any pre-hearing submissions, including exhibits and a statement, among other notable deficiencies, Respondents still contend that adverse inferences are inappropriate.

All this argument flies in the face of Commission Rule 210.17.



Is the ALJ left to disregard the Commission's own rules?

How much longer must Complainants and Staff be held hostage to Respondents' absolute and utter disregard for the Rules of Practice of this Investigative Body?

Respondents have intentionally pursued a pattern of conduct which is exemplified by delay and selective compliance with Commission Rules when it suits Respondents' position.

Inferences, adverse to Respondents are well based on the full and complete record now before the ALJ.

IV. DISCUSSION

A. Respondents Should Be Found In Default

The Complainants join the Staff's Motion for Default. The Commission Rules provide that "[a] party may be found in default as a sanction for abuse of process, under § 210A(c), or failure to make or cooperate in discovery, under § 210.33(b)." 19 C.F.R. § 21.0.16(a)(2) (emphasis added). Rule 210.33(b), in turn, limits sanctions to cases in which the party has failed to comply with an order compelling discovery, including "an order for the taking of a deposition or the production of documents, an order to answer interrogatories, [or] an order issued pursuant to a request for admissions." 19 C.F.R. § 210.33(b). In such cases, a party may move for a default, or the Judge may enter a default *sua sponte*. 19 C.F.R. § 210.16(b)(2). Although a default for a failure to make or cooperate in discovery should be a last resort, the facts of this investigation more than justify that very result.

Here, Respondents have failed to make and cooperate in discovery and have failed to comply with an order compelling discovery. Respondents have been given multiple opportunities to participate in this investigation and defend their interests. (See Staff's Memorandum In Support of Motion, pp. 2-4). However, they have not done so. Instead, as soon

[REDACTED]

as Complainants' original motion for a default was denied, Respondents ceased participating in discovery at all. (*Id.*).

Order No. 23 directed Respondents to comply with the outstanding discovery requests, including producing witnesses for deposition, responding to interrogatories, and answering requests for admissions. (*See* Order No. 23, at 5-6). Respondents were specifically warned that failure to comply with the Order could result in the imposition of sanctions, including a default. (Order No. 23, at 4-6).

Respondents nonetheless did not comply with Order No. 23 and did not provide the requested discovery. Instead, they served a "Statement of Position," announcing that they had filed a declaratory judgment action in U.S. District Court (Middle District of Tennessee) and that they "will not participate any further in this investigation." (Statement of Position at 2, 5).

Respondents have failed to cooperate in discovery and have willfully disobeyed the Judge's Order in this respect.

Under Commission precedent, this course of behavior warrants a finding of a default. *See, e.g., Ink Cartridges*, Order No. 51 (unreviewed initial determination finding a respondent in default pursuant to Rule 210.16(a)(2)); *Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-643, Order No. 17, at 4-5 (Jan. 9, 2008) ("*Cigarettes*") (unreviewed initial determination finding a respondent in default pursuant to Rules 210.16(a)(2) and 210.17); *Certain Ink Markers and Packaging Thereof*, Inv. No. 337-TA-522, Order No. 28 (June 1, 2005) (unreviewed initial determination making adverse inferences based on failure to cooperate in discovery); *Certain Automotive Measuring Devices, Products Containing Same, and Bezels for Such Devices*, Inv. No. 337-TA-494, Order No. 18 (April 7, 2004) (unreviewed initial determination finding a

[REDACTED]

respondent in default pursuant to Rule 210.16(a)(2)); *Certain Bearings and Packaging Thereof*, Inv. No. 337-TA-469, Order No. 104 (Jan. 14, 2003) (same).

Complainants therefore request that this motion be granted, that the Judge issue an initial determination finding Respondents in default under 19 C.F.R. §§ 210.16(a)(2), (b)(2), and that this matter be sent to the Commission for immediate entry of relief.

B. Adverse Inferences Are Appropriate As Respondents Are In Default Pursuant to Commission Rule 210.17(e)

Complainants have joined the Staff's Motion pursuant to Commission Rule 210.17 for an order finding Respondents in default for failure to file a pre-hearing brief. *See* 19 C.F.R. § 210.17. The Commission Rules state that “[f]ailures to act other than the defaults listed in § 210.16 may provide a basis for the presiding administrative law judge or the Commission to draw adverse inferences and to issue findings of fact, conclusions of law, determinations (including a determination on violation of section 337 of the Tariff Act of 1930), and orders that are adverse to the party that fails to act.” *Id.* These failures to act include “[f]ailure to file a brief or other written submission requested by the administrative law judge or the Commission during an investigation or a related proceeding.” 19 C.F.R. § 210.17(e). The Judge may take action under this Rule either *sua sponte* or in response to a motion by a party. 19 C.F.R. § 210.17.

Complainants agree with the Staff in that the circumstances of this investigation warrant making an adverse inference that Respondents have violated Section 337 and thereby holding Respondents in default.

Specifically, Respondents have not only failed to comply with their discovery obligations, but they have also failed to submit a pre-hearing brief, as well as exhibits and witness statements, and have determined not to participate any further in this investigation. (*See* Staff's Memorandum in Support of this Motion). By failing to file a pre-hearing brief,

[REDACTED]

Respondents have waived any arguments that they may have had concerning the issues of the investigation. (See Ground Rules 8(e), (f)).

Under the circumstances, a default and an adverse inference of violation are fully appropriate. *See Certain Electrical Connectors and Products Containing Same*, Inv. No. 337-TA-374, Order No. 38 (Feb. 9, 1996) (unreviewed initial determination finding respondent in default under 19 C.F.R. § 210.17 for failure to respond to a motion for summary determination and making an adverse inference of a violation); *see also, e.g., Cigarettes*, Order No. 11, at 4-6 (unreviewed initial determination finding a respondent in default pursuant to Rules 210.16(a)(2) and 210.17); *Certain Agricultural Vehicles and Components Thereof*, Inv. No. 337-TA-487, Order No. 45, at 4 (Oct. 1, 2003) (unreviewed initial determination finding respondents in default pursuant to 19 C.F.R. §§ 210.16 and 210.17).

Complainants therefore join the Staff in requesting the Judge issue an initial determination containing an adverse inference that Respondents have violated Section 337 and finding Respondents in default under 19 C.F.R. § 210.17(c), and that this matter be sent to the Commission for immediate entry of relief.

C. Adverse Inferences On Infringement, Importation, and Domestic Industry Against Respondents Are Also Appropriate

Complainants additionally move for default under Commission Rule 210.17(e) and request adverse inferences and specific findings of fact on the issues of importation, infringement and domestic industry against Respondents.

The evidence supporting these findings are established and uncontroverted.

1. The Facts Establish Importation Under Section 337

A violation under Section 337 of the Tariff Act of 1930, as amended, requires, among other things, “the importation into the United States, the sale for importation, or the sale within

[REDACTED]

the United States after importation by the owner, importer or consignee, of articles that ... infringe a valid and enforceable United States patent. 19 U.S.C. § 1337(a)(1)(B) (emphasis added).

Respondents have admitted that AIA Engineering and Vega have collaboratively, imported into the United States Sintercast line products, alleged in the Amended Complaint⁴ to be at issue. CX-14C. CX-15C. SX-5C. SX-6C. AIA Engineering answered Magotteaux's Amended Complaint by unequivocally stating that it "has exported to Vega in the United States Sintercast line products" and that it "has the capacity in India to produce and has such produced such products in India." CX-14C. Similarly, Vega answered Magotteaux's Amended Complaint acknowledging that it "has purchased from AIA[E] in India and imported into the United States Sintercast line products⁵, alleged in the Amended Complaint to be at issue."⁶ CX-15C.

Respondents freely admit that Sintercast line products ("Accused Products") have generated sales in the United States in the range of approximately \$5,000 in 2005, \$121,000 in 2007 and \$179,000 in 2008. SX-5C. SX-6C. More specifically, Respondents admit selling \$327,322 of Accused Products in the United States between January 1, 2005 and March 31, 2008. SX-5C. SX-6C.

Interrogatories answered by Respondents demonstrate the following: (i) AIAE has been and remains involved in the business of exporting into the United States Accused Products; (ii)

⁴ The Amended Complaint alleges, among other things, that Respondents manufacture, have manufactured on their behalf, import into, have imported on their behalf, and/or sell composite wear components and/or products containing the same under the Sintercast trademark. CX-12C.

⁵ Product literature regarding the Sintercast product line was produced during the course of this Investigation and is attached hereto for reference as Attachment 2 to Magotteaux's Statement of Facts.

⁶ According to Respondents, the Sintercast line products are imported under Harmonizing Tariff Schedule item number 8474.90.0020. (*Id.*).

[REDACTED]

AIAE has been and remains involved in the business of selling Accused Products to a related company called Vega Middle East for importation into the United States; (iii) Vega has been and remains involved in the business of purchasing Accused Products for importation into the United States from Vega Middle East; and (iv) Vega has been and remains involved in the business of importing these Accused Product into the United States and selling the same within the United States. SX-5C. SX-6C.

Documents produced by Respondents corroborate these undisputed facts. These documents include at least thirteen different commercial offers for sale, quotations, or proposals for the sale of Accused Products by Vega to customers and potential customers located in the United States and range in value from \$23,980 to \$197,800 inclusive of freight and pattern development charges. CX-18C – CX-21C. Cumulatively, these commercial offers for sale, quotations or proposals represent Respondents' attempt to generate \$1,430,587.50, with freight and pattern development charges, in gross sales of Accused Products within the United States. (*Id.*)

Further document production from Respondents evidences four discrete sales of Accused Products via purchase orders from customers in the United States. CX-18C – CX-21C. The four purchase orders total \$277,719 in gross sales of Accused Products to customers in the United States. (*Id.*) Similarly, other documents evidence the following undisputed facts: (i) AIA Engineering shipped Vega \$5,152 worth of Accused Products from a foreign port to its final destination in Charleston, South Carolina (CX-18C – CX-21C); and (ii) Accused Products were sold and installed by Vega in customer's facilities in Tennessee in November 2007 and in November 2008. CX-18C – CX-21C.

[REDACTED]

Based on the above uncontroverted evidence introduced into the record by Respondents, AIA Engineering and Vega meet the importation requirement of Section 337 of the Tariff Act of 1930. Not only do AIA Engineering and Vega collaboratively import into the United States and sell for importation in the United States Accused Products, but Vega has admitted to substantial sales of Accused Products in the United States over the past three years. Accordingly, an inference adverse to Respondents on importation is appropriate.

2. The Facts Establish Respondents Imported Products Infringe the '998 Patent

A violation under Section 337 of the Tariff Act of 1930, as amended, requires, among other things, “the importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer or consignee, of articles that ... infringe a valid and enforceable United States patent. 19 U.S.C. § 1337(a)(1)(B) (emphasis added).

In previous briefing, Complainants have shown that each and every limitation of the asserted claims 12-13, 16-18 and 20-21 reads on Respondents’ Accused Products. (*See* Complainants Pre-Hearing Brief, pp. 30-52).

Respondents produced three samples of the Accused Products in accordance with its responses to Complainants’ discovery requests. Faber Witness Statement at Q.21-Q.23. CX-26C. One such sample (the “AIAE Sample”) was inspected by Complainants’ expert, Dr. Katherine T. Faber, Ph.D. The results of this inspection are set forth in the written Witness Statement of Complainants’ Expert, Katherine T. Faber, Ph.D. (the “Faber Witness Statement”). The Faber Witness Statement includes expert findings of fact based on: (i) Dr. Faber’s inspection of the AIA Engineering Sample; (ii) laboratory testing of the AIA Engineering Sample for metallographic examination and particle size analysis, as performed by the CTL

[REDACTED]

- the AIAE Sample is a composite wear component since it is made of more than one material; the materials are visible in Figures 1 and 2 of the Sailors Report;

- the AIAE Sample and the Sailors Samples are composite wear components made of metal and ceramic;

- the AIAE composite wear components of the AIAE Sample and of the Sailors Samples are made using [REDACTED]

- the AIAE composite wear components of the AIAE Sample and of the Sailors Samples comprise and include a metal matrix found to be [REDACTED];

- the AIAE metal matrices of the AIAE Sample and of the Sailor Samples include a working face having ceramic inserts;

- the AIAE ceramic inserts of the AIAE Sample and of the Sailor Samples are [REDACTED]

- the AIAE porous ceramic pads of the AIAE Sample are [REDACTED]

- the AIAE porous ceramic pads of the AIAE Sample and of the Sailor Samples have been [REDACTED]

[REDACTED]

- a calculation using data compiled and listed in the Sailors Report regarding the chemical elements found in the ceramic portion of the Sailors Samples illustrates that, with respect to the Sailors Samples: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- a legitimate method of assessing homogeneity of a composition is to assess the average composition and its variability; the standard deviation associated with [REDACTED]

[REDACTED]

[REDACTED] a person having ordinary skill in the art would therefore consider the ceramic composites in the Sailors Samples homogeneous.

The Faber Witness Statement readily indicates that each and every claim limitation is found in the AIAE Accused Products and that a finding of infringement for claim 12 is appropriate. The Faber Witness Statement also readily demonstrates that each of the remaining claims 13, 16-18 and 20-21 are infringed by the AIAE accused products and will not be repeated

[REDACTED]

in this Memorandum. An inference of infringement of these claims adverse to Respondents is dictated by the record before the ALJ.

3. A Domestic Industry Exists Under Section 337

A violation under Section 337 of the Tariff Act of 1930, as amended, requires, among other things, “an industry in the United States, relating to the articles protected by the patent ... concerned, exists or is in the process of being established.” 19 U.S.C. § 1337(2). Because Magotteaux makes and sells products protected by at least claims 12-13 and 16-19 of the ‘998 Patent and because Magotteaux has significant investment in plant and equipment and in the employment of labor or capital to manufacture and sell products protected by the ‘998 Patent, and no contrary evidence has been submitted by Respondents, a finding that Magotteaux has established a domestic industry is appropriate.

a. **Magotteaux Practices Claims 12-13 and 16-19 of the Claimed Invention**

Magotteaux provided Dr. Faber a sample product produced under the Xwin® mark (the “Magotteaux Sample”) for inspection. Faber Witness Statement at Q.20. CX-26C. The results of this inspection are set forth in the Faber Witness Statement. (*Id.*). The Faber Witness Statement includes expert findings of fact based on: (i) Dr Faber’s inspection of the Magotteaux Sample; (ii) laboratory testing of the Magotteaux Sample for metallographic examination and particle size analysis, as performed by the CTL Group of Skokie, Illinois; and (iii) laboratory testing of the Magotteaux Sample for chemical analysis, as performed by McCrone Associates, Inc. of Westmont, Illinois. Faber Witness Statement at Q.24 and Q.36. CX-26C. Based on these findings of fact, the Faber Witness Statement concluded that each of claims 12-13 and 16-18 read on the Magotteaux Sample. Faber Witness Statement at Q.15. CX-26C. Because each

[REDACTED]

of these claims reads on the Magotteaux Sample, the technology prong test of the domestic industry inquiry is satisfied.

b. The Facts Regarding Claim 12

The following undisputed facts relevant to the application of claim 12 to the Magotteaux Sample are found in the First Faber Report or are otherwise part of the record.

- the Magotteaux Sample is a composite wear component since it is made of more than one material (Faber Witness Statement at Q.17. CX-26C.);
- the Magotteaux Sample is a composite wear component made of metal and ceramic (Faber Witness Statement at Q.17, Q.32-Q.34. CX-26C.);
- the Magotteaux composite wear component of the Magotteaux Sample is made using a classical casting method where molten metal is poured into a mold of the desired shape (Faber Witness Statement at Q.34. CX-26C.);
- the Magotteaux composite wear component of the Magotteaux Sample comprises and includes a metal matrix identified as a composition close to [REDACTED] (Faber Witness Statement at Q.32-Q.34. CX-26C.);
- the Magotteaux metal matrix of the Magotteaux Sample includes a working face having ceramic inserts;
- the ceramic inserts of the Magotteaux Sample are porous ceramic pad which has been infiltrated with metal (Faber Witness Statement at Q.32-Q.34. CX-26C.);
- the average weight percentage of Al_2O_3 in the Magotteaux Sample is [REDACTED] and the average weight percentage of ZrO_2 in the Magotteaux Sample is [REDACTED] (Faber Witness Statement at Q.48. CX-26C.);
- the porous ceramic pad of the Magotteaux Sample is a homogeneous ceramic composite of 20 to 80% Al_2O_3 and 80 to 20% ZrO_2 because the ceramic grains were identified as, on average [REDACTED] Al_2O_3 and [REDACTED] ZrO_2 by weight (Faber Witness Statement at Q.48. CX-26C.);
- products incorporating the Xwin® technology, i.e., the technology in products practicing the claimed invention of the '998

[REDACTED]

Patent and sold under the mark Xwin®, generally have a porous ceramic pad comprising a homogeneous ceramic composite of 20 to 80% of Al₂O₃ and 80 to 20% ZrO₂, the percentages being expressed by weights of the constituents (Faber Witness Statement at Q.48. CX-26C.);and

- the porous ceramic pad of the Magotteaux Sample has been infiltrated with liquid metal during casting. Faber Witness Statement at Q.32-Q.34. CX-26C.

The Faber Witness Statement readily indicates that each and every claim limitation is found in the Magotteaux Sample and that a finding of domestic industry for claim 12 is appropriate. The Faber Witness Statement also readily demonstrates that each of the remaining claims 13, and 16-18 are covered by the Magotteaux Xwin™ products and will not be repeated in this Memorandum. The findings in the Faber Witness Statement stand unrebutted and no contrary evidence or analysis of the Magotteaux Xwin® product has been provided in this Investigation.

c. Magotteaux Has Satisfied the Economic Prong of the Domestic Industry Inquiry

“The scope of the domestic industry in patent-based investigations has been determined on a case-by-case basis in light of the realities of the marketplace and encompasses not only the manufacturing operations but may include, in addition, distribution, research and development and sales.” *In the Matter of Certain Optical Disk Controller Chips and Chipset and Products Containing the Same*, 2005 WL 2040764 at *6, 7, USITC Inv. No. 337-TA-523, Order No. 75 (U.S.I.T.C. 2005).

In the United States, Magotteaux maintains a corporate facility in Franklin, Tennessee and a plant facility in Pulaski, Tennessee. Taylor Witness Statement at Q.10. CX-33C. CX-34C. The Pulaski plant facility opened in 1972. Taylor Witness Statement at Q.10. CX-33C. CX-34C. As technology evolved over the past three and a half decades, so did Magotteaux’s

[REDACTED]

investments in plant and equipment in the United States. Taylor Witness Statement at Q.10. CX-33C. CX-34C. Today, the Pulaski plant is one site in Magotteaux's operations where Xwin® technology has been manufactured and continues to be manufactured on an ongoing basis. Taylor Witness Statement at Q.10. CX-33C. CX-34C.

Nearly every aspect of the Pulaski plant is used, in some capacity, in the manufacture of products containing Xwin® technology. Taylor Witness Statement at Q.37-Q.40. CX-33C. CX-34C.

[REDACTED]

In 2006, Magotteaux, Inc. valued its property, plant and equipment including land and improvements at approximately [REDACTED] its building and improvements at approximately [REDACTED] its factory and office machinery and equipment at approximately [REDACTED] and its automotive equipment at approximately [REDACTED] for a total of approximately [REDACTED] in undepreciated assets. Taylor Witness Statement at Q.10. CX-33C. CX-34C. The depreciated value of these assets is approximately [REDACTED] Taylor Witness Statement at Q.10. CX-33C. CX-34C.

[REDACTED]

[REDACTED]

[REDACTED] Taylor Witness Statement at Q.9. CX-

[REDACTED]

33C. CX-34C. [REDACTED]

[REDACTED] Taylor Witness Statement at Q.9. CX-33C. CX-34C. [REDACTED]

[REDACTED]

Magotteaux has undertaken significant employment of labor and capital in connection with the substantial investment in the exploitation of its intellectual property. Taylor Witness Statement at Q.10. CX-33C. CX-34C. As of March 3, 2008, the Franklin facility supports [REDACTED] and the Pulaski plant supports [REDACTED] Taylor Witness Statement at Q.10. CX-33C. CX-34C. [REDACTED]

[REDACTED] (*Id.*). The total employment for Magotteaux Inc. during 2006 was [REDACTED] with an overall annual salary base of approximately [REDACTED] (*Id.*)

[REDACTED]

[REDACTED] (*Id.*)

A large percentage of Magotteaux employees at the Pulaski plant work, in some capacity, on products incorporating the Xwin® technology. Taylor Witness Statement at Q.37-Q.39. CX-33C. CX-34C. Similarly, a large percentage of Magotteaux employees at the Franklin facility work, in some capacity, supporting products incorporating the Xwin® technology. (*Id.*). In fact, almost every person employed by Magotteaux at the Magotteaux Franklin facility work who work in its sales department, product support department or in the technical center work in some capacity, supporting Xwin® products. (*Id.*)

Xwin® products made with this technology are sold to (i) the cement industry as, for example, hammers, vertical roller mill castings; (ii) the utility industry as, for example, rolls and

[REDACTED]

tables, (iii) the aggregate industry as, for example, blow bars with wear castings for horizontal shaft machines, as anvils and impellers and as vertical shaft machines; (iv) the waste industry as, for example, hammers and (v) the fluid business as, for example, pump casing housings. Taylor Witness Statement at Q.12. CX-33C. CX-34C.

In 2006, approximately [REDACTED] are directed to products made with, using or embodying Xwin® technology. Taylor Witness Statement at Q.10. CX-33C. CX-34C. During that year, Magotteaux sold [REDACTED] of Xwin® products manufactured [REDACTED] Taylor Witness Statement at Q.11. CX-33C. CX-34C. The gross sales from this volume of product amounted to approximately [REDACTED] with net sales amounting to approximately [REDACTED] and resulting in an overall profit margin, based on these sales, was of [REDACTED] (*Id.*).

The 2007 Consolidated Report indicates that gross sales increased in 2007 from approximately [REDACTED] to approximately [REDACTED] Taylor Witness Statement at Q.31-Q.36. CX-33C. CX-34C. Of the approximately [REDACTED] in gross sales during 2007, approximately [REDACTED] is attributable to the sale of Xwin® products. (*Id.*).

[REDACTED]

Magotteaux attributes this success, in part, to its extensive marketing plan that advertises its Xwin® products using: (i) brochures; (ii) proposals; (iii) quotations; (iv) annual trade shows

[REDACTED]

for various industries; (v) conferences; (vi) papers; (vii) presentations (e.g., PowerPoint presentations); (viii) industry wide gatherings; (ix) paid advertising in high circulation magazine articles; (x) direct-to-customer outreach using field representatives; and (xi) field testing with customers and potential customers. Taylor Witness Statement at Q.15-Q.29. CX-33C. CX-34C.

Because Magotteaux (1) has made significant investments in its plant and facilities in the United States since 1972, and continues to operate facilities, plants, land and property valued at

[REDACTED]

are attributable to the sale of Xwin® products; (2) employs more than [REDACTED] in the United States who support the manufacture and sale of Xwin® products [REDACTED]

[REDACTED] (3) sold approximately [REDACTED] of Xwin® products manufactured at the [REDACTED] the gross sales from this volume of product amounted to approximately [REDACTED]

[REDACTED] with net sales amounting to approximately [REDACTED] and resulting in an overall profit margin, based on these sales, was of [REDACTED] and (4) is recognized as an

industry leader in the domestic cement and mining industries, the economic prong test is also satisfied. The information and evidence on the issue of domestic industry stands un rebutted by

Respondents.

D. An Adverse Inference That The '998 Patent Is Not Subject To An Arbitration Clause Is Appropriate

During the Investigation, Respondents moved to terminate the Investigation in whole, based on an arbitration agreement contained in a Settlement Deed dated February 16, 2000 (the "Settlement Deed") between AIAE and Magotteaux International S/A. Respondents argued that the issues in this Investigation relate to the Settlement Deed because the prosecution history of the '998 Patent indicates conception of the invention claimed in the '998 Patent likely occurred before the parties executed the Settlement Deed. AIA Engineering therefore contends the subject

[REDACTED]

matter of the '998 Patent may be covered by the license provision of the Settlement Deed.

Magotteaux opposed the termination on the basis that AIA Engineering waived any right it may have had to arbitration because it had numerous opportunities to raise the issue of arbitration in both the prior Indian litigation and the present Investigation but failed to do so. Magotteaux also argued that the technology associated with the '998 Patent was unrelated to the Settlement Deed and was never transferred to AIAE under the Settlement Deed or any other agreement between the parties.

After briefing on the issue by both parties, the ALJ denied the Motion to Terminate and specifically found that (1) AIAE waived its right to arbitration; and (2) AIAE has failed to demonstrate that the '998 Patent is subject to the arbitration clause of the Settlement Deed.

Thus, Magotteaux believes that adverse inferences and findings of fact and conclusion of law that (1) AIAE waived its right to arbitration; (2) the '998 Patent is not subject to the arbitration clause of the Settlement Deed; and (3) AIAE has failed to demonstrate that the technology of the '998 Patent has been licensed to AIAE be entered. These findings are fully supported by the record before the Commission.

Complainants recognize that Respondents have moved for reconsideration of the denial of the Motion to Terminate. That motion is currently pending and Complainants have filed an opposition to the motion. As more fully set forth in its opposition, Respondents Motion for Reconsideration should be denied for the same reasons the ALJ found compelling in denying the Motion to Terminate initially. Respondents have cited to no new facts that would alter the ALJ's previous findings. Moreover, Respondents simply re-argue their position regarding waiver, and that the arbitration clause applies and then immediately turns around and files suit in the U.S. District Court for the Middle District of Tennessee for declaratory judgment that the '998 Patent,

[REDACTED]

currently the subject of the present Investigation, is invalid, not infringed and unenforceable.

Consequently, the Motion for Reconsideration should be denied and the adverse inference and findings of fact previously made by the ALJ with respect to Respondents' Motion to Terminate should be included in the Initial Determination.

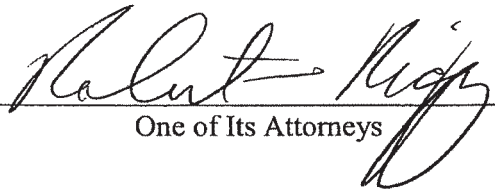
V. CONCLUSION

For the foregoing reasons, Complainants Magotteaux International, S/A and Magotteaux, Inc. respectfully request that the Commission Investigative Staff's Motion for Issuance of an Initial Determination Finding Respondents in Default and that an Adverse Inferences that Respondents have violated Section 337 be granted. Complainants further respectfully request that additional adverse inferences and finding of facts that (1) Respondents import and sell the accused products in the U.S., (2) that Respondents' accused products offered for sale and sold into the United States infringes at least claims 12-13, 16-18 and 20-21 of the '998 Patent, (3) that a domestic industry exists all in accordance with Section 337; (4) AIAE waived its right to arbitration; (5) the '998 Patent is not subject to the arbitration clause of the Settlement Deed; and (6) AIAE has failed to demonstrate that the '998 Patent technology has been licensed to AIAE.

(Signature page to follow)

Respectfully submitted,

MAGOTTEAUX S/A and MAGOTTEAUX,
INC.

By: 
One of Its Attorneys

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Dated: April 13, 2009

[REDACTED]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Complainants' Motion for Issuance of an Initial Determination Finding Respondents in Default and Request for Adverse Inferences on Importation, Infringement and Domestic Industry and accompanying Memorandum of Points and Authorities in Support** was served April 13, 2009, upon the following interested parties as indicated:

The Honorable Marilyn R. Abbott
Secretary
U.S. International Trade Commission
500 E. Street, S.W., Room 112A
Washington, D.C. 20436
(Original + 6 copies)

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- Via Overnight Mail
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- Via Facsimile
- Via Electronic Docket Filing

The Honorable Theodore R. Essex
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Attachment 1

MAGOTTEAUX PRELIMINARY EXHIBIT LIST

DIRECT EXHIBITS

<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>	<u>PURPOSE</u>	<u>SPONSORING WITNESS</u>	<u>ACCEPTANCE INTO EVIDENCE</u>
CX-1	Ribbon copy of U.S. Reissue Patent No. 39,998			
CX-2	Certified copy of Certificate of Correction of U.S. Reissue Patent No. 39,998			
CX-3	Certified copy of file history of U.S. Reissue Patent No. 39,998			
CX-4	Certified copy of U.S. Patent No. 6,399,176			
CX-5	Certified copy of file history of U.S. Patent No. 6,399,176			
CX-6	Certified copy of Assignment of U.S. Reissue Patent No. 39,998			
CX-7	Certified copy of Assignment of U.S. Patent No. 6,399,176			
CX-8	Tutorial Power Point Presentation on Technology at issue and claimed in the Patent-in-Suit in this Investigation. (Mag. Doc No. 2103, Bates # M072580- M072640)			
CX-9	Curriculum Vitae of Katherine Theresa Faber			
CX-10C	CTL Group Report (Confidential)			
CX-11C	McCrone Associates, Inc. Report for MA47664 (Confidential)			
CX-12C	Amended Complaint, filed November 14, 2008, without exhibits (Confidential)			
CX-13C	Respondents' documents bearing Bates Nos. AIA000924 – AIA001002, representative of Respondents' literature describing products imported into and sold in the United States under the Sintercast trademark (Confidential)			
CX-14C	AIAE's Answer to the Amended Complaint dated 11/20/2008 (Confidential)			
CX-15C	Vega's Answer to the Amended Complaint dated 11/20/2008 (Confidential)			
CX-16	Commission Investigative Staff's First Set of Interrogatories to Respondents, dated July 25, 2008 ("ITC Interrogatories")			

<u>EXHIBIT No.</u>	<u>DESCRIPTION</u>	<u>PURPOSE</u>	<u>SPONSORING WITNESS</u>	<u>ACCEPTANCE INTO EVIDENCE</u>
CX-17	Commission Investigative Staff's Request for Production of Documents & Things to Respondents, dated July 25, 2008 ("ITC Request for Production")			
CX-18C	Respondents' documents bearing Bates Nos. AIA000845 – AIA000850, AIA000867 – AIA000869, AIA000887 – AIA000914, and AIA000920 – AIA000923, representative of thirteen (13) different commercial offers for sale, quotations or proposals of Sintercast products from Vega to customers and/or potential customers in the United States (Confidential)			
CX-19C	Respondents' documents bearing Bates numbers AIA000841 – AIA000844, AIA000871, AIA000874 – AIA000876, AIA000877, representative of four (4) different purchase orders from Vega customers in the United States for the sale of Sintercast products (Confidential)			
CX-20C	Respondents' document bearing Bates numbers AIA000870, representative of an invoice dated July 2, 2005 from AIAE to Vega for the sale and importation into the United States of \$5,152 of Sintercast products (Confidential)			
CX-21C	Respondents' documents bearing Bates numbers AIA000858 – AIA000860, and AIA000864 – AIA000865, representative of two (2) different visit reports by Vega to Vega customers in the United States, said customers having purchased Sintercast products from Vega (Confidential)			
CX-22C	Complainants' First Set of Requests for Production of Documents and Things (No. 1) to Respondent AIAE, dated June 26, 2008 (Confidential)			
CX-23C	Complainants' First Set of Requests for Production of Documents and Things (No. 1) to Respondent Vega, dated June 26, 2008 (Confidential)			
CX-24C	AIAE's Objections and Responses to Magotteaux's Document Request to AIAE, dated December 29, 2008 (Confidential)			
CX-25C	Complainants' Expert Infringement Report of Katherine Theresa Faber, Ph.D., dated January 30, 2009 (Confidential)			

EXHIBIT No.	DESCRIPTION	PURPOSE	SPONSORING WITNESS	ACCEPTANCE INTO EVIDENCE
CX-26C	Appendices to Complainants' Expert Infringement Report dated January 30, 2009 (Confidential)			
CX-27C	Respondents' Expert Report of Richard Sailors, Ph.D., dated January 30, 2009 (Confidential)			
CX-28C	Complainants' Rebuttal Expert Infringement Report of Katherine Theresa Faber, Ph.D., dated February 6, 2009 (Confidential)			
CX-29C	Appendices to Complainants' Rebuttal Expert Infringement Report dated February 6, 2009 (Confidential)			
CX-30C	Transcript of the Confidential Videotaped Deposition of Christopher Taylor Taken on Behalf of the Respondents F.A.R., S.p.A., AIAE and Vega dated January 7, 2009 ("Taylor Deposition") (Confidential)			
CX-31C	Declaration of John Christopher Taylor dated March 20, 2008 (without exhibits), attached to the Amended Complaint as Confidential Exhibit A ("Taylor Declaration") (Confidential)			
CX-32C	Xwin® product literature and photograph of a Magotteaux products incorporating the same, attached to the Amended Complaint as Exhibit J and Confidential Exhibit C, respectively, each referenced in the Taylor Declaration (Confidential)			
CX-33C	Magotteaux, Inc. and Subsidiaries Consolidated Financial Statements, dated December 31, 2006, attached to the Amended Complaint as Confidential [Exhibit E], referenced in the Taylor Declaration, referenced in the Taylor Deposition as Exhibit 19 (Confidential)			
CX-34C	Magotteaux, Inc. and Subsidiaries Consolidated Financial Statements dated December 31, 2007, referenced in the Taylor Deposition as Exhibit 27 (Confidential)			
CX-35C	Pivot table showing sales of Xwin® products in U.S. Dollars since approximately 1998-1999 by year, tons, month and dollars, referenced in Taylor Deposition as Exhibit 22 (Bates Nos. M002560-M002615) (Confidential)			

<u>EXHIBIT No.</u>	<u>DESCRIPTION</u>	<u>PURPOSE</u>	<u>SPONSORING WITNESS</u>	<u>ACCEPTANCE INTO EVIDENCE</u>
CX-36C	Document prepared by Magotteaux comparing certain strengths, weakness, opportunities and threats of AIAE to Magotteaux, dated April 5, 2003, referenced in Taylor Deposition as Exhibit 32 (Bates Nos. M307356-M307359) (Confidential)			
CX-37	Copy of EP0838288A1			
CX-38	Certified translation of EP0838288A1			
CX-39	Copy of EP0930948B1			
CX-40	Verified/certified translation of EP0930948			
CX-41	Product Information on Ceramics from St. Gobain			
CX-42C	McCrone Associates, Inc. Report for MA47363 (Confidential)			

PHYSICAL EXHIBITS

<u>EXHIBIT No.</u>	<u>DESCRIPTION</u>	<u>PURPOSE</u>	<u>SPONSORING WITNESS</u>	<u>ACCEPTANCE INTO EVIDENCE</u>
CPX-1	Samples of Ceramic Grains- Physical Exhibits to be produced at trial			
CPX-2	Sample of AIAE Product analyzed and reported in Dr. Faber's Report- Physical Exhibits to be produced at trial			
CPX-3	Sample of Magotteaux Product analyzed and reported in Dr. Faber's Report- Physical Exhibits to be produced at trial			

Attachment 2

[REDACTED]

COMPLAINANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

CFF1. Parties to the Investigation.

- CFF1.1. The Commission instituted this Investigation, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, by publication of the Notice of Investigation in the *Federal Register* on April 25, 2008, (Vol. 73, No. 81, 22431).
- CFF1.2. The Commission named Magotteaux International S/A of Liege, Belgium and Magotteaux Inc. of Franklin, Tennessee as the Complainants. (Fed. Reg. Vol. 73, No., 81, 22431.)
- CFF1.3. The Commission named AIAE of India and Vega Industries of Brentwood, Tennessee as Respondents. (Fed. Reg. Vol. 73, No., 81, 22431.)
- CFF1.4. AIAE was, at the time this Investigation was instituted, a Corporation organized under the laws of India having its principal place of business at Plot No. 115, Gujarat Vyapari, Maha Mandel, Industrial Estate, Odhav Road, Ahmedabad 38240.
- CFF1.5. Vega Industries is a subsidiary of AIAE, having a principal place of business at 330 Franklin Rd., Suites 135-180, Brentwood, Tennessee 37027.

CFF2. The Investigation and Importation.

- CFF2.1. The Investigation was instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain composite wear components by reason of infringement of the claims of U.S. Reissue Patent No. 39,998 and whether a domestic industry in the United States exists as required by subsection (a)(2) of section 337. (Fed. Reg. Vol. 73, No., 81, 22431.)



- CFF2.2. AIAE and Vega Industries have admitted importing into the United States or selling within the United States after importation, certain composite wear components under the Trademark Sintercast®. SX-5C. SX-6C. CX-15C.
- CFF2.3. AIAE admits that AIAE has exported to Vega in the United States Sintercast® products, alleged in the Amended Complaint to be at issue. Those products are believed to have resulted in sales in the United States in the range of approximately \$5,000 in 2005, \$121,000 in 2007, and \$179,000 in 2008. SX-5C. SX-6C. CX-14C.
- CFF2.4. AIAE has the capacity in India to produce and has produced composite wear components in India. As relates to the United States, the Sintercast® product line forms, on average, a portion of AIAE's exports to the United States. CX-14C. SX-5C. SX-6C.
- CFF2.5. Vega admits that it has purchased composite wear components from AIAE in India and imported into the United States these products, alleged in the Amended Complaint to be at issue. CX-15C. SX-5C. SX-6C.
- CFF2.6. Vega's sales of such products in the United States have been in the range of approximately \$5,000 in 2005, \$121,000 in 2007, and \$179,000 in 2008. SX-5C. SX-6C.
- CFF2.7. The Harmonizing Tariff Schedule item numbers for these products is 8474.90.0020. SX-5C. SX-6C.
- CFF2.8. Vega purchases all composite wear component products from AIAE and does not have the capacity to produce the accused devices. SX-5C. SX-6C.
- CFF2.9. AIAE and Vega admit that AIAE has been and remains involved in the business of exporting into the United States composite wear components and products containing the same that are covered by one or more of the patent claims at issue. SX-5C. SX-6C.
- CFF2.10. Vega has been and remains involved in the business of importing composite wear components into the United States. SX-5C. SX-6C.



CFF2.11. Vega sells the composite wear components in the United States. SX-5C. SX-6C.

CFF2.12. The Accused Products imported into the United States by Vega are purchased from an affiliated company of Vega's called Vega Middle East, which purchases the composite wear components from AIAE. SX-5C. SX-6C.




CFF2.13. Vega admitted selling 
 SX-5C. SX-6C.




CFF2.14. Vega admitted selling 
 SX-5C. SX-6C.




CFF2.15. Vega admitted selling 
 SX-5C. SX-6C.

CFF2.16. Vega admitted selling 
 SX-5C. SX-6C.

CFF3. Sales and Offers For Sale.

CFF3.1. A commercial offer for sale, quotation or proposal dated 

 CX-18C.

CFF3.2. A commercial offer for sale, quotation or proposal dated 

 CX-18C.

CFF3.3. A commercial offer for sale, quotation or proposal dated 

 CX-18C.

[REDACTED]

CFF3.4. A commercial offer for sale, quotation or proposal dated [REDACTED]
[REDACTED]
[REDACTED] CX-18C.

CFF3.5. A commercial offer for sale, quotation or proposal dated [REDACTED]
[REDACTED]
[REDACTED] CX-18C.

CFF3.6. A commercial offer for sale, quotation or proposal dated [REDACTED]
[REDACTED]
[REDACTED] CX-18C.

CFF3.7. A commercial offer for sale, quotation or proposal dated [REDACTED] was
[REDACTED]
[REDACTED] CX-18C.

CFF3.8. A commercial offer for sale, quotation or proposal dated [REDACTED]
[REDACTED]
[REDACTED] CX-18C.

CFF3.9. A commercial offer for sale, quotation or proposal dated [REDACTED]
[REDACTED]
[REDACTED] CX-18C.

CFF3.10. A commercial offer for sale, quotation or proposal dated [REDACTED]
[REDACTED]
[REDACTED] CX-18C.

[REDACTED]

CFF3.11. A commercial offer for sale, quotation or proposal dated [REDACTED]
[REDACTED]
[REDACTED] CX-18C.

CFF3.12. A commercial offer for sale, quotation or proposal dated [REDACTED]
[REDACTED]
[REDACTED] CX-18C.

CFF3.13. A commercial offer for sale, quotation or proposal dated [REDACTED]
[REDACTED]
[REDACTED] CX-18C.

CFF3.14. A purchase order was received from [REDACTED]
[REDACTED]
[REDACTED] CX-19C.

CFF3.15. A purchase order was received from [REDACTED]
[REDACTED]
[REDACTED] CX-19C.

CFF3.16. A purchase order was received from [REDACTED]
[REDACTED]
[REDACTED] CX-19C.

CFF3.17. A purchase order was received from [REDACTED]
[REDACTED]
[REDACTED] CX-19C.

[REDACTED]

CFF3.18. An invoice dated [REDACTED]

[REDACTED]

[REDACTED] CX-20C.

CFF3.19. Vega personnel visited [REDACTED]

[REDACTED] CX-21C.

CFF3.20. Vega personnel visited [REDACTED]

[REDACTED] CX-21C.

CFF4. The Patent at Issue.

CFF4.1. The patent at issue in this Investigation is U.S. Reissue Patent No. 39,998 (“the ‘998 Patent”), and its Certificate of Correction. CX-1. CX-2.

CFF4.2. The ‘998 Patent issued on January 7, 2008 having 22 claims and was Reissued from U.S. Patent No. 6,339,176. CX-1. CX-4.

CFF4.3. The ‘998 Patent names Hubert Francois as inventor. (CX-1.)

CFF4.4. Complainant has asserted Claims 12, 13, 16, 17, 18, 20 and 21 of the ‘998 Patent against Respondents. (Prehearing Statement of Complainant.)

CFF4.5. As found in the ‘998 Patent and its attendant Certificate of Correction, Claim 12 of the ‘998 Patent reads:

Composite wear component produced by classical or centrifugal casting, said composite wear component comprising[:]

a metal matrix having a working face or faces including inserts which have wear resistance, the inserts include a porous

[REDACTED]

ceramic pad, wherein the porous ceramic pad comprises a homogeneous ceramic composite [of] 20 to 80% of Al_2O_3 and 80 to 20% of ZrO_2 , the percentages being expressed by weights of the constituents, and the porous ceramic pad being integrated into the metal matrix by impregnation of a liquid metal in the porous ceramic pad during the casting. CX-1. CX-2.

CFF4.6. As found in the '998 Patent and its attendant Certificate of Correction, Claim 13 of the '998 Patent reads:

Composite wear component according to claim 12, wherein the ceramic material includes from 55 to 60% of by weight of Al_2O_3 and from 38 to 42% by weight of ZrO_2 . CX-1. CX-2.

CFF4.7. As found in the '998 Patent and its attendant Certificate of Correction, Claim 16 of the '998 Patent reads:

Composite wear component according to claim 12, wherein the inserts include an aggregate of composite ceramic grains which have a particle size within the range F6 to F22 of the FEPA standard. CX-1. CX-2.

CFF4.8. As found in the '998 Patent and its attendant Certificate of Correction, Claim 17 of the '998 Patent reads:

Composite wear component according to claim 16, wherein the ceramic grains are manufactured by one of electrofusion, sintering and flame spraying. CX-1. CX-2.

CFF4.9. As found in the '998 Patent and its attendant Certificate of Correction, Claim 18 of the '998 Patent reads:

Composite wear component according to claim 16, wherein the ceramic grains are jointed integrally with the aid of an inorganic or organic liquid adhesive prior to the casting with the liquid metal. CX-1. CX-2.

CFF4.10. As found in the '998 Patent and its attendant Certificate of Correction, Claim 20 of the '998 Patent reads:

Composite wear component produced by classical or centrifugal casting according to claim 12 and made up of a metal matrix including a wear-resistant ceramic pad, wherein the ceramic pad is in the form of a honeycomb structure in which the various cells are of polygonal or circular shape within the ceramic phase. CX-1.

[REDACTED]

CX-2.

CFF4.11. Claim 21 of the '998 Patent reads:

Composite wear component according to claim 20, wherein a thickness of walls of the various cells constituting the ceramic phase varies from 5 to 25 mm. CX-1. CX-2.

CFF4.12. The phrase "solid solution" is not a claim term in the '998 Patent. CX-1.
CX-2.

CFF4.13. The phrase "solid solution" is used only once in the '998 Patent, at column 2, lines 56-66 of the written description portion of the specification of the '998 Patent and is reprinted below:

To meet the first objective the invention proposes a composite wear component produced by conventional or centrifugal casting. It consists of a metal matrix whose wear surface comprises inserts which have good abrasion resistance properties, these inserts being made of a ceramic material, itself composite, consisting of a solid solution or homogenous phase of 20 to 80% of Al_2O_3 and 80 to 20% of ZrO_2 , the percentages being expressed by weights of constituents. CX-1.

CFF5. Infringement.

CFF5.1. AIAE waived its right to arbitration (Order No. 20).

CFF5.2. AIAE has failed to demonstrate that the '998 Patent is subject to the arbitration clause of the Settlement Deed. (Order No. 20).

CFF5.3. There is no evidence of a license between Magotteaux International S/A or any of its subsidiaries and AIAE and any of its subsidiaries or related companies relating to the technology of the '998 Patent (Order No. 20).

CFF5.4. Three AIAE samples were produced to Magotteaux by AIAE. One such sample (the "AIAE Sample") was inspected by Dr. Faber in forming the opinions set forth in the First Faber Report. CPX-2. CX-26C. Faber Witness Statement, Q.20-Q.30.

CFF5.5. The AIAE Sample was subject to laboratory testing by the CTL Group of

[REDACTED]

Skokie, Illinois for metallographic examination and particle size analysis and subject to laboratory testing by McCrone Associates, Inc. of Westmont, Illinois for chemical analysis. CX-26C. Faber Witness Statement, Q.20-Q.30.

CFF5.6. The CTL Report observes that the AIAE Sample had an [REDACTED]
[REDACTED]

CX-26C. Faber Witness Statement, Q.20-Q.30.

CFF5.7. The McCrone Report observes the following facts with respect to the AIAE Sample: [REDACTED]
[REDACTED] Q.39-Q.53.

CFF5.8. Dr. Faber observed that Components from the AIAE Sample have obvious areas of ceramic grain in a metal matrix along one face; and the AIAE Sample has a 'honeycomb' configuration in which the ceramic pad formed the honeycomb with metal-filled holes. CX-26C. Faber Witness Statement, Q.39-Q.53.

CFF5.9. Dr. Faber has observed that (i) the AIAE Sample is a composite wear component since it is made of more than one material; (ii) the AIAE Sample is a composite wear component made of metal and ceramic; (iii) the AIAE composite wear component is made using [REDACTED]
[REDACTED] (iv) the AIAE composite wear component comprises and includes a metal matrix found to be [REDACTED] (v) the AIAE metal matrix includes a working face having ceramic inserts; (vi) the AIAE ceramic inserts are a [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED] CX-26C. Faber Witness Statement, Q.20-Q.30,
Q.39-Q.53.

CFF5.10. Dr. Faber has observed that the AIAE porous ceramic pad is a [REDACTED]
[REDACTED]
[REDACTED] Q.39-Q.53.

CFF5.11. Dr. Faber has observed that the ceramic grains of the AIAE Sample have a
range in the average length of [REDACTED]
[REDACTED]
[REDACTED] CX-26C.
Faber Witness Statement, Q.20-Q.30.

CFF5.12. Dr. Faber has observed that as ceramic composite grains of [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] CX-26. Faber Witness Statement, Q.49-Q.51.

CFF5.13. Dr. Faber has observed that ceramic grains must be joined integrally with
the aid of [REDACTED]
[REDACTED]
[REDACTED] CX-26C. Faber Witness Statement, Q.51

CFF5.14. Dr. Faber has observed that AIAE Sample is made of a metal matrix
including a wear resistant ceramic pad which is in the form of a honeycomb

[REDACTED]

structure. Various cells within the honeycomb are of polygonal or circular shape within the ceramic phase of [REDACTED] CX-26. Faber Witness Statement, Q.52

CFF5.15. Dr. Faber has observed that average thickness of the cell walls of the ceramic phase of [REDACTED] [REDACTED] CX-26C. Faber Witness Statement, Q.53

CFF5.16. Dr. Faber has concluded that after analysis and evaluation, the AIAE Sample meets the limitations of claims 12-13, 16-18 and 20-21 of the '998 Patent since the AIAE Sample includes each of the terms and limitations expressed in these claims. CX-26C. Faber Witness Statement, Q.14

CFF6. Domestic Industry.

CFF6.1. Magotteaux International S/A is a corporation organized under the laws of Belgium, having its principal place of business at Rue A. Dumont, B-4051 Vaux-sous-Chèvremont, Belgium. Magotteaux, Inc. is a Tennessee corporation, with its principal place of business at 725 Cool Springs Boulevard, Suite 200, Franklin, Tennessee, 37067. Magotteaux, Inc. is a subsidiary of Magotteaux International S/A which is the assignee of the '998 Patent. CX-12C.

CFF6.2. Magotteaux's product line using the technology of the '998 Patent is Magotteaux's Xwin® product line. CX-32C. Taylor Witness Statement, Q.14-Q.29.

CFF6.3. Products incorporating the Xwin® technology are currently being manufactured and sold in the United States and are generally characterized as having a porous ceramic pad comprising a homogeneous ceramic composite of 20 to 80% of Al₂O₃ and 80 to 20% ZrO₂, the percentages being expressed by weights of the constituents. CX-26C, CX-32C. Taylor Witness Statement, Q.7-Q.9.

- [REDACTED]
- CFF6.4. The ceramic grains in products using the Xwin® technology may have concentrations of Al₂O₃ and ZrO₂ that vary slightly and that, for example, one formulation of the Xwin® technology uses approximately [REDACTED] Al₂O₃ and [REDACTED] ZrO₂. Another exemplary formulation of the Xwin® technology uses approximately [REDACTED] Al₂O₃ and [REDACTED] ZrO₂. CX-26C. Taylor Witness Statement, Q.48.
- CFF6.5. The ceramic grains used in products incorporating the Xwin® technology [REDACTED]
[REDACTED]
[REDACTED] CX-41. Taylor Witness Statement, Q.7-Q.9. Francois Witness Statement, Q.8.
- CFF6.6. Dr. Faber inspected, analyzed and reported certain expert opinions on a sample product provided by Magotteaux (the “Magotteaux Sample”) for the purpose of comparing the Magotteaux Sample to the claims. CX-26C. Faber Witness Statement, Q.31-Q.38.
- CFF6.7. The Magotteaux Sample was subject to laboratory testing by the CTL Group of Skokie, Illinois for metallographic examination and particle size analysis and subject to laboratory testing by McCrone Associates, Inc. of Westmont, Illinois for chemical analysis. CX-26C. Faber Witness Statement, Q.31-Q.38.
- CFF6.8. The results of the metallographic examination and particle size analysis performed by the CTL Group and the results of the chemical analysis performed by the McCrone Associates, Inc. formed the basis of Dr. Faber’s Opinion on Infringement. CX-26C. Faber Witness Statement, Q.31.
- CFF6.9. The Magotteaux Sample has an average length along the long dimension of the ceramic grains of [REDACTED] and the average length of the short dimension of the ceramic grains is [REDACTED] Faber Witness Statement. CX-26C.

- [REDACTED]
- CFF6.10. The Magotteaux Sample has an average weight percentage of Al_2O_3 of [REDACTED] and the average weight percentage of ZrO_2 is [REDACTED] CX-26C. Faber Witness Statement, Q.48.
- CFF6.11. The Magotteaux Sample is a composite wear component since it is made of more than one material and the Magotteaux Sample is a composite wear component made of metal and ceramic. CX-26C. Faber Witness Statement, Q.17, Q.31, and Q.32.
- CFF6.12. The Magotteaux composite wear component is made using a classical casting method where molten metal is poured into a mold of the desired shape. CX-26C. Faber Witness Statement, Q.33.
- CFF6.13. The Magotteaux composite wear component comprises and includes a metal matrix identified as a composition close to [REDACTED] CX-26C. Faber Witness Statement, Q.17, Q.31 and Q.32.
- CFF6.14. The Magotteaux metal matrix includes a working face having ceramic inserts. CX-26C.
- CFF6.15. The ceramic inserts are a porous ceramic pad which has been infiltrated with metal. CX-26C. Faber Witness Statement, Q.32, Q.33.
- CFF6.16. The porous ceramic pad is a homogenous ceramic composite of 20 to 80% Al_2O_3 and 80 to 20% ZrO_2 because the ceramic grains were identified as, on average [REDACTED] Al_2O_3 and [REDACTED] ZrO_2 by weight. CX-26C. Faber Witness Statement, Q.48.
- CFF6.17. The porous ceramic pad has been infiltrated with liquid metal during casting. CX-26C. Faber Witness Statement, Q.32, Q.33.
- CFF6.18. The Magotteaux porous ceramic pad is a homogenous ceramic composite of [REDACTED] Al_2O_3 and [REDACTED] ZrO_2 because the ceramic grains were identified as, on average [REDACTED] Al_2O_3 and [REDACTED] ZrO_2 by weight. CX-26C. Faber Witness Statement, Q.48.
- CFF6.19. The ceramic grains of the Magotteaux Sample have a range in the average

[REDACTED]

length of [REDACTED] depending upon whether the short or long dimension of the grain are being measured. These size ranges clearly fit within the range of F22 to F6 FEPA standard. CX-26C. Faber Witness Statement, Q.31.

CFF6.20. Ceramic composite grains of Al₂O₃ and ZrO₂ are not naturally occurring. Composite grains are produced by processes which fuse Al₂O₃ and ZrO₂ at high temperature. Angular composite grains fused Al₂O₃ and ZrO₂ associated with the Magotteaux Sample are normally manufactured by electrofusion, sintering or flame spraying. CX-26C. Faber Witness Statement, Q.50.

CFF6.21.

[REDACTED]

[REDACTED]

[REDACTED] CX-26C. Faber Witness Statement, Q.51.

CFF6.22. The Magotteaux Sample, after analysis and evaluation embodies at a minimum at least claims 12-13, 16-18 for the Magotteaux Sample, since it includes each of the terms and limitations expressed in these claims of U.S. Reissue Patent No. 39,998. CX-26C. Faber Witness Statement, Q.15.

CFF6.23. Magotteaux has made a significant investment in plant and equipment in the United States and has undertaken significant employment of labor and capital in connection with the substantial investment in the exploitation of its intellectual property. CX-33C. CX-34C. Taylor Witness Statement, Q.10.

CFF6.24. Magotteaux opened a plant facility in Pulaski, Tennessee in 1972. As the technology evolved, this plant has become one site in Magotteaux's operations where Xwin® technology has been manufactured on an ongoing basis. CX-33C. CX-34C. Taylor Witness Statement, Q.10.

CFF6.25. Xwin® technology and products made with this technology are sold to (i) the cement industry as, for example, hammers, vertical roller mill

[REDACTED]

castings; (ii) the utility industry as, for example, rolls and tables, (iii) the aggregate industry as, for example, blow bars with wear castings for horizontal shaft machines, as anvils and impellers and as vertical shaft machines; (iv) the waste industry as, for example, hammers and (v) the fluid business as, for example, pump casing housings. CX-33C. CX-34C. Taylor Witness Statement, Q.12.

CFF6.26. Sales attributable to Xwin® technology have risen approximately [REDACTED] from 2006 to 2007; [REDACTED] CX-32C. CX-33C. Taylor Witness Statement, Q.30-Q.36.

CFF6.27. In the United States, Magotteaux maintains a corporate facility in Franklin, Tennessee and a plant facility in Pulaski, Tennessee. CX-32C. CX-33C. Taylor Witness Statement, Q.10 and Q.14.

CFF6.28. As of March 3, 2008, the Franklin facility supports [REDACTED] employees and the Pulaski plant supports [REDACTED] employees. CX-32C. CX-33C. Taylor Witness Statement, Q.10.

CFF6.29. Of the [REDACTED] employees at the Franklin facility as of March 3, 2008, [REDACTED]
[REDACTED]
[REDACTED]
CX-32C. CX-33C. Taylor Witness Statement, Q.10.

CFF6.30. The total employment for Magotteaux Inc. during 2006 was [REDACTED] with an overall annual salary base of approximately [REDACTED] CX-32C. CX-33C. Taylor Witness Statement, Q.10.

CFF6.31. As of March 3, 2008, approximately [REDACTED] of the Pulaski plant's gross sales (in dollar value) are directed to products made with, using or embodying Xwin® technology. CX-32C. CX-33C. Taylor Witness Statement, Q.10, Q.13.

CFF6.32. A large percentage of Magotteaux employees at the Pulaski plant work, in some capacity, on products incorporating the Xwin® technology. CX-32C.

[REDACTED]

CX-33C. Taylor Witness Statement, Q.8, Q.13, Q.37-Q.40.

CFF6.33. A large percentage of Magotteaux employees at the Franklin facility work, in some capacity, supporting products incorporating the Xwin® technology.

CX-32C. CX-33C. Taylor Witness Statement, Q.8, Q.10, Q.13, Q.37-Q.40.

CFF6.34. Almost every person related to sales or product support or the technical center employed by Magotteaux at its Franklin facility works, in some capacity, supporting products incorporating the Xwin® technology. CX-

32C. CX-33C. Taylor Witness Statement, Q.37-Q.40.

CFF6.35. Many portions of the Pulaski plant are used, in some capacity, for making products including the Xwin® technology. CX-32C. CX-33C. Taylor Witness Statement, Q.37-Q.40.

CFF6.36. Ceramic grains used in Xwin® products [REDACTED]

[REDACTED] CX-32C. CX-33C. Taylor Witness Statement, Q.9.

CFF6.37.

[REDACTED]

CX-32C. CX-33C. Taylor Witness Statement, Q.8.

CFF6.38.

[REDACTED]

[REDACTED]

[REDACTED] CX-32C. CX-33C. Taylor Witness Statement, Q.8, Q.10, Q.37-Q.40.

CFF6.39. Magotteaux markets its Xwin® products using: (i) brochures; (ii) proposals; (iii) quotations; (iv) annual trade shows for various industries; (v) conferences; (vi) papers; (vii) presentations (e.g., PowerPoint presentations); (viii) industry wide gatherings; (ix) paid advertising in high circulation magazine articles; (x) direct-to-customer outreach using field representatives; and (xi) field testing with customers and potential customers. CX-32C. CX-33C. Taylor Witness Statement, Q.15-Q.29.

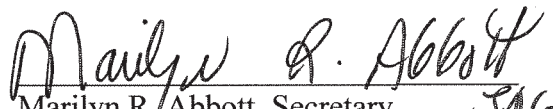
- [REDACTED]
- CFF6.40. In 2006, Magotteaux, Inc. valued its property, plant and equipment including land and improvements at approximately [REDACTED] its building and improvements at approximately [REDACTED] its factory and office machinery and equipment at approximately [REDACTED] and its automotive equipment at approximately [REDACTED] for a total of approximately [REDACTED] Million in undepreciated assets. The depreciated value of these assets is approximately [REDACTED]. These numbers are found in the 2006 Consolidated Report. CX-32C. CX-33C. Taylor Witness Statement, Q.10.
- CFF6.41. In 2006, Magotteaux sold [REDACTED] of product which was manufactured in the [REDACTED] using the Xwin® technology. CX-32C. CX-33C. Taylor Witness Statement, Q.11.
- CFF6.42. The gross sales from this volume of product amounted to approximately [REDACTED] with net sales amounting to approximately [REDACTED] providing an overall profit margin of [REDACTED]. CX-32C. CX-33C. Taylor Witness Statement, Q.11.
- CFF6.43. The environments of use into which the [REDACTED] was sold into during 2007 included aggregates, cement, and utilities. CX-32C. CX-33C. Taylor Witness Statement, Q.11.
- CFF6.44. The 2007 Consolidated Report indicates that gross sales increased in 2007

**IN THE MATTER OF CERTAIN COMPOSITE WEAR
COMPONENTS AND PRODUCTS CONTAINING THE SAME**

Inv. No. 337-TA-644

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER 26** has been served by hand upon, the Commission Investigative Attorney, **David O. Lloyd, Esq.**, and the following parties as indicated June 8, 2009.


Marilyn R. Abbott, Secretary *306*
U.S. International Trade Commission
500 E Street, SW, Room 112A
Washington, D.C. 20436

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AND MAGOTTEAUX, INC.:**

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**IN THE MATTER OF CERTAIN COMPOSITE WEAR
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CERTIFICATE OF SERVICE - PAGE 2

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