

*In the Matter of*

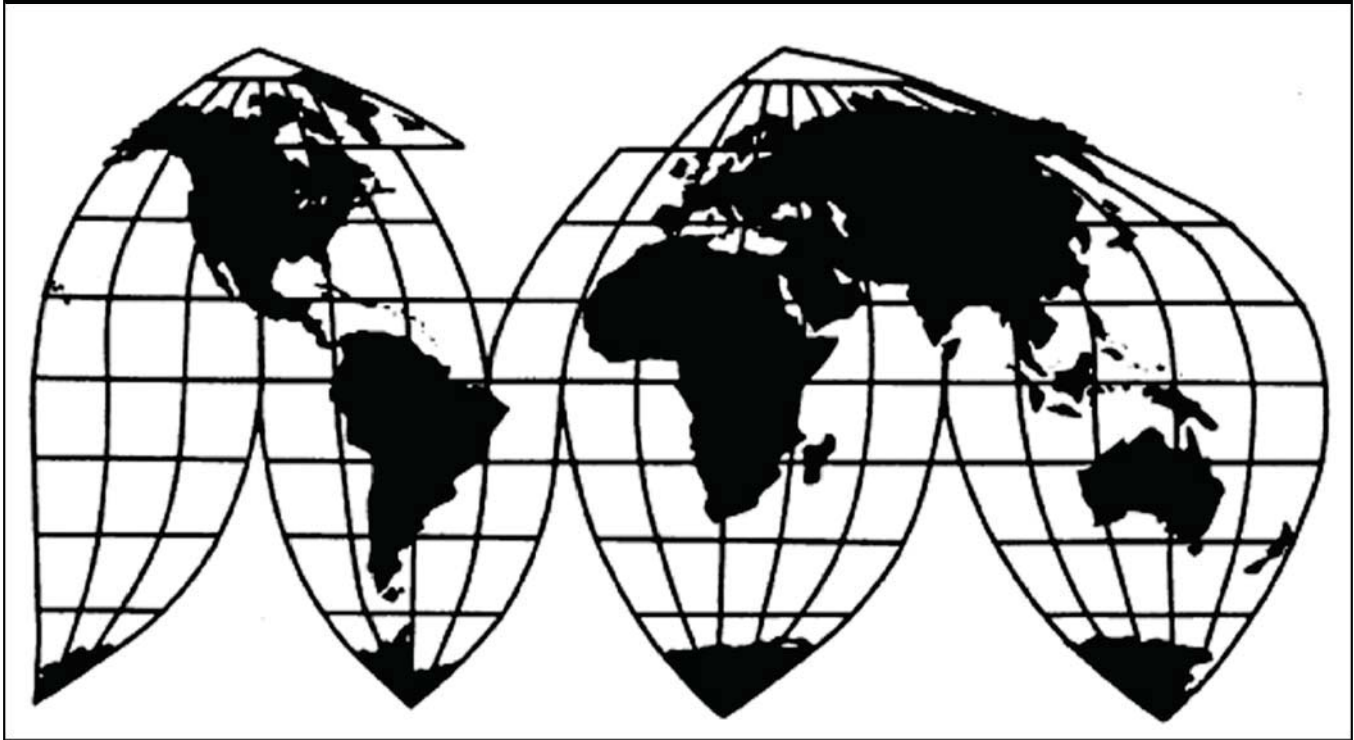
**Certain Rubber Antidegradants,  
Antidegradant Intermediates and Products  
Containing the Same**

Investigation No. 337-TA-652

Publication 4264

October 2011

**U.S. International Trade Commission**



Washington, DC 20436

# **U.S. International Trade Commission**

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# U.S. International Trade Commission

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**Certain Rubber Antidegradants,  
Antidegradant Intermediates and Products  
Containing the Same**

Investigation No. 337-TA-652





UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C.

In the Matter of

CERTAIN RUBBER ANTIDEGRADANTS,  
ANTIDEGRADANT INTERMEDIATES AND  
PRODUCTS CONTAINING THE SAME

Investigation No. 337-TA-652

**NOTICE OF COMMISSION DETERMINATION NOT TO REVIEW AN INITIAL  
DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE GRANTING  
SINORGCHEM'S SUMMARY DETERMINATION MOTION AND KUMHO'S  
SUMMARY DETERMINATION MOTION; TERMINATION OF THE  
INVESTIGATION.**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination of the presiding administrative law judge granting respondents' summary determination motions in the above-captioned investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337. This action terminates the investigation.

**FOR FURTHER INFORMATION CONTACT:** James Worth, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3065. 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:** On July 10, 2008, the Commission instituted this investigation based upon a complaint filed on behalf of Flexsys America L.P. (St. Louis, Missouri) ("Flexsys"). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 ("section 337"), in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain rubber antidegradants, antidegradant intermediates, and products containing the same that infringe claims 61-74 of U.S. Patent No. 5,453,541 ("the '541 patent") and claims 23-28 of U.S. Patent No. 5,608,111 ("the '111 patent"). 73 *Fed. Reg.* 39719 (July 10, 2008). The complaint

named as respondents Sinorgchem Co., Shandong (Shandong, China) (“Sinorgchem”), Korea Kumho Petrochemical Co., Ltd. (Seoul, South Korea), Kumho Tire USA, Inc. (Rancho Cucamonga, California), and Kumho Tire Co., Inc. (Seoul, South Korea). (The last three respondents are referred to collectively as “Kumho.”) The Commission in its notice of institution noted that the ALJ might wish to consider whether the claims asserted in this investigation were precluded by prior litigation. 73 Fed. Reg. 39719.

On July 29, 2008, Sinorgchem moved for summary determination and dismissal of this investigation as to Sinorgchem, stating that Flexsys’s claims in the complaint for this investigation represent improper claim splitting as to the ‘111 patent and claim preclusion as to the ‘541 patent. On July 31, 2008, Kumho moved for summary determination that Flexsys is also precluded from re-litigating its ‘111 and ‘541 patents against Kumho. The Commission investigative attorney filed responses on August 4 and 5, 2008, respectively in support of Sinorgchem and Kumho. Flexsys filed a response in opposition on August 4, 2008. The ALJ heard argument at a preliminary conference on August 5, 2008.

On August 8, 2008, the ALJ issued Order No. 6, asking the parties to respond to certain questions. On August 15, 2008, Sinorgchem and Kumho each filed submissions. On August 22, 2008, Flexsys filed a response. On August 28, 2008, Sinorgchem filed a supplemental response. On August 29, 2008, the Commission investigative attorney filed a submission. On September 3, 2008, Flexsys filed a surreply.

On September 15, 2008, the ALJ issued the subject ID (Order No. 9), granting the motions for summary determination and terminating the investigation in its entirety.

On September 29, 2008, Flexsys filed a petition for review of the subject ID. On October 6, 2008, Sinorgchem, Kumho, and the Commission investigative attorney filed responses opposing the petition.

Having examined the relevant portions of the record in this investigation, including the ID, the petition for review, and the responses thereto, the Commission has determined not to review the subject ID. The investigation is terminated in its entirety.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.42 - .46 of the Commission’s Rules of Practice and Procedure (19 C.F.R. §§ 210.42 - .46).

By order of the Commission.

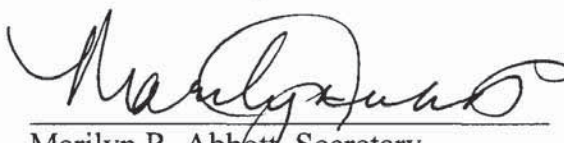


Marilyn R. Abbott  
Secretary to the Commission

Issued: October 30, 2008

**CERTIFICATE OF SERVICE**

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF COMMISSION DETERMINATION NOT TO REVIEW AN INITIAL DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE GRANTING SINORGCHEM'S SUMMARY DETERMINATION MOTION AND KUMHO'S SUMMARY DETERMINATION MOTION; TERMINATION OF THE INVESTIGATION** has been served by hand upon the Commission Investigative Attorney, Juan Cockburn, Esq., and the following parties as indicated, on OCT 31 2008.



Marilyn R. Abbott, Secretary  
U.S. International Trade Commission  
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**ON BEHALF OF COMPLAINANT FLEXSYS  
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**ON BEHALF OF RESPONDENTS KOREA KUMHO  
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**PUBLIC VERSION**

UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C.

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In the Matter of	)	
	)	
CERTAIN RUBBER ANTIDEGRADANTS,	)	Investigation No. 337-TA-652
ANTIDEGRADANT INTERMEDIATES,	)	
AND PRODUCTS CONTAINING THE	)	
SAME	)	

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Order No. 9: Initial Determination Granting Sinorgchem's Summary Determination Motion No. 652-1 And KKPC's Summary Determination Motion No. 652-3 And Terminating The Investigation In Toto

On July 29, 2008, pursuant to Commission rule 210.18, respondent Sinorgchem Co., Shandong (Sinorgchem) moved for dismissal of this investigation as to Sinorgchem based on the application of prohibition against improper claim splitting as to U.S. Patent No. 5,608,111 (the '111 patent)<sup>1</sup> in issue and the doctrine of claim preclusion (res judicata) as to U.S. Patent No. 5,453,541 (the '541 patent)<sup>2</sup> in issue. (Motion Docket No. 652-1.)<sup>3</sup>

On July 31, 2008, respondents Kumho<sup>4</sup>, pursuant to Commission rule 210.18, moved for

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<sup>1</sup> In issue are process claims 23-28 of the '111 patent.

<sup>2</sup> In issue are process claims 61-74 of the '541 patent.

<sup>3</sup> Sinorgchem, in Motion No. 652-1, represented that respondents Korea Kumho Petrochemical Co., Ltd. (KKPC), Kumho Tire USA, Inc. (Kumho Tire USA) and Kumho Tire Co., Inc. (Kumho) (collectively "Kumho") support said motion. Said motion included, inter alia, a declaration of Wang Nongyee (Wang Decl.).

<sup>4</sup> Referring to the Kumho respondents, KKPC is located in the Republic of Korea and organized under the laws of The Republic Of Korea. KKPC purchases intermediates for making rubber antidegradants that are manufactured by Sinorgchem, converts the intermediates to rubber antidegradants, and imports those rubber antidegradants into the United States. Kumho Tire is a corporation of Korea that obtains rubber antidegradant from KKPC, incorporates it into tires, and imports those tires into the United States through its wholly owned subsidiary, Kumho Tire USA. Kumho Tire USA is incorporated in State of California and imports tires into the United States

summary determination that complainant Flexsys America L.P. (Flexsys) is precluded from seeking an exclusion order based on allegations of infringement of claims 61-72 of the '541 patent and claims 23-28 of the '111 patent on the ground that the doctrine of claim preclusion prevents Flexsys from re-litigating its '111 and '541 patents against Kumho. (Motion Docket No. 652-3.)<sup>5</sup>

The staff, in separate responses dated August 4 and August 5, 2008, argued that Motion Nos. 652-1 and 652-3 should be granted.

Complainant, in a combined response dated August 4, 2008, opposed each of Motion Nos. 652-1 and 652-3.<sup>6</sup>

At the preliminary conference on August 5, 2008, pursuant to Order No. 1, extensive arguments were heard on Motion Nos. 652-1 and 652-3.

On August 8, 2008, Order No. 6 issued, requiring respondents to provide a response to certain questions, requiring complainant to respond to said responses, and giving the staff an opportunity to respond to each of the foregoing.

On August 15, 2008, each of Sinorgchem and Kumho submitted a response to Order No.

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that include the rubber antidegradant. All three respondents are members of the umbrella organization Kumho Asiana Group and will be collectively referred to as Kumho. (Complaint, ¶¶ 11, 12, 13, 14.)

<sup>5</sup> Kumho, in Motion No. 652-3, represented that respondents Sinorgchem supported Motion No. 652-3. Said Motion No. 652-3 included, inter alia, a declaration of Sung Kyu Lim (Lim Decl.), and the Ohio Order of Dismissal (Ohio Dismissal) regarding the '541 patent.

<sup>6</sup> Said response included, inter alia, a declaration of David Crich (Crich Decl.) and a Ohio Order of Dismissal (Ohio Dismissal) regarding the '541 patent.

6.<sup>7</sup>

On August 22, 2008, complainant submitted a response to respondents' submissions.<sup>8</sup>

On August 28, 2008, Sinorgchem filed a "Supplemental Submission of Respondent Sinorgchem Co., Shandong In Response To Order No. 6."<sup>9</sup>

On August 29, 2008, the staff submitted a response to Order No. 6. In the staff's view Flexsys failed to demonstrate how any of the alleged differences, or any of the questions raised by Crich, are directly linked to the water content, selectivity, or yield or any limitation that was at issue in Certain Rubber Antidegradants, Components Thereof, and Products Containing Same, Inv. No. 337-TA-533 (Antidegradants I)<sup>10</sup> or the Ohio Civil Action, or that would be in issue in this investigation; that for example, none of the claims of any patents at issue in this investigation, Antidegradants I, or the Ohio Civil Action are directed to the equipment used in the process, the flow rate of the chemicals during the process, the order in which the chemicals and protic material are mixed, or the quantity of 4-ADPA, its intermediates, or 6PPD produced

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<sup>7</sup> Sinorgchem's response included, inter alia, a Supplemental Declaration of Wang Nogyue (Wang Supp. Decl.) Kumho's response included, inter alia, Supplemental Declaration of Sung Kyu Lim (Lim Supp. Decl.).

<sup>8</sup> Said response included, inter alia, a Supplemental Declaration of David Crich (Crich Supp. Decl.)

<sup>9</sup> As set forth in the supplemental response, the reasons for its filing were to correct statements of Flexsys as to lack of certifications as to exhibits included with Sinorgchem's August 15 submission and to provide a certification inadvertently omitted in the August 15 filing. While Sinorgchem's August 28 filing should have requested leave, the administrative law judge is accepting the filing, in view of the substance of said filing.

<sup>10</sup> The staff, in its response in support of Motion No. 652-3, noted that while neither of the two Kumho Tire respondents were parties in Antidegradants I both of said respondents in 337-TA-652 are either subsidiaries or affiliates of respondent KKPC.

by the process; that most if not all of Crich's comments uses phrases such as "can affect" or "could affect," which comments appear to be pure speculation; that the issue is not whether something could affect water content, selectivity, or yield but rather whether a difference between the "current" process and the process accused in Antidegradants I has affected water content, selectivity, or yield in a meaningful manner; and that nothing in Crich's Supp. Decl. or Flexsys's submission demonstrates that any of the alleged differences or "questions raised" have affected the water content, selectivity, or yield in a meaningful manner.<sup>11</sup> Therefore, the staff concluded that Flexsys has not shown that any genuine issue of material fact exists so as to preclude granting Sinorgchem's Motion No. 652-1. As to Kumho's process, the staff argued that the Sinorgchem and the Kumho processes are independent of each other; that Flexsys's contentions with respect to Kumho's response to Order No. 6 are superficial; and that therefore, Flexsys has not shown that any genuine issue of material fact exists so as to preclude granting Kumho's Motion No. 652-3.

On September 3, 2008, complainant Flexsys moved for leave to file an attached reply to the staff's submission pursuant to Order No. 6 filed on August 29, 2008. (Motion Docket No. 652-5.) Order No. 8, which issued on September 4, 2008, ordered respondents and the staff to respond to Motion No. 652-5. On September 4, 2008, the staff filed an unopposed motion for leave to file a surreply to Flexsys Motion No. 652-5. (Motion Docket No. 652-6.) On September 8, 2008, each of Sinorgchem and KKPC responded to Motion No. 652-5. Motion Nos. 652-5 and 652-6 are granted.

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<sup>11</sup> The staff noted that in this regard, the Wang Decl. and Wang Supp. Decl. consistently and unequivocally state that the minimum water content at both of Sinorgchem's production plants is always {            } which was the critical issue in Antidegradants I.

The '111 and '541 patents have been the subject of prior litigation involving Sinorgchem and KKPC. Specifically, in Antidegradants I, Flexsys asserted that the process by which Sinorgchem produces certain of the subject chemicals, 4-ADPA and its intermediates, was covered by claims 7 and 11 of the '111 patent, as well as by claims 30 and 61 of U.S. Patent No. 5,117,063 (the '063 patent). See, e.g., Complaint, ¶ 104, p. 16, ¶ 106, pp. 16-17.<sup>12</sup> Flexsys also previously asserted the '111, '541, '063, and '538 patents against each of the respondents in a Civil Action filed on January 28, 2005, in the Northern District of Ohio. (Complaint, ¶ 111, p. 18; Docket No. 2413, Complaint, ¶ 62 at 18.) In Flexsys' complaint in the Civil Action, which resulted in the Ohio Dismissal, Flexsys did not identify any specific claim, but merely asserted that the defendants infringed each of the patents. See, e.g., Motion No. 652-3, Exh. D, ¶ 17.

In Antidegradants I, as to Sinorgchem, the Commission determined that Sinorgchem's accused process literally infringed the asserted claims of the '111 and '063 patents and entered an exclusion order. On appeal, the Federal Circuit reversed the Commission's literal infringement determination and remanded the matter back to the Commission for a determination of infringement under the doctrine of equivalents. Sinorgchem Co., Shandong v. U.S. Int'l Trade Comm'n, 511 F.3d 1132, 1140-41 (Fed. Cir. 2007) (Sinorgchem v. ITC).

Referring to respondent Sinorgchem, at issue in Sinorgchem v. ITC were independent claims 30 and 61 of the '063 patent and claims 7 and 11 of the '111 patent. Those claims describe methods for producing 4-ADPA and 6PPD. The Federal Circuit found that claim 61 of the '063

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<sup>12</sup> Flexsys also had asserted U.S. Patent No. 6,140,538 (the '538 patent). However, Flexsys's motion to terminate the investigation as to the '538 patent in Antidegradants I was granted in Order No. 27 on October 7, 2005.

patent was representative of the asserted claims. Claim 61 reads:

61. A method of producing alkylated p-phenylenediamines [6PPD] comprising the steps of:

- a) bringing aniline and nitrobenzene into reactive contact in a suitable solvent system;
- b) reacting the aniline and nitrobenzene in a confined zone at a suitable temperature, and in the presence of a suitable base and controlled amount of protic material to produce one or more 4-ADPA intermediates;
- c) reducing the 4-ADPA intermediates to produce 4-ADPA; and
- d) reductively alkylating the 4-ADPA of Step c) [which produces 6PPD].

('063 patent at 15:34-46 (emphasis added).)<sup>13</sup> The central question was whether Sinorgchem's method of producing 4-ADPA intermediates satisfies the claim limitations of step (b). There was

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<sup>13</sup> Claim 11 of the '111 patent in issue in Antidegradants I read:

11. A method of producing alkylated p-phenylenediamines or substituted derivatives thereof comprising:

- a) bringing aniline or substituted aniline derivatives and nitrobenzene into reactive contact in a suitable solvent system;
- b) reacting the aniline or substituted aniline derivatives and nitrobenzene in a confined zone at a suitable temperature, and in the presence of a suitable base and controlled amount of protic material to produce one or more 4-ADPA intermediates;
- c) reducing the 4-ADPA intermediates to produce 4-ADPA or substituted derivatives thereof; and
- d) reductively alkylating the 4-ADPA or substituted derivatives thereof of step (c) wherein the amount of protic material in step (b) is controlled by the continuous distillation of said protic material.



- b) reacting the aniline or substituted aniline derivatives and nitrobenzene in a confined zone at a suitable temperature, and in the presence of a suitable base and protic material to produce one or more 4-ADPA intermediates, and
- c) controlling the amount of said protic material in step (a) or (b) to provide a selectivity of at least 0.97, wherein the selectivity is the molar ratio of 4-ADPA intermediates to undesired products.

(‘111 Patent at 22:18-31.) Like claim 61 of the ‘063 patent, which was representative of independent claim 30 of the ‘063 patent, and claims 7 and 11 of the ‘111 patent in Sinorgchem v. ITC, independent claim 23 requires controlling the amount of protic material to produce 4-ADPA intermediates, although claim 23 requires a selectivity of at least 0.97 with the selectivity being the molar ratio of 4-ADPA intermediates to undesired products. Significantly said selectivity is dependent on controlling the amount of protic material in steps (a) or (b). The Federal Circuit in Sinorgchem v. ITC found that “controlled amount” in asserted claims of the ‘111 patent could only have encompassed processes that utilized at most four percent water when aniline was solvent. While the ITC had found that the 4 percent language was inconsistent with Example 10, which the Federal Circuit recognized was a preferred embodiment which uses more than 10 percent water in a reaction where aniline is the solvent and a high percentage (92.8%) of 4-ADPA intermediates is produced, the Federal Circuit found that Example 10 was “merely one of twenty-one distinct embodiments, all of which are described as ‘preferred embodiment[s]’” and that whereas in the ‘111 patent there are multiple embodiments disclosed, the Federal Circuit has previously interpreted claims to “exclude embodiments inconsistent with unambiguous language in the patent’s specification or prosecution history” Sinorgchem v. ITC at 1138. (emphasis added). This unambiguous language was found to require the asserted claims of the ‘111 patent



to have only up to about four percent water based on the volume of the reaction mixture when aniline was utilized as a solvent. Moreover, it is undisputed based on the finding of the Federal Circuit that the Sinorgchem process in issue in Antidegradants I always used more {

} Sinorgchem v. ITC at 1135-41.<sup>14</sup>

Referring to respondent KKPC, in Antidegradants I this administrative law judge determined that KKPC did not infringe any of the asserted claims of the '111 patent (viz. process claims 7 and 11) and the asserted claims of the '063 patent (viz., process claims 30 and 61) which cover production of 6PPD because KKPC did not perform all of the steps of the process and was not a "joint-infringer" in that it had not acted in concert with Sinorgchem. (ID at pp. 104-05). Flexsys petitioned for review of the non-infringement determination, but the Commission declined to take review, thereby affirming the determination of the administrative law judge. (Antidegradants I, Comm. Op. at 29 (July 13, 2006) (Comm. Op.)) As part of Flexsys' appeal to the Commission, it had referred to its infringement allegations against KKPC as a downstream infringement of the 4-ADPA claims,<sup>15</sup> which Flexsys raised in its

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<sup>14</sup> The administrative law judge rejects complainant's argument (opposition at 14) that "the relevance of the water content is greatly diminished by the fact that the asserted claims of the '541 and '111 patents contain no numerical upper limit on the amount of protic material and do not include the term 'controlled amount' of protic material." Representative asserted claim 61 of the '063 patent in Antidegradants I does not recite any numerical upper limit in the amount of protic material. Yet the Federal Circuit unquestionably found that the specification of the patent was limited in the coupling step to "up to about four percent water based on the volume of the reaction mixture when aniline was utilized as the solvent." Moreover while claim 23 of the '111 patent in issue does not recite "controlled amount" it does require "controlling the amount of said protic material" in its coupling step b).

<sup>15</sup> Flexsys, in its complaint in Antidegradants I, sought relief against downstream products made by KKPC and/or its affiliates. However, prior to the commencement of the hearing in that investigation, Flexsys withdrew any claim for remedy against downstream products, stating:

reply brief before the administrative law judge in Antidegradants I.<sup>16</sup> The Commission rejected Flexsys's "downstream" infringement theory, stating that Flexsys had waived assertion of 4-ADPA claims against KKPC by failing to raise the 4-ADPA claims in Flexsys's post hearing brief. (Comm. Op. at 29.) Flexsys also sought to have KKPC's 6PPD product encompassed within any order excluding 4-ADPA and 6PPD produced by Sinorgchem because KKPC used 4-ADPA produced by Sinorgchem as its starting material for its 6PPD product. The Commission also rejected this remedy request, stating:

"Flexsys argues that even if the Commission finds no violation with respect to KKPC, the limited exclusion order should nevertheless cover 6PPD made by KKPC from 4-ADPA made by Sinorgchem. Such a provision would obviously vitiate the finding of no violation of section 337 with respect to KKPC and we have not included it in the order."

Comm'n Op. 38, n. 14.

In the Civil Action in the Northern District of Ohio, on September 20, 2006, Flexsys had moved to amend its complaint to dismiss its infringement allegations with respect to the '541 patent in issue in this investigation and the '538 patent. The district court in the Ohio Dismissal granted Flexsys's motion and dismissed Flexsys's infringement allegations relating to the '541 and '538 patents with prejudice.

Pursuant to Commission rule 210.18, summary determination "shall be rendered if

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Complainant disavows any request in its Verified Complaint as supplemented for an exclusion order or cease and desist order directed to any downstream rubber products including, but not limited to, tires, belts, inner tubes and hoses.

See Motion No. 652-3, Exh. 7 (10/28/05 Stipulation Regarding Remedy).

<sup>16</sup> Flexsys Rebuttal Brief, at 46-48 (December 16, 2005).

pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary determination as a matter of law.” The evidence “must be viewed in the light most favorable to the party opposing the motion . . . with doubts resolved in favor of the nonmovant.” Crown Operations Int'l, Ltd. v. Solutia, Inc., 289 F.3d 1367, 1375 (Fed. Cir. 2002) (internal citations omitted). “Issues of fact are genuine only if the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party.” Id. at 1375 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). In other words, the evidence is to be viewed in a light most favorable to the nonmovant, and all reasonable inferences must be drawn in favor of the nonmovant. Certain Condensers, Parts Thereof and Products Containing the Same, Including Air Conditioners for Automobiles, Inv. No. 337-TA-334, Views of the Commission at 3 (Nov. 25, 1992). Pursuant to Commission Rule 210.18, the administrative law judge may deny a motion for summary determination when discovery is necessary to establish facts essential to a party’s opposition. In re Certain Condensers, Inv. No. 337-TA-334(R), Order No. 12, 1999 ITC LEXIS 363 at \*6 (I.T.C April 27, 1999) (“[p]ursuant to Commission Rule 210.18(d), the administrative law judge may refuse an application for summary determination when discovery is necessary to establish facts essential to a party’s opposition”).

Sinorgchem, in support of Motion No. 652-1, argued that Flexsys's new complaint is legally deficient and should be dismissed in that Flexsys is required to allege that Sinorgchem's current process is materially different from the process that was the subject of the prior actions and Flexsys does not allege any difference in or changes to the process currently being used by

Sinorgchem as compared to the Sinorgchem process of the prior litigations; that the prohibition against improper claim splitting precludes Flexsys from asserting different claims of the '111 patent in this investigation; and that the dismissal in the Northern District of Ohio “with prejudice” of the '541 patent precludes reassertion of the '541 patent because the voluntary dismissal in Ohio, with prejudice, is a final decision on the merits and Flexsys' infringement claims for the '541 patent are the same cause of action that was and dismissed in the Ohio action.

Kumho, in support of Motion No. 652-3, argued that because Flexsys lost against KKPC in Antidegradants I, Flexsys is precluded from reasserting the same '111 patent against Kumho in this investigation; and that because Flexsys' '541 patent was dismissed “With Prejudice” against Kumho in the Ohio action, it cannot be reasserted by Flexsys against Kumho in this investigation.

Flexsys, in opposing Motion Nos. 652-1 and 652-3, argued that Sinorgchem has failed to demonstrate that the process currently being used in its Nangyang plant in China is the same as the process that was being used in its Cao County plant in China in 2005 and disclosed in discovery in the 533 investigation; that the Wang Decl. included with Motion No. 652-1 fails to demonstrate that Sinorgchem's current processes are the same as the processes used in 2005; that Sinorgchem's data regarding water content fails to demonstrate that the processes are the same; that Flexsys is entitled to discovery regarding the differences between Sinorgchem's current processes and the process used in 2005, and respondents' res judicata defense is further negated by a substantial change in the nature and scope of respondents' activities in violation of section 337; that Flexsys' claim under the '541 patent is not barred by the express terms of the stipulated Ohio Dismissal; that Flexsys' claim for violation of section 1337(a)(1)(b)(ii) is separate and

distinct from its district court claim under section 271(g); that Flexsys' complaint in this investigation asserts claims directed to a process for making 4-ADPA intermediates, which is a separate cause of action from the complaint in Antidegradants I because the claims asserted in this investigation are different in scope from the claims that are the subject of Antidegradants I; that the fact that Flexsys' complaint states a new cause of action is highlighted by a new importation issue; and that respondents' motions cannot be granted without permitting Flexsys to take discovery regarding essential facts solely in respondents' possession.

I. Motion Nos. 652-1 and 652-3

Complainant argued that a substantial change in the nature and scope of respondents' activities, *viz.* an increase in quantities imported and which respondents are importing, negates *res judicata*. (Opposition at 17.) As an initial matter, this administrative law judge, in Antidegradants I, has found that KKPC and Sinorgchem are separate entities and are not joint infringers. (ID at pp. 104-05.) Complainant makes no allegations otherwise in this investigation, although complainant again alleges that KKPC purchases products from Sinorgchem. Thus, the combined imports into the United States of KKPC and Sinorgchem are not found to be a single unit with respect to complainant's argument. Significantly, KKPC, the respondent whose imports have increased, was judged to not infringe complainant's patents (the '111, '063, and '538 patents) in Antidegradants I, and that decision was not appealed. In contrast, the Commission found that Sinorgchem literally infringed complainant's patents, but Sinorgchem won on appeal before the Federal Circuit and is now back before the Commission and this administrative law judge on remand to determine if Sinorgchem infringes under the doctrine of equivalents. Thus, the administrative law judge rejects complainant's argument that an increase

in importation of non-infringing products and a decrease of potentially infringing products of two unrelated entities, namely Sinorgchem and KKPC, changes the circumstances of the investigations to such an extent that a new cause of action is created.

Complainant cites Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955)

(Lawlor). In Lawlor, the Court found that:

The conduct presently complained of was all subsequent to the 1943 judgment. In addition, there are new antitrust violations alleged here -- deliberately slow deliveries and tie-in sales, among others -- not present in the former action. While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case.

(Lawlor, 349 U.S. at 328.) In this investigation, however, none of the Kumho respondents are accused of any infringement, but instead KKPC is accused of purchasing products from allegedly infringing processes from Sinorgchem, which is the same behavior which KKPC was accused of in Antidegradants I, while Kumho Tire and Kumho Tire USA are accused of purchasing and using products from KKPC.<sup>17</sup> As for Sinorgchem, if the product from the new plant is found to be made using a new process, then that would be a new cause of action. Should the new plant be

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<sup>17</sup> As Kumho argued in its response to Order No. 8:

Order No. 8 requires each of the Respondents and the ITC Staff to respond to the “factual errors” alleged in “Flexsys’ Reply To Commission Investigative Staff’s Response To Order No. 6” (“Flexsys Reply”). All the “factual errors” alleged in Flexsys’ Reply concern the Sinorgchem process; none are applicable to the Korea Kumho Petrochemical Co., Ltd. (“KKPC”) process.

There is no dispute in the record that KKPC continues to use, today, the same reductive alkylation process to synthesize 6PPD from 4-ADPA that it has used since prior to January 2005.

found to use the same process alleged to infringe in Antidegradants I, the alleged infringement by Sinorgchem would simply be a continuation of the same cause of action currently at issue in Antidegradants I, in which investigation KKPC was found not to infringe.

Regarding Young Eng'rs, Inc. v. United States Int'l Trade Comm'n, 721 F.2d 1305, 1316 (Fed. Cir. 1983) (Young Eng'rs), relied on by complainant, the Court found that:

Even under the broad view that a claim may embrace continuing conduct subsequent to the judgment, we find no authority that claim preclusion would apply to conduct of a different nature from that involved in the prior litigation. Lawlor v. National Screen Service Corp., *supra*, is clearly to the contrary.

With respect to patent litigation, we are unpersuaded that an "infringement claim," for purposes of claim preclusion, embraces more than the specific devices before the court in the first suit. Adjudication of infringement is a determination that a thing is made, used or sold without authority under the claim(s) of a valid enforceable patent. Thus, the status of an infringer is derived from the status imposed on the thing that is embraced by the asserted patent claims, the thing adjudged to be infringing. By the same token, where the alleged infringer prevails, the accused devices have the status of noninfringements, and the defendant acquires the status of a noninfringer to that extent. We reject TYE's theory that under principles of res judicata it became an unfettered licensee.

(Young Eng'rs, 721 F.2d at 1316 (emphasis added).) Thus, the Young Eng'rs Court found that an infringement claim covers only the specific matter at issue before the Court and the administrative law judge declines to further extend that finding to support complainant's position. Moreover, the Young Eng'rs court's finding supports the administrative law judge's finding that a party found not to infringe is a non-infringer.

Complainant further relied on In re Certain Mechanical Gear Couplings, Inv. No. 337-TA-343, Order No. 10, 1993 ITC LEXIS 194 at \*23-24 (I.T.C. March 23, 1993), which denied a respondents' motion for summary determination based on res judicata, stating:

“uncontroverted facts and admissions show that respondents' activities since the dismissal of the District Court case constitute a continuing series of allegedly wrongful acts which have undergone a substantial change in scope, and have given rise to a separate cause of action.” Here, however, complainant is attempting to show that increasing importation by a non-infringer and decreasing importation by an accused infringer somehow combines into a “wrongful act.”

Complainant had also argued that a “new cause of action that is separate and distinct from Antidegradants I is highlighted by the presence of a new importation issue that was not litigated in the prior investigation.” (Opposition at 31.) However, the basis for complainant’s argument, *viz.*, the “fairly close nexus” test in Certain Sucralose, Sweeteners Containing Sucralose, ITC Inv. No. 337-TA-604, Order No. 11, 2007 ITC LEXIS 841 at \*13 (Aug. 8, 2007), had no precedent when the staff in Inv. No. 337-TA-604 recommended it. Also, it was rejected by the administrative law judge in that investigation. In addition, the ID resolving the motion for which said “test” was recommended was vacated, and no final ID has issued in that investigation. (Opposition at 32.)

## II. Motion No. 652-1

Sinorgchem argued that complainant “had the obligation to make a threshold showing in its second § 337 Complaint that the basis of its cause of action set forth therein differs from its previous causes of action.” (Sinorgchem Memorandum at 8.) The administrative law judge, however, views this argument mooted by the Commission’s institution of this investigation. Moreover, *res judicata* is an affirmative defense, and anticipation of an affirmative defense is nowhere required by the Commission rules. (See, *inter alia*, Commission rule 210.12.)

Hemphill v. Kimberly-Clark Corp., 530 F. Supp. 2d 108 (D.D.C. 2008) (Hemphill), relied



on by Sinorgchem, concerned infringement of different patent claims of the same patent by the same products, and the Hemphill court found that res judicata could be “properly brought in a pre-answer Rule 12(b)(6) motion when ‘all relevant facts are shown by the court’s own records, of which the court takes notice.’” (Sinorgchem Memorandum at 8 citing Hemphill at 111.)

However, the Hemphill case was terminated in a response to a 12(b)(6) motion by defendant, not because the complaint was defective on its face. Thus, the Hemphill court determined that the facts alleged in the complaint showed that res judicata applied. Foster v. Hallco, Mfg. Co., 947 F.2d 469 (Fed. Cir. 1991) (Foster) was relied on by Sinorgchem for the premise that “colorable changes in an infringing device or changes unrelated to the limitations in the claims of the patents would not present a new cause of action.” (Memorandum at 8-9 citing Foster at 479-80.) Hence, the administrative law judge finds the Foster case irrelevant to the question of whether or not a complaint must anticipate an affirmative defense.

Referring to the ‘111 patent, it is undisputed that Flexsys asserted the process claims 7 and 11 of the ‘111 patent against Sinorgchem in Antidegradants I and the process claims 23-28 of the ‘111 patent in Inv. No. 337-TA-652. Claims 7 and 11 were the only process claims asserted in Antidegradants I and on appeal to the Federal Circuit. The Federal Circuit reversed the Commission’s literal infringement determination and remanded Antidegradants I back to the Commission for a determination of infringement under the doctrine of equivalents. Flexsys did not assert the process claims 23-28 of the ‘111 patent in Antidegradants I. Sinorgchem contends that Flexsys is precluded from asserting the process claims 23-28 of the ‘111 patent against its processes under the doctrine against claims splitting.

Where the accused processes are the same or essentially the same in two

successive actions, a patent owner may not split a cause of action into separate grounds of recovery and raise the separate grounds in successive lawsuits. Mars Inc. v. Nippon Conlux Kabushiki-Kaisha, 58 F.3d 616, 619-20 (Fed. Cir. 1995) (Mars). In Mars, the Federal Circuit stated:

It is well established that a party may not split a cause of action into separate grounds of recovery and raise the separate grounds in successive lawsuits; instead, a party must raise in a single lawsuit all the grounds of recovery arising from a single transaction or series of transactions that can be brought together. See Restatement (Second) of Judgments § 24(2) (1982) (all actions arising from the same transaction or series of transactions are regarded as constituting a single cause of action); Gregory v. Chehi, 843 F.2d 111, 117 (3d Cir. 1988) (for purposes of claim preclusion analysis, the term “claim” is defined “broadly in transactional terms, regardless of the number of substantive theories advanced in the multiple suits by the plaintiff”) (citing Restatement (Second) of Judgments); Foster v. Hallco Mfg. Co., 947 F.2d at 478-79, 20 USPQ2d at 1248-49 (same); Alyeska Pipeline Service Co. v. United States, 688 F.2d 765, 769- 70, 231 Ct.Cl. 540 (1982) (same; “claim splitting cannot be justified on the ground that the two actions are based on different legal theories”), cert. denied, 461 U.S. 943, 103 S.Ct. 2120, 77 L. Ed.2d 1301 (1983).

Mars, 58 F.3d at 619-620. The rule against claim splitting prevents parties from attempting to re-litigate the same patent in subsequent actions against the same or essentially the same products or processes by asserting previously non-adjudicated claims of the patent at issue. See e.g., Hemphill (holding that where the “nucleus of facts [is] identical in both actions,” a patent holder is precluded from bringing a second lawsuit against the same accused infringer based on different claims of a previously asserted patent); Biogenex Labs., Inc. v. Ventana Medical Systems, Inc., 2005 U.S. Dist. LEXIS 45405 at \*6-8 (N.D. Cal. Aug. 5, 2005) (Biogenex) (barring patentees from splitting causes of action within a single patent where the patentee attempted to institute separate lawsuits based on different patent claims in the same patent); Civix-DDI, LLC v.

Expedia, Inc., 2005 WL 112906 at \*4 (N.D. Ill. 2005) (barring assertion of identical patents that were the subject of the first action) (Civix); AMEX, LLC v. Mopex, Inc., 215 F.R.D. 87, 92 (S.D.N.Y. 2002) (ruling that patentee's attempt to assert a new patent claim after the close of fact discovery was properly precluded by the Magistrate Judge and affirming Magistrate Judge's decision to make the ruling dispositive, thereby barring patentee "forever from asserting that claim against the [defendant].").

In Hemphill, the patent owner sued the same previously-accused infringer for infringement of the same patent, but under a different patent claim, by "the same products." Hemphill at 110. The alleged infringer moved to dismiss the complaint based on claim preclusion under Rule 12(b)(6) for failing to state a new cause of action. The Court in Hemphill specifically recognized that, although res judicata is an affirmative defense, it is also "properly brought in a pre-answer Rule 12(b)(6) motion when 'all relevant facts are shown by the court's own records, of which the court takes notice.'" Hemphill at 111. The Hemphill Court noted, "Ms. Hemphill makes no assertion to the contrary" and "the nucleus of facts is identical in both suits." Id. Further, relying on Foster at 479-80, the Court in Hemphill found that for claim preclusion to apply the devices in the two suits must be "essentially the same... colorable changes in an infringing device or changes unrelated to the limitations in the claims of the patents would not present a new cause of action." Id. The court dismissed Hemphill's complaint. (See also Young Eng'rs, supra, finding that a respondent must, to prove res judicata, show that the allegedly infringing goods are the same.)

The prohibition against claim splitting applies despite the absence of a final judgment in Antidegradant I. For example:

Unlike res judicata, which may only be applied to dispose of an action following a final judgment on the merits in a prior action, see Cent. States, Southeast & Southwest Areas Pension Fund v. Hunt Truck Lines, 296 F.3d 624, 628 (7th Cir. 2002), courts have applied the doctrine of claim splitting before there is a final judgment in a prior action. See e.g., CIVIX, 2005 WL 1126906, at \*4 (collecting authorities); see also Serlin, 3 F.3d at 223 (stating that a court may dismiss an action “for reasons of wise judicial administration [ ] whenever it is duplicative of a parallel action already pending in another federal court”) (internal quotation marks and citation omitted); Walton v. Eaton Corp., 563 F.2d 66, 70 (3d Cir.1977) (stating that the plaintiff clearly had “no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant.”) (collecting authorities). [Note omitted].

Kim v. Sara Lee Bakery Group, Inc., 412 F. Supp. 2d 929, 941-942 (N.D. Ill. 2006) (Kim). (See also Civix, 2005 WL 112906 at \* 4; Biogenex, 2005 U.S. Dist. LEXIS 45405 at \*7.) As the court in Kim makes clear, a final judgment is not a prerequisite for the application of the prohibition against claim splitting. Thus, a court may apply the prohibition wherever a complainant brings an infringement action regarding the same subject matter against the same defendant, even though there has not been a final judgement.

Based on the foregoing, the administrative law judge finds that the prohibition against claim splitting applies in this investigation, if Sinorgchem meets its burden of showing the accused process is “essentially the same” in this investigation as it was in Antidegradants I.

Complainant argued that claim preclusion should not apply to this investigation because:

The asserted claims of both the ‘541 and ‘111 patents are directed to methods of making 4-ADPA intermediates. In contrast, the claims asserted in the 533 Investigation were directed to methods of making 4-ADPA or methods of making alkylated derivatives of 4-ADPA, such as 6PPD.

(Opposition at 29 (emphasis in original).) Complainant further argued that “each of the claims

being asserted in this investigation contains one or more specific limitations relating to the reaction of aniline and nitrobenzene that was not present in the claims asserted in the 533 Investigation.” (Opposition at 30 (internal citations omitted).) Complainant also argued that “because these claims are directed to a method for making an intermediate, rather than a final product, these claims give rise to a separate cause of action than was asserted in the 533 Investigation.” (Opposition at 29-30.) In support, complainant relies on Bates Mach. Co. v. WM. A. Force & Co., 139 F. 746, 746-47 (S.D.N.Y. 1905), which case held that a suit for patent infringement on newly asserted claims of the same patent that was previously adjudicated was not barred because the two sets of claims cover different devices. Complainant further argued that:

Respondents' “claim-splitting” argument rests on the tenuous proposition that claims 23-28 of the '111 patent could have been asserted in the 533 Investigation. This argument has been soundly rejected as a basis for claim preclusion. Acumed, 525 F.3d at 1325-26 (rejecting contention that “a claim is barred by claim preclusion merely because it could have been raised in a prior action between the parties that was resolved on the merits”); Kearns, 94 F.3d at 1556 (“[r]es judicata does not automatically apply to claims that might have been included in the prior complaint”). In Acumed, the Court cited additional authority stating:

[T]he Supreme Court explained as early as 1876 that claim preclusion does not bar a claim merely because it could have been raised in a prior action between the parties that was resolved by a final judgment on the merits: ... More recently, the Ninth Circuit has also clarified that claim preclusion does not bar a claim merely because it could have been raised in a prior action between the parties that was resolved by a final judgment on the merits: ...

Acumed, 525 F.3d at 1326 (citing Cromwell v. County of Sac, 94 U.S. 351, 356 (1876) and Hells Canyon Pres. Council v. U.S. Forest Serv., 403 F.3d 683, 686 n.2 (9th Cir. 2005)).

Here the interests of justice would be grossly disserved by applying res

judicata to claims 23-28 of the '111 patent, which were never presented for adjudication in the 533 Investigation. See Kearns, 94 F.3d at 1556 ("it must be shown ... that the interest of justice is not disserved by applying res judicata to claims that were never presented for adjudication").

(Opposition at 30-31.) Essentially, complainant is arguing that bringing an action for infringement of certain patent claims does not preclude bringing an action for infringement of different claims of the same patent against the same respondent, if those claims are sufficiently different, regardless of whether the accused processes are the same. Complainant, however, has cited to no case law supporting this argument. For example, the holding of the Acumed case, on which complainant relies in part, reads:

Because Stryker has conceded that the T2 Long and the T2 PHN accused devices are not “essentially the same” under Foster, it has failed to meet its burden to show that the infringement claim in Acumed I is the same as the infringement claim in the present action. Accordingly, Stryker has failed to show that Acumed I bars the present action under the doctrine of claim preclusion.

Acumed LLC v. Stryker Corp., 525 F.3d 1319, 1327 (Fed. Cir. 2008).

Thus, the court in Acumed made no analysis of the patent claims; rather, the decision of the court rested squarely on whether the products at issue were “essentially the same.” Further the holding of Kearns, on which complainant likewise relies on, reads:

In the case at bar it is not possible to show that the identical issue was presented in the sixteen patents that were not before the Michigan court, as in the five patents that were; for each patent, by law, covers a independent and distinct invention. Further, infringement must be separately proved as to each patent.

\* \* \*

We conclude that the Michigan dismissal was res judicata only with respect to the five patents that were before the Michigan court. The dismissal is affirmed as to these five patents. The dismissal is vacated as to

the sixteen patents that were not before the Michigan court.

Kearns v. General Motors Corp., 94 F.3d 1553, 1556-1557 (emphasis added) (Kearns). Thus, as in the Acumed case, the Kearns court made no analysis of individual patent claims, but rather found that each patent gives rise to a new infringement cause of action.

The case law relied on by complainant, instead of supporting its contention that different patent claims give rise to a different cause of action, firmly supports the conclusion that the process at issue must be “essentially the same.” See Acumed, 525 F.3d at 1324. Federal cases provide further guidance on this issue. The accused devices or processes are considered essentially the same “where the differences between them are merely ‘colorable’ or ‘unrelated to the limitations in the claim of the patent.’” Roche Palo Alto LLC v. Apotex, Inc., 531 F.3d 1372, 1379 (Fed. Cir. 2008) (Roche) (emphasis added), quoting Acumed, 525 F.3d at 1324, and Foster, 947 F.2d at 480). In Roche, the Federal Circuit further clarified when a product or process “is essentially the same” by stating:

We find no error in the district court's analysis. The court determined that the ANDA-1 formulation and the ANDA-2 formulation are “essentially the same” because any differences between them are unrelated to the claims of the '493 patent. Though the court recognized that there are differences in the concentrations of the ingredients in the ANDA-1 and ANDA-2 formulations, it also realized that all of the concentrations are well within the ranges claimed in the '493 patent. The fact that they are stabilized by different mechanisms, even if true, is irrelevant because both formulations are encompassed by the claims of the '493 patent. Thus, any difference in composition between the two formulations is merely colorable and the two formulations are “essentially the same.”

Roche, 531 F.3d at 1380. Hence, the sole issue, in Motion No. 652-1, is whether Sinorgchem has established, as a matter of law, that its new process at its Nangyang plant to manufacture 6PPD and 4-ADPA is the same or involves merely colorable differences when compared to the old

process at its Cao County plant that was in issue in Antidegradants I.

Based on the specification of the '111 patent, the claims in issue in Antidegradants I and this investigation and Sinorgchem v. ITC the administrative law judge finds that said issue involves the claim terms relevant to the water content controlling the amount of protic material, yield of 4-ADPA intermediates and selectivity of 4-ADPA-intermediates involved in the coupling process in the reaction of aniline and nitrobenzene to produce 4-ADPA intermediates.<sup>18</sup> To the contrary, none of the claims of any patents at issue in this investigation in Antidegradants I or the Ohio Civil action were directed to the equipment used in the process, the flow rate of the chemicals during the process, the order in which the chemicals and protic material are mixed or the quantity of 4-ADPA, its intermediates, or 6PPD produced by the claimed process. Thus, the issue is whether there are any differences between the coupling processes at the Cao County and Ningyang plants today versus at the Cao Country plant in 2005 that was in issue in Antidegradants I, and which are not colorable. See Roche, supra.

Sinorgchem, in support of Motion No. 652-1 argued that there is nothing different with regard to the amount of protic material present during the process used at the Ningyang plant that was not litigated in Antidegradants I; that with regard to the Ningyang plant, Sinorgchem confirms that{

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<sup>18</sup> According to the specifications of the '541 and '111 patents in issue in Inv. No. 337-TA-652, selectivity, *i.e.*, production of desired 4-ADPA intermediates in contrast to non-desired nitrodiphenylamine, is related to the water content, where the lower the amount of water, the higher the selectivity. (See, *e.g.*, staff Exh. 2, the '541 patent, at 5:36-42 and staff Exh. 3, the '111 patent, at 5:35- 42);and that the patents define the terms "selectivity" and "yield" as follows: "selectivity is the ratio of the moles of product generated and the number of moles of nitrobenzene consumed"; yield is defined as conversion of nitrobenze times selectivity. (See staff Exh. 2, at 10:17-21 and staff Exh. 3 at 10:4-6.) (Staff Response to Order No. 6 at 2, fn.1.)



} by the parties for the Cao Plant

during Antidegradants I; and that therefore it is not subject to dispute that the Sinorgchem process at {

} to form 4-ADPA

intermediates.

Wang, who submitted the Wang Decl., has been the general manager of Sinorgchem since 1998. Before and during 2001, he was directly involved in the development of the continuous Sinorgchem process now used at both the Cao County and Ningyang plants to make 4-ADPA intermediates, 4-ADPA, and 6 PPD. (Wang Decl. ¶ 2.) Wang testified live before this administrative law judge in the evidentiary hearing in Antidegradants I. (See open session on November 9, 2005 at 867 through 1168 and on November 10, 2005 at 1169 through 1412; see also closed session on November 9, 2005 at 868 through 1168 and on November 10, 2005 at 1169 through 1482.) Thus, in the open session on November 9, 2005, Wang testified:

A. My full name is Wang Nongyue.

Q. And, Mr. Wang, what is your position at Sinorgchem?

A. I'm a manager.

Q. And what are your responsibilities as a general manager?

A. I am responsible for Sinorgchem's production, operation, manufacturing and the R&D.

Q. Mr. Wang, could you briefly describe your educational background?

A. During the year of 1978 to 1982, I was study in the university,

major in chemical engineering, obtained a bachelor's degree. During the year of 1987 to 1989, I studied in graduate school, majored in chemical engineering, obtained a master's degree. Starting 2003 to this date, I'm studying to obtain my master's degree in management -- correction -- doctor's degree in management.

Q . And, Mr. Wang, could you describe your professional background and the positions you have held at different companies?

A. Okay. After I graduated from university, that was 1982, I was working at Tian Jing Pesticide Company and my primary responsibility was research. And that was the largest pesticide research institute in China. I was the compound research rooms director. After I obtained my master's degree in 1989, I worked at the Che Jiang Chemical University, which is Che Jiang Research Technology Institute. My responsibility then was the R&D on chemical engineering and the project management. And I was chemical engineering plant, vice plant director. My primary responsibility --

\* \* \*

THE WITNESS: And it was, it was Shandong Province, middle size pesticide base, as a director. During the year of 1993 to 1998, I was working at Che Jiang University Chemical Engineering Company as a director. Che Jiang University is the most famous university in my country. During that period of time I was -- I worked in the provision level, city level and the national level various projects as R&D researcher and project management personnel. In 1998 I became the Sinorgchem's chemical -- Sinorgchem Chemical Engineering Company's general manager. And I had over ten publications in the famous magazines in my country. And many times I received award -- awarded to me from the city level, provincial level, and the national level.

(November 9, 2005 Tr. at 1121-23.) The administrative law judge found Wang credible in his testimony on November 9 and 10, 2005.

Since 2001, Wang has been and still is responsible for overseeing the manufacture and/or

sales of 4-ADPA intermediates, 4-ADPA, and 6 PPD at the Cao County plant. Since 2006, he has had the same responsibilities for the Ningyang plant. He is the same Wang Nongyue who executed on September 18, 2005 a Declaration (Exhibit 1 to Wang Decl.) with a number of attached Exhibits (Exhibits 2 and 3 to Wang Decl.) in Antidegradants I describing certain aspects of the continuous Sinorgchem process. Said Exhibit 2 to the Wang Decl. {

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The Crich Decl., included with Flexsys' opposition to Motion No. 652-1 dated August 4, 2008, indicated that, in Antidegradants I, Crich had been qualified as an expert and previously provided expert testimony. (Crich Decl. ¶ 3.) With respect to the Wang Decl., Crich declared:

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Order No. 6 issued by the administrative law judge on August 8, 2008 posed the following questions, inter alia, to Sinorgchem:

Does Sinorgchem agree that Wang Exhibit 4 [which was said by Wang to disclose the water contents win the condensation reaction for the Ningyang plant] is inadequate to show the details of the process at issue with respect to the Ningyang plant? If not, Sinorgchem should explain, in detail.

\* \* \*

Sinorgchem should address whether or not selectivity and yield are the same as between the Cao County and the Ningyang plants, and should also address the reason(s) for any differences as between the Wang declaration in the 533 investigation and the Wang declaration attached to the motion at issue.

Referring to the first question and making reference to the Wang Supp. Decl.,

Sinorgchem responded:

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Referring to the second question, supra, and making reference to the Wang Supp. Decl.,  
Sinorgchem responded:

In response to the ALJ's Question No. 3, Sinorgchem has {

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The administrative law judge finds that Sinorgchem, in light of the Wang Decl. and Wang Supp. Decl., has conclusively established that there are no differences which are more than merely colorable between the coupling processes at the Cao County and Ningyang plant today versus the coupling process at the Cao County plant in 2005 which was in issue in Antidegradants I. Thus, Exhibit 4 of the Wang Decl. is a summary of the water content in the coupling reaction mixture {

} Those measurements the administrative law judge finds, as a matter of law, confirm that{

} which is the same range as in the Cao County plant. (Id.) Moreover, {

} Wang also

included representative{

} The administrative law judge finds that those measurements confirmed that the content of the water in the coupling reaction mixture in Sinorgchem's Cao County plant, which was the subject of Antidegradants I, was consistently

{ } Significantly, Flexsys stipulated in Antidegradants I that {



} in said Exhibit E to the Wang Decl. of September 18, 2005.

Flexsys' expert, Crich, has contended that more information is needed regarding the water content data reported in Exhibit 4 the Wang Decl., in that Crich needs information regarding plant schematics showing the location of the ports from which the samples were taken, information regarding other process parameters at the time the same was taken, and information regarding the procedures used for analyzing the samples. However, reference is made to a

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} Moreover, Crich did not need any additional information about the water content in Sinorgchem's process to support his opinions in Antidegradants I. Thus, Crich testified at the hearing that he based his opinions on the RT Base Operation Manual and Wang's testimony:

Q. . . . What did you base your opinion on, on the content of water in the Sinorgchem condensation mixture?

A. As I said, I've looked at the RT base manual and the deposition testimony of Mr. Wang, which stated that there was an accurate description of the process.

Q. Did you independently verify any of the [water] measurements that are summarized in the first two pages of RX-800C?

A. No, I did not.

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(Transcript from Antidegradants I, Nov. 9, 2005, p. 1041, l. 23 to p. 1042, l. 13.) In addition, Crich did not visit Sinorgchem's facility, as it was unnecessary. (Id. at p. 1040, l. 11-13.)<sup>19</sup>

Flexsys, in its filing on September 3, argued that{

} Thus, Flexsys argued that

Sinorgchem's current process differs from that in use in 2005 based on the following:

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(Flexsys' Response to Order No. 6 at 13.) However, none of the claims of any of the patents at issue in this investigation, Antidegradants I, or the Ohio Civil Action contain an element directed to the type of equipment to be used to produce 4-ADPA, its intermediates or 6PPD, or{

} Thus, the differences, if any, in production or monitoring equipment used Sinorgchem in its production of antidegradant products are found not to be related to any patent claim. See

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<sup>19</sup> In view of the declarations of Crich in this investigation, it is not understood why Crich was silent in 2005 about the many so-called discrepancies he now raises and why he had no dispute as to the water content in the coupling stage in 2005. Speculations in this investigation should not warrant denial of Motion No. 652-1.

Roche, 531 F.3d at 1380. Moreover, Wang, in the two declarations submitted in connection with Sinorgchem’s Motion No. 652-1, declared that {

regardless of{  
} Thus, the administrative law judge finds that,

}

In addition, the administrative law judge finds that the “coupling” stage (condensation reaction) is the only stage in the Sinorgchem process where the water content is relevant, because that is the stage where the limitations “up to about 4%,” selectivity, and yield come into play.

Therefore, the administrative law judge finds that the {

} is unrelated to the patent claims, and therefore, irrelevant. Roche, 531 F.3d at 1380.

With respect to yield and selectivity of 4-ADPA intermediates, the administrative law judge finds that there is no material difference between the Cao County and Ningyang plants. Crich’s calculations demonstrated that{

Flexsys has argued that the order of the introduction of the aniline, nitrobenzene and catalyst feed is important with respect to infringement. (See e.g., reply at 4-5.) Crich's Supp.

Decl. read:

This information is material to the claims being asserted in the present action. For example, claim 61 of the '541 patent includes, in part, a step of controlling the amount of protic material in either a step of bringing aniline and nitrobenzene into reactive contact in a suitable solvent system or a step of reacting nitrobenzene in a confined zone at a suitable temperature, and in the presence of a suitable base and protic material to produce one or more 4-ADPA intermediates. Because the controlling step can occur in either the "bringing" or "reacting" steps, the missing information regarding the Ningyang plant is material to the claims at issue. By failing to provide the information regarding the order in which the reactants are mixed at the Ningyang plant, Sinorgchem has failed to establish how these material process steps are being performed at that plant.

(Crich Supp. Decl., ¶ 13.) Crich has not explained how the use of one order of mixing over the other relates to water content in the condensation stage, to selectivity, or to yield, which are the only limitations in issue. As declared by Wang, {

} Thus, the administrative law judge finds the order of adding the reactants in Sinorgchem's process irrelevant to the issues before him. Moreover, as found, supra, and as the staff points out, "Dr. Crich does not explain how the use of one order of mixing over the other relates to

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<sup>20</sup> The staff noted that {

}

water content in the condensation stage, to selective, or to yield, which are the only [claim] limitations in issue.” (Staff Surreply at 6.)

The administrative law judge understands that all inferences are to be drawn in favor of Flexsys on Sinorgchem’s Motion No. 652-1. However, the opposing party must come forward with evidence that establishes a genuine issue of material fact in order to defeat a motion for summary determination. Under Rule 56(e) of the Federal Rules of Civil Procedure, it is not enough to allege some factual dispute or the possibility of a factual dispute. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Flexsys argued that Crich has identified purported “inconsistencies that raise doubts as to several material facts” (Flexsys’s Reply at p. 2), but this showing is not sufficient. See id. at 247-48 and 249 (“[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment” and insufficiently probative evidence will not prevent summary judgment). Conclusory and speculative expert statements that are unsupported by any actual information, analysis or explanation, are insufficient to raise a genuine issue of material fact. Sitrick v. Dreamworks, LLC, 516 F.3d 993, 1001 (Fed. Cir. 2008); Dynacore Holdings Corp. v. U.S. Philips Corp., 516 F.3d 1263, 1278 (Fed. Cir. 2004); Novartis Corp. v. Ben Venue Lab., Inc., 271 F.3d 1043, 1054 (Fed. Cir. 2001) (expert opinions that were no more than theoretical speculation, which raise, at best, a “metaphysical doubt as to the material facts,” were insufficient to defeat summary judgment). This standard applies even if the moving party bears the burden of proof on the issue for which summary judgment is sought. Sitrick, 516 F.3d at 1001 (conclusory expert affidavit was insufficient to defeat a summary judgment motion of invalidity based on enablement); Telemac Cellular Corp. v. Topp Telecom, Inc., 247 F.3d 1316, 1329 (Fed. Cir.

2001) (broad conclusory statements offered by Telemac's experts were not sufficient to establish a genuine issue of material fact to defeat a summary judgment motion of invalidity). The administrative law judge finds that Crich's conclusory and speculative declarations do not create any genuine issue of material fact sufficient to defeat Sinorgchem's Motion No. 652-1.

Referring to the '541 patent, the Ohio Dismissal was a stipulated, or voluntary, order of dismissal with prejudice. (Opposition at 19.) The relevant text reads:

1. Flexsys will not assert the present claims of the '538 or the '541 patents against the processes which were commercially used by Sinorgchem Co., Shandong ("Sinorgchem") and KKPC as of the date of the filing of the original complaint and which were disclosed during discovery in the ITC action. Thus, the effect of the dismissal of Flexsys' present action with respect to such processes as to the '538 and '541 patents will be "with prejudice."

(Opposition, Exhibit B, Order of Dismissal at 1, ¶ 1 (emphasis added).) A voluntary dismissal with prejudice operates as a final adjudication on the merits and has a res judicata effect. See Warfield v. AlliedSignal TBS Holdings, Inc., 267 F.3d 538, 542 (6<sup>th</sup> Cir. 2001) (quoting Harrison v. Edison Bros. Apparel Stores, Inc., 924 F.2d 530, 534 (4<sup>th</sup> Cir. 1991)); see also Hallco Mfg. Co., Inc. v. Foster, 256 F.3d 1290, 1297 (Fed. Cir. 2001). Further, the ITC is to give preclusive effect to prior district court decisions. See Young Eng'rs, 721 F.2d at 1316 ("Thus, we conclude that where the 'infringement claim' which is the basis for the § 1337 investigation is a claim which would be barred by a prior judgment if asserted in a second infringement suit, that infringement claim may also be barred in a § 1337 proceeding."); VastFame Camera, Ltd. v. Int'l Trade Comm'n, 386 F.3d 1108, 1115 n.2 (Fed. Cir. 2004) (noting that res judicata and collateral estoppel are applicable to Section 337 proceedings); Certain EPROM, EEPROM, Flash Memory, and Flash Microcontroller Semiconductor Devices, and Products Containing Same, Inv. No.

337-TA-395, Comm. Op. at 3-7 (October 13, 1998) ("The Federal Circuit has made it clear that the Commission should invoke principles of res judicata in the same manner as a district court to avoid devoting time and attention to a matter that has already been resolved by another forum."). Since the Ohio Dismissal was a dismissal based on a contract between the parties, the res judicata effect must be informed by the language of the dismissal itself. (See Norfolk Southern Corp. v. Chevron, U.S.A., Inc., 371 F.3d 1285 (11<sup>th</sup> Cir. 2004); see also Pactiv Corp. v. Dow Chem. Co., 449 F.3d 1227, 1231 n.2 (Fed. Cir. 2006).)<sup>21</sup> Thus, based on the language of the dismissal, whether or not the Ohio action precludes Flexsys from asserting the '541 patent against Sinorgchem in this investigation rests on whether the "processes which were commercially used by Sinorgchem Co., Shandong ("Sinorgchem") and KKPC as of the date of the filing of the original complaint and which were disclosed during discovery in the ITC action."<sup>22</sup> In other words, the express language of the stipulation at issue states that if the accused process in the Ohio action is the same as the accused process in the current investigation, then res judicata applies and the investigation should be terminated with respect to the '541 patent. The parties, in the stipulation at issue, provide contrasting means of determining just how

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<sup>21</sup> Complainant relies on Kinik Co. V. International Trade Comm'n, 362 F.3d 1359 (Fed. Cir. 2004) for the proposition that an infringement action at the district court is different in scope from an ITC infringement action because there are defenses in district court not available at the ITC. Complainant then proposes that this difference in scope means that district court infringement actions cannot have res judicata effect on ITC infringement actions, because the action cannot be based on the "same set of transactional facts." (Opposition at 27.) Complainant cites to no case law supporting their proposition and the citations, supra, contradicts complainant's position. Moreover, the administrative law judge finds that the facts at issue are the same as between the Ohio action and the current investigation.

<sup>22</sup> The stipulation is not limited to specific claims, thus the precise claims at issue in the Ohio action and this investigation are irrelevant.

a “different process” is defined:

3. Flexsys also reserves the right to assert the present claims of the ‘538 or ‘541 patents or new claims of reissued versions of such patents against different processes that Sinorgchem and/or KKPC have used commercially but not disclosed after the date that the original complaint in this action was filed.

\* \* \*

4. Sinorgchem and KKPC, on the other hand, contend that Flexsys can only assert such present or reissue claims to the extent that a defendant (a) changes its process in a manner that is material to the infringement analysis under the ‘538 and ‘541 patents, and (b) the change significantly increases the likelihood of an infringement finding for the changed process as compared to the current process. Flexsys disagrees with this contention. Thus, the parties reserve their respective rights to litigate the effect of this dismissal as to different processes.

(Opposition, Exh. B, Order of Dismissal at 1, ¶¶ 3,4 (emphasis added).) The intent of the parties, as evidenced by paragraphs 3 and 4, supra, is to express disagreement as to how to define a different process. In fact, the parties stated “the parties reserve their respective rights to litigate the effect of this dismissal as to different processes.” Thus, the administrative law judge finds that there is no language defining a different process in the stipulation at issue, and the express language of said stipulation must be supplemented by the principles of res judicata. As the administrative law judge has found, supra, an action for infringement may be brought against a respondent under a patent that has been previously brought against that same respondent only if the accused processes are not “essentially the same.” There is no dispute that the Ohio action and Antidegradants I were brought against the same accused process. Thus, the result of the analysis of the process used in Antidegradants I and the current investigation applies here as well as set forth, supra. The administrative law judge therefore finds that the process accused in the Ohio



action and the process accused in the current investigation are “essentially the same.” Based on the foregoing, the administrative law judge finds that there are no issues of material fact with regard to the ‘541 patent and Motion No. 652-1.

Complainant argued that Sinorgchem’s Ningyang plant{  
} and, thus, that the process used there could not have been  
“commercially used” as of the date of the filing in the original complaint. Such an argument assumes that constructing a new plant is the same as using a new process. There is, however, no mention of specific production facilities or plants in the Ohio Dismissal. As the administrative law judge has found, supra, there is, in fact, no clear definition of a “different process” in the Ohio Dismissal.<sup>23</sup> Thus, complainant is essentially asking this administrative law judge to rule that construction of a new production facility, as a matter of law, automatically negates res judicata and gives rise to a new cause of action for patent infringement, regardless of the process implemented at the plant, and regardless of the results of prior patent infringement actions. Moreover, certain of complainant’s other arguments depend, generally, on the assumption that constructing a new plant is the same as using a new process. For example, complainant has also argued that “paragraph (1) makes clear that Flexsys is not precluded from asserting the ‘541 patent against processes that were not in commercial use as of January, 2005, regardless of whether they are ‘different.’” (Opposition at 23.) That is precisely the opposite of the express language of the Ohio Dismissal, which reads “Flexsys will not assert the present claims of the

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<sup>23</sup> In fact, Flexsys made no effort to provide any such definition, although Sinorgchem and Kumho both provided some guiding language in that regard. (See Opposition, Exh. B, Order of Dismissal at 1, ¶ 4 (“changes its process in a manner that is material to the infringement analysis under the ‘538 and ‘541 patents.”).)

'538 or the '541 patents against the processes which were commercially used by Sinorgchem Co., Shandong ("Sinorgchem") and KKPC as of the date of the filing of the original complaint and which were disclosed during discovery in the ITC action.” (Opposition, Exhibit B, Order of Dismissal at 1, ¶1 (emphasis added).) Complainant has provided no legal or factual precedent for such an assumption, and the administrative law judge declines to give any credence to complainant’s arguments depending on such.

Complainant also argued that its “reservation of right” in the Ohio Dismissal at ¶¶ 3, 4 further negates res judicata. Specifically, complainant argued that “Flexsys expressly reserved the right to assert the ‘541 patent against ‘different processes,’ regardless of whether the differences are material to the claims.” (Opposition at 25.) Again, complainant has ignored the express language of the Ohio Dismissal. The stipulation at issue reads in pertinent part: “the parties reserve their respective rights to litigate the effect of this dismissal as to different processes.” (Ohio Dismissal at ¶4.) Thus, the right that complainant reserved was to litigate whether or not the dismissal affected a different process; that is, whether a “different process” is defined as being different in a way that is material to the claims, as desired by respondents, or a different process is defined as having any differences at all. As the administrative law judge has found, supra, that the parties’ disagreement has resulted in there being no clear definition of what a different process is, it is left to this administrative law judge so define it. Moreover, paragraphs 3 and 4 of the stipulation, by their express terms, do not negate res judicata; in fact, said paragraphs have an affect only if the process is different in certain respects and, again, said paragraphs do not define what different means. Thus, said paragraphs reinforce that if the process accused in the Ohio action is in use at the Nangyang plant, then res judicata applies.

III. Motion No. 652-3

Although neither Kumho Tire nor Kumho Tire USA were parties to Antidegradants I, they are both subsidiaries or affiliates of respondent KKPC and the administrative law judge finds that they can rely on the doctrine of claim preclusion based on the prohibition against claim splitting in Antidegradants I. Moreover, each of Kumho Tire and Kumho Tire USA were parties in the Ohio action. Therefore, the administrative law judge finds that for the purpose of this order, the Kumho respondents are treated as a singular entity.

Referring to the '111 patent, it is undisputed that Flexsys had asserted process claim 7 and 11 of the '111 patent against KKPC in Antidegradants I and are asserting process claims 23-28 of the '111 patent in Inv. No. 337-TA-652. This administrative law judge, in Antidegradants I, had found that KKPC did not infringe the 6PPD process claims asserted by complainant (that is, claim 11 of the '111 patent and claim 61 of the '063 patent) and that determination was affirmed by the Commission. (Comm. Op. at 28-29.) Flexsys did not appeal the Commission's Final Determination in favor of KKPC. (Complainant's Response to Respondents' Statements of Undisputed Material Facts at 8, ¶16.) Flexsys, in its complaint in Antidegradants I, also sought relief against downstream products made by KKPC's and/or its affiliates. However, prior to the commencement of the hearing in that investigation, Flexsys withdrew any claim for remedy against downstream products, stating:

Complainant disavows any request in its Verified Complaint as supplemented for an exclusion order or cease and desist order directed to any downstream rubber products including, but not limited to, tires, belts, inner tubes and hoses.

(See Motion No. 652-3, Exh. 7 (10/28/05 Stipulation Regarding Remedy).) Flexsys also sought

to have KKPC's 6PPD product encompassed within any order excluding 4-ADPA and 6PPD produced by Sinorgchem because KKPC used 4-ADPA produced by Sinorgchem as its starting material for its 6PPD product. The Commission also rejected this remedy request, stating:

Flexsys argues that even if the Commission finds no violation with respect to KKPC, the limited exclusion order should nevertheless cover 6PPD made by KKPC from 4-ADPA made by Sinorgchem. Such a provision would obviously vitiate the finding of no violation of section 337 with respect to KKPC and we have not included it in the order.

(Comm. Op. at 38, n. 14.) In the complaint in Inv. No. 337-TA-652, complainant accuses KKPC of importing infringing 4-ADPA and converts it "using well known processes" into infringing 6PPD, and further accuses Kumho Tire Co., Inc., of blending "KKPC's infringing 6PPD into the rubber used to manufacture automobile tires." (Complaint at 11, ¶¶57-59.) Thus, complainant is basing its infringement allegations against Kumho on the fact that Kumho purchases allegedly-infringing 4-ADPA from Sinorgchem. However, complainant made the same accusations against Kumho in Antidegradants I. The Commission Opinion in Antidegradants I stated "it is undisputed that KKPC does not perform any of the steps of the 4-ADPA claims." (Comm. Op. at 29.) Complainant also does not allege, in the current action, that Kumho makes 4-ADPA, infringing or otherwise.<sup>24</sup> Based on the foregoing, the administrative law judge finds that the allegations with respect to Kumho are the same allegations that

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<sup>24</sup> Complainant is asserting no patent claims going to the process for producing 6PPD. (See, generally, Complaint; Kumho's Memorandum ¶ 18 (undisputed).) As complainant has asserted no patent claims regarding the process for producing 6PPD, whether Kumho's process for making 6PPD has changed is moot. However, the Lim Declaration states that "KKPC's chemical process for commercially producing 6PPD from 4-ADPA has not changed." (Kumho Memorandum, Exh. 13.) Moreover, complainant admits in its complaint and on the record that Kumho uses "well known processes" to make 6PPD, and that Kumho infringes no asserted claims directly. (Complaint at p. 11, ¶ 57; Tr. at 54-55, 57.)

complainant made in Antidegradants I. With respect to Kumho, Antidegradants I has reached a final decision. Therefore, the administrative law judge finds that res judicata applies to complainant's allegations against Kumho as to the '111 patent. Moreover, the administrative law judge finds that complainant is precluded from seeking any relief with respect to downstream infringement by Kumho.

Referring to the '541 patent, the Ohio Dismissal was a stipulated, or voluntary, order of dismissal with prejudice. (Opposition at 19.) The language most relevant to the '541 patent with respect to Kumho reads:

1. Flexsys will not assert the present claims of the '538 or the '541 patents against the processes which were commercially used by Sinorgchem Co., Shandong ("Sinorgchem") and KKPC as of the date of the filing of the original complaint and which were disclosed during discovery in the ITC action. Thus, the effect of the dismissal of Flexsys' present action with respect to such processes as to the '538 and '541 patents will be "with prejudice."

(Opposition, Exhibit B, Order of Dismissal at 1, ¶ 1.) As found with regard to Sinorgchem, supra, the Ohio Dismissal has a res judicata effect on this proceeding if the accused process is "essentially the same." Yet, complainant has, in this investigation, accused no Kumho process of infringement, and therefore there can be no "different process" that triggers any exception to res judicata. Thus, the administrative law judge finds that Flexsys has the same position in this investigation as it did in the Ohio action. Further, Kumho has the same position with respect to Sinorgchem as it did in the Ohio action. Thus, no new claims against Kumho appear to be involved in the current investigation when compared to the Ohio action. Based on the foregoing, Motion No. 652-3 is granted, and the administrative law judge terminates this investigation with respect to Kumho regarding the '541 patent.

#### IV. Conclusion

Based on the foregoing, the administrative law judge grants Motion No. 652-1 and grants Motion No. 652-3. Hence, the investigation is terminated in toto.

This initial determination, which grants Motion Nos. 652-1 and 652-3, pursuant to Commission rule 210.42(c), and the Commission Notice of Investigation dated July 3, 2008,<sup>25</sup> is hereby CERTIFIED to the Commission. Pursuant to Commission rule 210.42(h)(3), this initial determination shall become the determination of the Commission within thirty (30) days after the date of service hereof unless the Commission grants a petition for review of this initial determination pursuant to Commission rule 210.43, or orders on its own motion a review of the initial determination or certain issues therein pursuant to Commission rule 210.44.<sup>26</sup>

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<sup>25</sup> The Commission, in its Notice of Investigation dated July 3, 2008, stated:

The Commission notes that the patents at issue were the subject of earlier litigation, which raises the question of whether the complainant is precluded from asserting those patents. In instituting this investigation, the Commission has not made any determination as to whether the complainant is so precluded. Accordingly, the presiding administrative law judge may wish to consider this issue at an early date. Any such decision should be issued in the form of an initial determination (ID).

(emphasis added.) The administrative law judge interprets this language as an instruction to issue an ID with respect to the issue of res judicata, even if such is a denial.

<sup>26</sup> Because discovery has been stayed, which discovery involves both Sinorgchem and Kumho, and a target date has been set, pursuant to Order No. 7, early action by the Commission on Order No. 9 is requested.

This Initial Determination will be made public unless a bracketed confidential version is received no later than September 26, 2008.

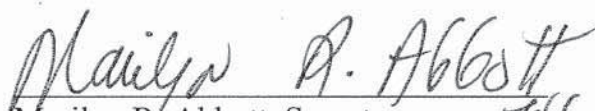
  
Paul J. Luckern  
Chief Administrative Law Judge

Issued: September 12, 2008

**CERTAIN RUBBER ANTIDEGRADANTS, ANTIDEGRADANT INTERMEDIATES, AND PRODUCTS CONTAINING THE SAME**      **Inv. No. 337-TA-652**

**PUBLIC CERTIFICATE OF SERVICE**

I, Marilyn R. Abbott, hereby certify that the attached **Public Version Order** has been served by hand upon Commission Investigative, Attorney Juan Cockburn, Esq., and the following parties as indicated, on December 11, 2008.

  
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**CERTAIN RUBBER ANTIDEGRADANTS, ANTIDEGRADANT    Inv. No. 337-TA-652**  
**INTERMEDIATES, AND PRODUCTS CONTAINING**  
**THE SAME**

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