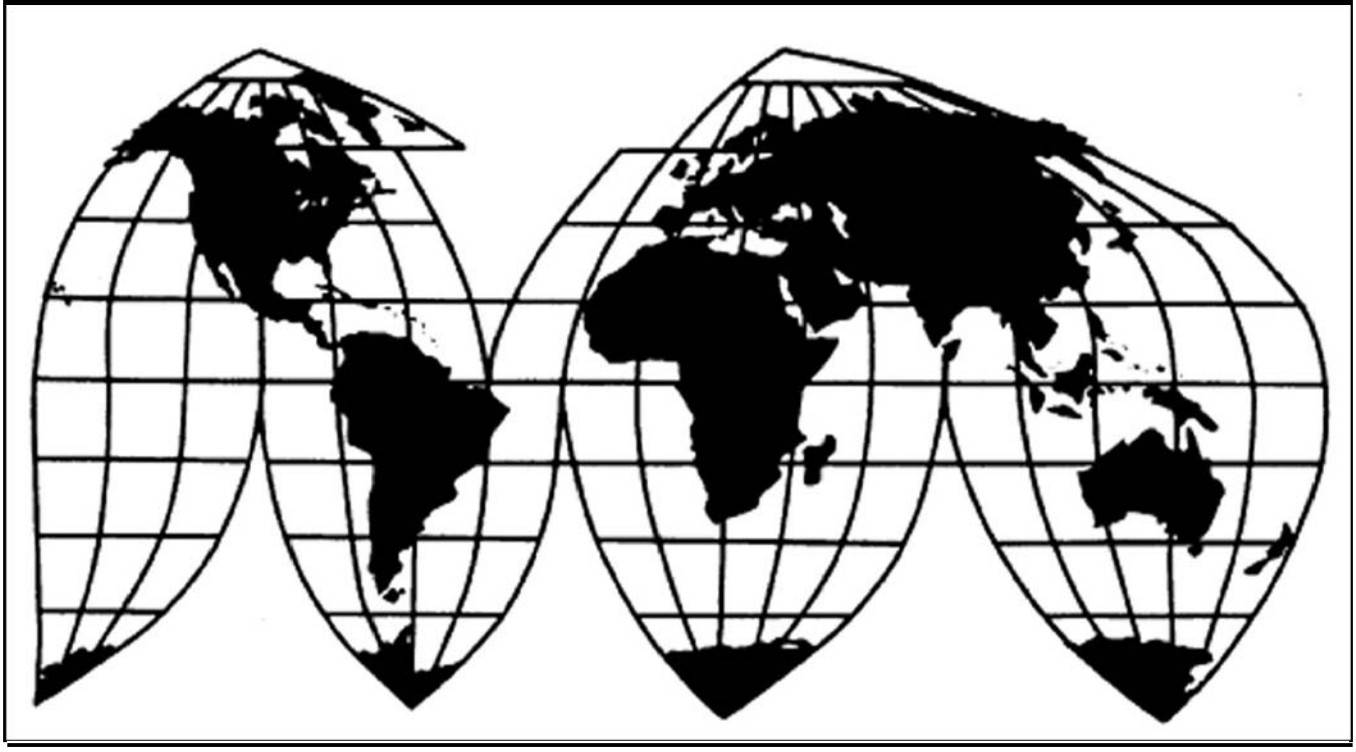
In the Matter of

Certain Hydraulic Excavators And Components Thereof

Investigation No. 337-TA-582

Publication 4115 **December 2009**

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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

In the Matter of **CERTAIN HYDRAULIC EXCAVATORS AND COMPONENTS THEREOF**	**Investigation No. 337-TA-582**

NOTICE OF FINAL DETERMINATION OF VIOLATION OF SECTION 337 AND ISSUANCE OF A GENERAL EXCLUSION ORDER AND CEASE AND DESIST ORDERS; 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 to find a violation of section 337 of the Tariff Act of 1930, as amended, in the above-captioned investigation. Notice is also given that the Commission has issued a general exclusion order and two cease and desist orders, and has terminated the investigation.

FOR FURTHER INFORMATION CONTACT: Jonathan J. Engler, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 205-3112. Copies of nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. General information concerning the Commission may be obtained by accessing its Internet server (http://www.usitc.gov). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at http://edis.usitc.gov. Hearing-impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: On August 29, 2006, the Commission instituted this investigation, based on a complaint filed by Caterpillar Inc. ("Caterpillar") of Peoria, Illinois. The complaint alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain hydraulic excavators and components thereof by reason of infringement of U.S. Trademark Registration No. 2,140,606, U.S. Trademark Registration No. 2,421,077, U.S. Trademark Registration No. 2,140,605, and U.S. Trademark Registration No. 2,448,848. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337. The complaint named twenty one (21) firms as respondents. The complainant requested that the Commission issue a general exclusion order and cease and desist orders. Two respondents, Barkley Industries LLC and Frontera Equipment Sales, have been found in default. Nineteen respondents have been terminated as a result of settlement agreements.

On September 9, 2008, the ALJ issued an initial determination, Order No. 67, granting Caterpillar's motion for summary determination concerning violations of section 337. No petitions for review were filed.

On October 8, 2008, the Commission determined to extend the deadline for determining whether to review the subject ID to October 30, 2008.

On October 30, 2008, the Commission determined to review Order No. 67. 73 *Fed. Reg.* 65,879. The Commission requested briefing by the parties, based on the record, on several questions and solicited comments from the parties, interested government agencies, and any other interested parties on the issues of remedy, the public interest, and bonding.

On November 18, 2008, the Commission received comments from Caterpillar, the IA, and from interested party Volvo Construction Equipment North America, Inc. ("Volvo") Volvo filed additional comments on November 25, 2008.

Having examined the relevant portions of the record in this investigation, including the ALJ's ID, the trademarks at issue, and the written submissions on violation, remedy, the public interest, and bonding, the Commission has determined to issue a general exclusion order prohibiting sale and use in the United States, unlicensed entry for consumption in the United States, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, of certain hydraulic excavators and components thereof that infringe United States Trademark Registration Nos. 2,140,606; 2,241,077; 2,140,605 and 2,448,848, which cover the "CAT" and "Caterpillar" marks. In so doing, the Commission determined that the public interest factors enumerated in section 337(g)(1) do not preclude the issuance of the aforementioned remedial order and that the bond during the period of Presidential review shall be 100 percent of the entered value of the articles in question. The Commission's order was delivered to the United States Trade Representative on the day of its issuance.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.16(c)(2), 210.45, 210.49, and 210.50 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.16(c)(2), 210.45, and 210.49).

By order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: January 14, 2009

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

In the Matter of	
CERTAIN HYDRAULIC EXCAVATORS AND COMPONENTS THEREOF	**Inv. No. 337-TA-582**

GENERAL EXCLUSION ORDER

The Commission has determined that there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) based on the unlawful importation and sale of certain hydraulic excavators that infringe United States Trademark Registration Nos. 2,140,606; 2,241,077; 2,140,605 and 2,448,848, which cover the "CAT" and "Caterpillar" marks.

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 a general exclusion from entry for consumption is necessary because there is a pattern of violation of section 337 and it is difficult to identify the source of the infringing products. Accordingly, the Commission has determined to issue a general exclusion order prohibiting the unlicensed importation of infringing gray market hydraulic excavators bearing the trademarks at issue.

The Commission has further determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) do not preclude issuance of the general exclusion 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) Hydraulic excavators manufactured by or under authority of Caterpillar Inc. for sale and use outside the North America Commercial Division (United States and Canada) which (a) bear one or more of the following U.S. Trademark Reg. Nos. 2,140,605; 2,140,606; 2,421,077; and 2,448,848 and (b) are materially different from hydraulic excavators manufactured by or under authority of Caterpillar Inc. for sale and use in the United States, are excluded from entry for consumption into the United States, entry for consumption from a foreign-trade zone, or withdrawal from warehouse for consumption, except if imported by, under license from, or with the permission of the trademark owner, or as provided by law, until such date as the trademarks are abandoned, canceled, or rendered invalid or unenforceable. This paragraph shall apply to hydraulic excavators exported, shipped, sold, purchased, or imported by any and all persons, including authorized Caterpillar dealers.

(2) Notwithstanding paragraph 1 of this Order, the aforesaid hydraulic excavators excludeable under paragraph 1 of this Order are entitled to entry into the United States for consumption, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, under bond in the amount of 100 percent of entered value pursuant to subsection (j) of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337(j)), 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 until such time as the United States Trade Representative notifies the Commission that this Order is approved or disapproved but, in any event, not later than 60 days after the date of receipt of this Order.

(3) In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to hydraulic excavators bearing the asserted trademarks 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.

(4) Complainant Caterpillar Inc. shall file a written statement with the Commission, made under oath, each year on the anniversary of the issuance of this Order stating whether Caterpillar Inc. continues to use each of the aforesaid trademarks in commerce in the United States in connection with hydraulic excavators, whether any of the aforesaid trademarks has been abandoned, canceled, or rendered invalid or unenforceable, and whether Caterpillar Inc. continues to satisfy the economic requirements of Section 337(a)(2).

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

(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 the U.S. Customs and Border Protection.

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

(8) At the discretion of U.S. Customs and Border Protection ("CBP") and pursuant to procedures it establishes, persons seeking to import hydraulic excavators 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 paragraphs 1 through 7

of this Order. At its discretion, Customs 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.

By Order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: January 14, 2009

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

In the Matter of	
CERTAIN HYDRAULIC EXCAVATORS AND COMPONENTS THEREOF	**Inv. No. 337-TA-582**

CEASE AND DESIST ORDER

IT IS HEREBY ORDERED THAT Frontera Equipment Sales ("Frontera") cease and desist from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, marketing, offering for sale, transferring (except for exportation), or soliciting U.S. agents or distributors for certain hydraulic excavators, as described below, in violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, except as provided in Section IV.

I. Definitions

As used in this Order:

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

(B) "Caterpillar" shall mean Caterpillar Inc., 100 N.E. Adams Street, Peoria, Illinois 61629-7310, complainant in this investigation, and its successors and assigns.

(C) "Respondent" shall mean Frontera Equipment Sales, U.S. Expressway 83, Donna, Texas 78537.

(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.

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

(F) The terms "import" and "importation" refer to importation for entry for consumption, entry for consumption from a foreign-trade zone, and withdrawal from warehouse for consumption under the Customs laws of the United States.

(G) The term "covered product" shall include hydraulic excavators that are manufactured abroad by or on behalf of, or are imported by or on behalf of, Respondent, and are materially different from hydraulic excavators manufactured by or under authority of Caterpillar Inc. for sale and use in the United States that infringe the following federally-registered U.S. trademarks: U.S. Registration Nos. 2,140,605; 2,140,606; 2,421,077; and 2,448,848, and that are not imported by, under license from, or with the permission of the trademark owner, or as provided by law.

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, contractors, controlled (whether by stock ownership or otherwise) and/or majority owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of Respondent.

III. Conduct Prohibited

The following conduct of the Respondent in the United States is prohibited by the Order. While the trademarks remain valid and enforceable, and are not abandoned, canceled, or rendered invalid or unenforceable, Respondent shall not:

(A) import or sell for importation into the United States covered products except under license of the trademark owner;

(B) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation), in the United States imported covered products except under license of the trademark owner;

(C) advertise imported covered products except under license of the trademark owner;

(D) solicit U.S. agents or distributors for imported covered products except under license of the trademark owner; or

(E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products in the United States except under license of the trademark owner.

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 U.S. Trademark Registration Nos. 2,140,605; 2,140,606; 2,421,077; and 2,448,848, 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 December 31, 2009. 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 the quantity in units and the value in dollars of covered products that the Respondent has imported or sold in the United States after importation during the reporting period and 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.

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 two (2) years from the close of the fiscal year to which they pertain.

(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 VI(B) and VII(C) shall remain in effect until such date on which the trademarks are abandoned, canceled, or rendered invalid or unenforceable, whichever is later.

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 under authority delegated by the President, 70 Fed Reg 43251 (July 21, 2005), subject to Respondent posting a bond of in the amount of 100% of entered value per unit of the covered products. This bond provision does not apply to conduct that is otherwise permitted by Section IV of this Order. Covered products imported on or after the date of issuance of this order are subject to the entry bond as set forth in the general 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.

The bond is to be forfeited in the event that the United States Trade Representative approves, or does not disapprove within the 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 therefor made by Respondent to the Commission.

By Order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: January 14, 2009

CERTAIN HYDRAULIC EXCAVATORS AND COMPONENTS THEREOF **337-TA-582**

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF FINAL DETERMINATION OF VIOLATION OF SECTION 337 AND ISSUANCE OF A GENERAL EXCLUSION ORDER AND CEASE AND DESIST ORDERS; TERMINATION OF THE INVESTIGATION** has been served by hand upon the Commission Investigative Attorney, Rett Snotherly, Esq., and the following parties as indicated, on January 14, 2009.

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

ON BEHALF OF COMPLAINANT CATERPILLAR INC:

Cecilia H. Gonzalez, Esq.
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1299 Pennsylvania Avenue, NW
Washington, DC 20004-2402
P-202-783-0800

( ) Via Hand Delivery
( ) Via Overnight Mail
(X) Via First Class Mail
( ) Other: _____

ON BEHALF OF RESPONDENTS RITCHIE BROS. AUCTIONEERS, INC., RITCHIE BROS. AUCTIONEERS (AMERICA) INC., PACIFIC RIM MACHINERY, INC. , MUSSELMAN CONSTRUCTION CO., DBA MUSSELMAN RENTALS AND SALES, DEANCO AUCTION COMPANY OF MISSISSIPPI, INC., TRACTORLAND EQUIPMENT COMPANY, INC., AND PETROWSKY ACTIONEERS, INC.:

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( ) Via Overnight Mail
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F-202-772-1682

ON BEHALF OF RESPONDENTS KUHN EQUIPMENT SALES, PRIMA INTERNATIONAL TRADING, DOM-EX LLC, MMS EQUIPMENT SALES LLC, SOUTHWESTERN MACHINERY OF FLORIDA, INC, AND UNITED EQUIPMENT COMPANY:

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( ) Via Hand Delivery
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RESPONDENT

Frontera Equipment Sales
U.S. Expressway 83
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GOVERNMENT AGENCIES:

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Washington, DC 20229
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( ) Via Overnight Mail
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Elizabeth Kraus, Deputy Director
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P-301-496-2644

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( ) Via Overnight Mail
(X) Via First Class Mail
( ) Other: _____

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of	
CERTAIN HYDRUALIC EXCAVATORS AND COMPONENTS THEREOF	Inv. No. 337-TA-582

ORDER NO. 67: INITIAL DETERMINATION GRANTING MOTION FOR SUMMARY DETERMINATION CONCERNING VIOLATION OF SECTION 337, REMEDY, BONDING, AND THE PUBLIC INTEREST

(February 6, 2009)

On June 27, 2008, complainant Caterpillar, Inc. ("Caterpillar") filed a Motion for Summary Determination Concerning Violation of Section 337, Remedy, Bonding and the Public Interest. (Motion Docket No. 582-067.) Caterpillar seeks a determination that there has been a violation of Section 337 and for entry of a general exclusion order and cease and desist orders against the two defaulting domestic respondents. On July 10, 2008, the Commission Investigative Staff ("Staff") filed a response in support of the motion.[1]

I. BACKGROUND

A. Institution and Procedural History of This Investigation

By publication of a notice in the *Federal Register* on September 6, 2006, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, the Commission instituted Investigation No. 337-TA-582 with respect to U.S. Trademark Registration Nos. 2,140,606, 2,421,077, 2,140,605, and 2,448,848 to determine:

[1] Staff filed a motion for leave to file its response one day out of time. (Motion Docket No. 582-068.) Staff explains that its delay in filing was a result of waiting for clarification from Caterpillar relating to one of its exhibits. Good cause being shown and there being no opposition, the motion is hereby GRANTED.

> [W]hether there is a violation of subsection (a)(1)(C) 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 hydraulic excavators or components thereof by reason of infringement of U.S. Trademark Registration No. 2,140,606, U.S. Trademark Registration No. 2,421,077, U.S. Trademark Registration No. 2,140,605, or U.S. Trademark Registration No. 2,448,848, and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

71 Fed. Reg. 58577 (2006).

Caterpillar, Inc. ("Caterpillar") of Peoria, Illinois is the complainant. *Id.* The respondents named in the Notice of Investigation were: Alex Lyon & Son Sales Managers and Auctioneers, Inc. of Fayetteville, New York; Barkley Industries, LLC of Litchfield Park, Arizona; Deanco Auction Company of Mississippi, Inc. of Philadelphia, Mississippi; Dom-Ex, Inc. of Hibbing Minnesota; Frontera Equipment Sales of Donna, Texas; Hoss Equipment Co., Inc. of Irving, Texas; Key Equipment, LLC of Milwaukee, Wisconsin; Kuhn Equipment Sales Co., Inc. of Summerville, South Carolina; MMS Equipment Sales LLC of Three Way, Tennessee; Musselman Construction Co., d/b/a Musselman Rentals and Sales of Lewiston, Idaho; Pacific Rim Machinery, Inc. of Gig Harbor, Washington; Petrowksy Auctioneers, Inc. of North Franklin Connecticut; Prima International Trading of Fayetteville, New York; Ritchie Bros, Auctioneers Inc. of British Columbia, Canada; Ritchie Bros. Auctioneers (America) Inc. of Lincoln, Nebraska; Southwestern Machinery of Florida of Port St. Lucie, Florida; Tractorland Equipment Company, Inc. of Morena Valley, California; United Equipment Company, Inc. of Turlock, California; World Tractor & Equipment Company of Charlotte, North Carolina; Worldwide Machinery, Inc. of Houston, Texas; and Yoder & Frey Auctioneers of Holland, Ohio. *Id.* The Commission Investigative Staff ("Staff") of the Commission's Office of Unfair Import

Investigations is also a party in this investigation. *Id.* The investigation was originally assigned to Administrative Law Judge Robert L. Barton, Jr. *Id.*

On July 5, 2007, the Commission reassigned the investigation to Administrative Law Judge Charneski. (*See* Notice of a Commission Decision to Permanently Reassign Certain Section 337 Investigations (July 5, 2007).) On October 16, 2007, the Commission again reassigned the investigation to this ALJ. (*See* Notice of a Commission Decision to Reassign Certain Section 337 Investigations (October 16, 2007).)

Of the 21 respondents listed above, only two respondents, namely Barkley Industries, LLC ("Barkley") and Frontera Equipment Sales ("Frontera") (collectively "Defaulting Respondents"), failed to answer the Complaint and default judgments against both were granted. (*See* Order No. 8 (December 1, 2006).) Thereafter, the Commission determined not to review the order. (*See* Notice of Commission Decision Not to Review an Initial Determination Finding Respondents Barkley Industries LLC and Frontera Equipment Sales in Default (December 26, 2006).) The other 19 respondents filed responses to the Complaint, have entered into settlement agreements with Caterpillar and have been terminated from the investigation. (*See* Order Nos. 18, 19, 38, 49, 61 and 66.) The Commission determined not to review any of these orders. (*See* Notice of Commission Decision Not to Review Initial Determinations Granting Joint Motions to Terminate Investigation as to Certain Respondents (March 30, 2007); Notice of Commission Decision Not to Review Initial Determinations Granting Joint Motions to Terminate Investigation as to Certain Respondents (May 17, 2007); Notice of Commission Decision Not to Review Initial Determinations Granting Joint Motions to Terminate Investigation as to one Respondent (Sept. 11, 2007); Notice of Commission Decision Not to Review Initial Determinations Granting Joint Motions to Terminate Investigation as to two Respondents (June

10, 2008); Notice of Commission Decision Not to Review Initial Determination Granting Motion to Terminate as to Three Respondents (July 30, 2008).)

B. The Parties

Caterpillar is a designer and producer of heavy duty earthmoving, construction and materials handling machinery, heavy duty diesel and gas engines, gas turbines, and financial products. [ ]

Respondent Frontera Equipment Sales Co. is in the business of buying and selling used heavy construction and earth moving equipment from a wide variety of manufacturers including Caterpillar and is located in Texas. (Compl. at ¶ 3.5.) Frontera failed to answer the Complaint and was found to be in default. (*See* Order No. 8.)

Respondent Barkley Industries, LLC is an Arizona corporation in the business of buying, selling, and renting used construction and earth moving equipment from a wide variety of manufacturers including Caterpillar. (Compl. at ¶ 3.2.) Barkley failed to answer the Complaint and was found to be in default. (See Order No. 8.)

C. The Products at Issue

The products at issue in this investigation are certain Caterpillar-branded hydraulic excavators and components thereof bearing Caterpillar's trademarks. [ ] A hydraulic excavator is a hydraulically-controlled excavating system. Hydraulic excavators are used to excavate and load earth, blasted rock, sand, and other types of aggregate into trucks, concrete mobiles, and rock-crushing units. [ ]

II. SUMMARY DETERMINATION

Pursuant to Commission Rule 210.18, summary determination "... shall be rendered if 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 a summary determination as a matter of law." 19 C.F.R. § 210.18(b); *see also DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001); *Wenger Mfg., Inc. v. Coating Machinery Systems, Inc.*, 239 F.3d 1225, 1231 (Fed. Cir. 2001). The evidence "must viewed in the light most favorable to the party opposing the motion . . . with doubt resolved in favor of the nonmovant." *Crown Operations Int'l, Ltd. v. Solutia,* Inc., 289 F.3d 1367, 1375 (Fed. Cir. 2002); *see also Xerox Corp. v. 3Com Corp.*, 267 F.3d 1361, 1364 (Fed. Cir. 2001) ("When ruling on a motion for summary judgment, all of the nonmovant's evidence is to be credited, and all justifiable inferences are to be drawn in the nonmovant's favor."). "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)). The trier of fact should "assure itself that there is no reasonable version of the facts, on the summary judgment record, whereby the nonmovant could prevail, recognizing that the purpose of summary judgment is not to deprive a litigant of a fair hearing, but to avoid an unnecessary trial." *EMI Group North America, Inc. v. Intel Corp.*, 157 F.3d 887, 891 (Fed. Cir. 1998). "Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate." *Sandt Technology, Ltd. v. Resco Metal and Plastics Corp.*, 264 F.3d 1344, 1357 (Fed. Cir. 2001) (Dyk, C.J., concurring). "In other words, '[s]ummary judgment is authorized when it is quite clear what the truth is,' [citations omitted], and the law requires judgment in favor of the movant based upon facts not in genuine dispute." *Paragon*

Podiatry Laboratory, Inc. v. KLM Laboratories, Inc., 984 F.2d 1182, 1185 (Fed. Cir. 1993). *Paragon Podiatry Laboratory, Inc. v. KLM Laboratories, Inc.*, 984 F.2d 1182, 1185 (Fed. Cir. 1993).

A violation of Section 337 may not be found unless supported by "reliable, probative, and substantial evidence." 35 U.S.C. § 559; *see also Certain Ink Markers and Packaging Thereof*, Inv. No. 337-TA-522, Order No. 30 at 13-14 (July 25, 2005) (Unreviewed Initial Determination); *Certain Sildenafil or any Pharmaceutically Acceptable Salt Thereof, Such as Sildenafil Citrate and Products Containing Same*, Inv. No. 337-TA-489, Com. Op. Remedy, the Public Interest, and Bonding at 4-5 (July 2004).

III. VALIDITY AND ENFORCEABILITY

A. Validity

On June 20, 2007, Administrative Law Judge Barton issued an initial determination finding that of U.S. Trademark Registration No. 2,140,606, U.S. Trademark Registration No. 2,421,077, U.S. Trademark Registration No. 2,140,605, and U.S. Trademark Registration No. 2,448,848 (collectively "Caterpillar Trademarks") are valid. (*See* Order No. 45 (June 20, 2007).) The Commission determined not to review the order. (*See* Notice of Commission Decision Not to Review the Initial Determination Contained in Order No. 45 (July, 26, 2007).) (*See also* SOF 44-61.)

B. Enforceability

Caterpillar argues that its Trademarks are enforceable. (Memo. at 8.) Caterpillar argues that the only challenge to enforceability came from the "Bryan Cave Respondents" who have since been terminated from the investigation based on settlement agreement. (*Id.*) Caterpillar

argues that no other challenges to the enforceability of its Trademarks remains. (*Id.*) Staff agrees. (Staff Br. At 4.)

The ALJ finds that Caterpillar Trademarks are enforceable. The evidence shows that Caterpillar has actively protected and enforced its trademarks. (*See* Statement of Undisputed Facts ("SoF") at 62-64.)

IV. IMPORTATION

Section 337(a)(1)(C) declares unlawful "the importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that infringe a valid and enforceable United States trademark registered under the Trademark Act of 1946." *19 U.S.C. § 1337*(a)(1)(C).

On June 20, 2007, Administrative Law Judge Barton issued an initial determination finding that certain respondents imported hydraulic excavators. (*See* Order No. 45 (June 20, 2007).) The Commission determined not to review the order. (*See* Notice of Commission Decision Not to Review the Initial Determination Contained in Order No. 45 (July, 26, 2007).)

Caterpillar argues that the Defaulting Respondents imported, offered for sale and/ or sold foreign excavators. (Memo. at 13.) Caterpillar contends that Frontera sold several gray market excavators on its website, which were manufactured for and sold in either the Asian Pacific market or Latin American market, and bear one or more of the Caterpillar Trademarks. (*Id.*) Similarly, Caterpillar contends that Barkley sold several gray market excavators on its website that were manufactured for and sold in either the Japanese market or Asian Pacific market, and bear one or more of the Caterpillar Trademarks. (*Id.* at 14.) Staff agrees. (Staff Resp. at 4.)

The ALJ finds that the evidence shows that the Defaulting Respondents have imported, offered for sale and/or sold grey market excavators. Specifically, the evidence shows that Frontera offered four 320CL model excavators for sale on its website. [

]The excavator with the serial number ANB-03705 was manufactured for and sold in the Asia Pacific market and those with serial numbers ANB-02869, ANB-02871 and BER-00484 were manufactured for and sold in the Latin American market. (Compl. ¶ 7.) As Caterpillar products, each of the Caterpillar gray market excavators offered for sale, and/or sold by Frontera bears the asserted "CAT" and/or "CATERPILLAR" trademarks.[¶

]

The evidence further shows that Barkley offered several excavators for sale on its website. [ ] Barkley offered a 311CU model excavator with serial number CLK-00752, three 320C model excavators with serial numbers AKH-02694, FBA-02754, and AKH-01450, two 320CU model excavators with serial numbers APA-00371 and APA-00544, a 330CL model excavator with serial number HAA-00468, and a 345BII model excavator with serial number AMD-00327, which were all manufactured for and sold in the Japanese market. (*Id.*; Compl. ¶ 7.) Additionally, Barkley also offered for sale a 330CL model with serial number KDD-00470, which was manufactured for and sold in the Asia Pacific market. (*Id.*) As Caterpillar products, each of these excavators Barkley offered for sale, and/or sold bears the asserted "CAT" and/or "CATERPILLAR" trademarks.[

] Therefore, the ALJ finds that the importation requirement has been satisfied.

V. INFRINGEMENT

A. Applicable Law

Infringement of a U.S. registered trademark occurs when, *inter alia*, any person, without the consent of the trademark owner, uses "in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1114(1). "The test for infringement of a federally registered trademark is likelihood of confusion." *Certain Woodworking Machines*, Inv. No. 337-TA-174, Initial Determination at 24 (Feb. 6, 1985) (unreviewed in relevant part).

Gray market goods are genuine goods that are imported without the consent of the U.S. trademark holder. *Gamut Trading Co. v. U.S. International Trade Comm'n*, 200 F.3d 775, 778 (Fed. Cir. 1999) ("*Gamut*"). Although gray market goods are genuine goods -- meaning they are not counterfeit goods -- and legitimately bear the trademark in their country of origin, the goods are gray because the goods are materially different from the trademarked goods that are intended for sale in the United States. *Id.* at 778-79. In *Gamut*, the Federal Circuit concluded that the basic question in determining infringement in gray market cases concerning goods of foreign origin is "whether there are differences between the foreign and domestic product and if so whether the differences are material." *Id.* at 799. Thus, when the gray market goods are identical to the products authorized for domestic sale by the trademark holder, the markholder cannot prevent the importation of gray market goods. "As such, the basic question in gray market cases 'is not whether the mark was validly affixed' to the goods, 'but whether there are differences between the foreign and domestic product and if so whether the differences are material.' We have applied 'a low threshold of materiality, requiring no more than showing that

consumers would be likely to consider the differences between the foreign and domestic products to be significant when purchasing the product.'" *Bourdeau Bros. v. Int'l Trade Comm'n*, 444 F.3d 1317, 1321 (Fed. Cir. 2006) (citing *Gamut Trading Co. v. U.S. International Trade Comm'n,* 200 F.3d 775, 777).

The existence of material differences creates a legal presumption that consumers are likely to be confused as to the source of the gray market product, resulting in damage to the markholder's goodwill. *Certain Agricultural Tractors Under 50 Power Take-Off Horsepower*, Inv. No. 337-TA-380, Commission Opinion (March 5, 1997), USITC Pub. 3026 (March 1997) ("Tractors") at 4, 5. When there are material differences between domestic products and foreign products bearing the same marks, exclusion of the gray market goods is warranted on grounds of both: (1) protecting consumers from confusion or deception as to the source, quality, and nature of the product bearing the marks; and (2) safeguarding the goodwill of the domestic enterprise. *Gamut,* 200 F.3d at 780. When the same trademark appears on gray market goods that are materially different from authorized goods, but nonetheless bear strong similarities in appearance or function, the likelihood of consumer confusion is heightened. *Certain Agricultural Tractors Under 50 Power Take-Off Horsepower*, Inv. No. 337-TA-380, Initial Determination at 21, citing *Nestle, 982 F.2d at 641.* Differences that would be readily apparent to consumers of the products when the products are side-by-side can be material. *Gamut,* 200 F.3d at 781. Differences need not be physical, but can include nonphysical differences such as warranty protection or service commitments. *SKF*, 423 F.3d at 1313. In addition, the unlawful act defined by section 337 is the "importation into the United States, the sale for importation into the United States, or the sale within the United States after importation" of an article that infringes a registered trademark. *19 U.S.C. § 1337*(a)(1)(C). Thus, for purposes of establishing a violation

of section 337, the question of whether an item is infringing should be determined "at the time of its importation or sale, not in some later point of time." Tractors, Comm'n Op. at 9.

The Federal Circuit has also held that a plaintiff in a gray market trademark infringement case must establish that "all or substantially all" of its sales are accompanied by the asserted material difference in order to show that its goods are materially different. *SKF United States, Inc. v. Int'l Trade Comm'n*, 423 F.3d 1307, 1315 (Fed. Cir. 2005). The Court reasoned that

> "[i]f less than all or substantially all of a trademark owner's products possess the material difference, then the trademark owner has placed into the stream of commerce a substantial quantity of goods that are or may be the same or similar to those of the importer, and then there is no material difference. . . a trademark owner's argument that consumers would be confused by gray goods lacking an asserted material difference from the authorized goods is inconsistent with the owner's own sale of marked goods also lacking that material difference from its own authorized goods. To permit recovery by a trademark owner when less than "substantially all" of its goods bear the material difference from the gray goods thus would allow the owner itself to contribute to the confusion by consumers that it accuses gray market importers of creating.

Id. (internal citations omitted.) The Federal Circuit further held that the "all or substantially all" test recognizes that something less than 100% compliance will suffice and permits a small amount of nonconforming goods. *Id.* at 1316. "[A] trademark owner must show that all or substantially all of its authorized goods are accompanied by each of the claimed material differences to satisfy that standard." *Id.*

Complainant has the burden of proving, by a preponderance of the evidence, that there is infringement of the trademarks in issue. *See, e.g., Certain Agricultural Vehicles and Components Thereof*, Inv. No. 337-TA-487, 2004 ITC LEXIS 257, *22-23 (January 13, 2004) (citing *Conroy v. Reebok International, Ltd., 14 F.3d 1570, 1573 (Fed. Cir. 1994).*)

B. Material Differences

Caterpillar argues that its hydraulic excavators that are sold in the United States ("U.S. Excavators") are accompanied by standard features that are not present in foreign excavators. (Memo. at 10.) Specifically, Caterpillar argues that the U.S. Excavators contain certain physical differences, namely (1) English language warning labels; (2) English language operation and maintenance manuals; (3) travel alarms; (4) seat belts; and (5) lift table stickers. (*Id.* at 10-12.) Caterpillar further argues that the U.S. Excavators contain certain non-physical differences, namely its product support and product improvement programs ("PIP") through which Caterpillar contacts owners to implement various updates. (*Id.* at 12.) Caterpillar argues that the excavators sold by the Defaulting Respondents do not contain one or more of these differences and that these differences are material. (*Id.* at 13-19.)

Staff agrees with Caterpillar on almost every difference. (Staff Resp. at 7-13.) Staff, however, argues that Caterpillar has failed to show that the grey market excavators do not contain a seat belt and, therefore, this is not a material difference between the U.S. Excavators and grey market excavators. (*Id.* at 9-10.)

1. English language warning labels

Caterpillar argues that its U.S. Excavators are sold with English language warning labels, while the grey market excavators are sold with warning labels in the language of the region for which they were intended for sale. (Memo. at 10.) Caterpillar further argues that this difference is material because the appropriate language labels are important for safety and liability purposes. (*Id.* at 18.) Staff agrees. (Staff Resp. at 7-8.)

The ALJ finds that the grey market excavators sold by Defaulting Respondents are not accompanied by this difference. The U.S. Excavators are sold with English language warning labels, which are required by U.S. regulations.

[ ] The evidence shows that grey market excavators sold by the Defaulting Respondents were sold with labels in the language predominant in the country in wich they were first sold, which was not English. [

] The ALJ further finds that these differences are material because English language warning labels required by U.S. regulations and failure to have English language warning labels would result in a liability issue for the owner, operator and maintenance personnel of the excavator. [ ]

2. English language operation and maintenance manuals

Caterpillar argues that its U.S. Excavators are sold with English operation and maintenance manuals that are physically attached by a wired cable to each excavator, while the grey market excavators are sold with warning labels in the language of the region for which they were intended for sale. (Memo. at 11.) Caterpillar further argues that this difference is material because the appropriate language labels are important so that customers can properly maintain the excavators and also because they are important for safety and liability purposes. (*Id.* at 16, 18-19.) Staff agrees. (Staff Resp. at 8.)

The ALJ finds that the grey market excavators sold by Defaulting Respondents are not accompanied by this difference. The U.S. Excavators are sold with English operation and maintenance manuals. [ ]

The evidence shows that grey market excavators sold by the Defaulting Respondents were sold with operation and maintenance manuals in the language predominant in the country in which they were first sold, which was not English. [

] The ALJ further finds that these differences are material to a U.S. customer because English language operation and maintenance manuals allow them to properly care for their excavators, avoid downtime, and because failure to do so would result in a liability issue for the owner, operator and maintenance personnel of the excavator. [ ]

3. Travel alarm

Caterpillar argues that its U.S. Excavators are sold with travel alarms, which sounds an audible warning alarm when the excavator moves, as required by U.S. laws, while the grey market excavators intended for sale elsewhere do no include travel alarms as a mandatory attachment and may not even include them as an optional attachment. (Memo. at 11.) Caterpillar further argues that this difference is material because it is an important safety feature and required by U.S. regulations. (*Id.* at 16.) Any failure to include this feature could result in a fine to the owner of the excavator as well as more downtime. (*Id.* at 17.) Staff agrees. (Staff Resp. at 9.) The ALJ finds that the grey market excavators sold by Defaulting Respondents are not accompanied by this difference. [

] The ALJ further finds that this is material to a U.S. customer because it is required by OSHA regulations and failure to have such a feature can result in downtime. [

]

4. Seat belt

Caterpillar argues that its U.S. Excavators are sold with seat belts as required by federal regulations, while the grey market excavators intended for sale elsewhere do no include seat belts as a mandatory attachment and may not include them as an optional attachment. (Memo. at 11.) Caterpillar further argues that this difference is material because it is an important safety feature and required by U.S. regulations. (*Id.* at 16.) Staff argues that Caterpillar has failed to show that the hydraulic excavators abroad are not manufactured with safety seat belts. (Staff Resp. at 9.)

The ALJ agrees with Staff. Caterpillar has pointed to no evidence that the grey market excavators imported by the Defaulting Respondents fail to have seat belts. (*See* SoF ¶¶ 93-121.) Therefore, the ALJ finds that Caterpillar has failed to meet its burden with respect to the seat belts.

5. Lift table sticker

Caterpillar argues that its U.S. Excavators are sold with lift table stickers, which identify the lifting capacity, in pounds, of the excavator, as required by U.S. laws, while the grey market excavators intended for sale elsewhere may not include such stickers if they are not rated for lifting or may include lift table stickers in a foreign language or in metric measurements, depending on the region for which they are intended. (Memo. at 11-12.) Caterpillar further argues that this difference is material because it is an important safety feature and required by U.S. regulations. (*Id.* at 16.) Any failure to include this feature could result in a fine to the owner of the excavator as well as more downtime. (*Id.* at 17.) Staff agrees. (Staff Resp. at 10.) The ALJ finds that the grey market excavators sold by Defaulting Respondents are not accompanied by this difference. The U.S. Excavators are sold with lift table stickers that use the

English system, *e.g.* pounds, for measurement and comply with federal regulations. [ ] The evidence shows that the grey market excavators sold by the Defaulting Respondents would not have had lift table stickers if they were not rated for lifting [ ] and, in some cases, would not have had a lift table sticker because they were intended for sale in Japan and thus not rated for lifting.[2] [ ] The ALJ further finds that this is material to a U.S. customer because it is required by OSHA regulations and failure to have such a feature can result in downtime. [ ]

6. PIP

Caterpillar argues that the PIP are programs through which Caterpillar contacts the owners of excavators to implement various updates and are administered by the Marketing Business Unit for each of the individual marketing regions. (Memo. at 12.) Caterpillar argues that the PIPs are generally not available on excavators intended for sale elsewhere and their administration is problematic because imported gray market excavators will not receive the appropriate support because the machine is no longer within the territory of the marketing

[2] Caterpillar excavators intended for sale in Japan do not have lift table stickers because, in Japan, excavators are not considered legal lifting devices. [ ]

organization that originally sold the machine or any dealer within the original territory. (*Id.*) Caterpillar argues that the PIPs are significant because without it the customer's excavators may not get the necessary updates, and customers may experience significant delays in getting appropriate service and parts support resulting in downtime at their job sites when compared to the service and parts support given to owners the U.S. Excavators. (*Id.* at 17.) Staff agrees. (Staff Resp. at 10-11.)

The ALJ finds that the grey market excavators sold by Defaulting Respondents are not accompanied by this non-physical difference. Caterpillar's North American Regional Department administers the PIPs on the U.S. Excavators. [ ] The evidence shows that because the grey market excavators sold by the Defaulting Respondents were not first sold in the United States, a customer would likely not receive the appropriate updates, and even if it did, would have not gotten the same level of service or support as a customer that owned an excavator intended for and first sold in the United States.

[ ] The ALJ further finds that this is material to a U.S. customer because without PIPs, customer's excavators may not get the necessary updates and could experience significant delays and downtime when compared to the service and parts support given to owners of U.S. excavators.

[ ]

Therefore, the ALJ finds that the Defaulting Respondents have imported, offered for sale and/or sold after importation grey market hydraulic excavators that fail to contain one or more of the material differences listed above, namely English language warning labels, English language operation and maintenance manuals, standard travel alarms, English unit lift table stickers and PIP support services.

C. All or Substantially All

[

]

The Federal Circuit recently dealt with the issue of whether an authorized dealers' sales could be included in the "all or substantially all" analysis stating that the ITC "must presume that sales by authorized dealers were in fact authorized." *Bourdeau*, 444 F.3d at 1327. The Federal Circuit reasoned that to hold otherwise would allow the mark holder to disclaim sales by simply

stating that they were not authorized. *Id.* The Court noted, however, that the mark holder could rebut the presumption. *Id.* The Court further stated that the mark holder could still prevail if it showed that the sales of the grey market goods by the dealers was so small that substantially all of the domestic sales bore the material differences. *Id.*

First, the ALJ finds that all or substantially all of Caterpillar's domestic sales of U.S. Excavators were accompanied by all of the material differences. [

]

As for the sales of Caterpillar's subsidiaries and dealers, the ALJ finds that the sales of grey market excavators by these subsidiaries and dealers should not be included in the "all or substantially all" analysis. Caterpillar has met its burden of rebutting the presumption that the sales of its subsidiaries and dealers were authorized sales. [

] Therefore, since Caterpillar and its subsidiaries are separate corporate entities, the ALJ finds that the sales of Caterpillar's subsidiaries should not be included in the all or substantially all analysis. *See Certain Agricultural Vehicles And Components Thereof,* Investigation No. 337-TA-487, 2006 ITC LEXIS 862, at *46 (December 20, 2006) (finding that the complainant John Deere should not be held accountable for the actions of its wholly owned subsidiary because they are two separate and distinct corporate entities).

Regarding Caterpillar's dealers, [

] Therefore, the ALJ finds that Caterpillar has met its burden of rebutting the presumption that the sales of its dealers was authorized and, thus, the dealers' sales should not be included in the "all or substantially all" analysis.

Therefore, the ALJ finds that all or substantially all of Caterpillar's sales of hydraulic excavators are accompanied by the material differences and that the sales of Caterpillar's subsidiaries and dealers should not be included in the "all or substantially all" analysis.[3]

In sum, Caterpillar has demonstrated by a preponderance of the evidence that the Defaulting Respondents have infringed the Caterpillar Trademarks through the unauthorized importation, sale for importation and/or sale after importation of grey market hydraulic excavators.

VI. DOMESTIC INDUSTRY

On June 20, 2007, Administrative Law Judge Barton issued an initial determination finding that Caterpillar has satisfied the domestic industry requirement. (*See* Order No. 44 (May 23, 2007).) The Commission determined not to review the order. (*See* Notice of Commission Decision Not to Review an Initial Determination Granting In Part and Denying in Part Complainant's Motion for Summary Determination (June 20, 2007).)

VII. REMEDY AND BONDING

A. General Exclusion Order

Under Section 337(d), the Commission may issue either a limited or a general exclusion order. A limited exclusion order instructs the U.S. Customs and Border Protection ("CBP") to exclude from entry all articles that are covered by the patent at issue and that originate from a

[3] The ALJ notes, however, that even if the sales of Caterpillar's subsidiaries and dealers were to be considered in the "all or substantially all" analysis, all or substantially all of the excavator sales of Caterpillar, its subsidiaries and dealers are accompanied by the material differences. [ ]

named respondent in the investigation. A general exclusion order instructs the CBP to exclude from entry all articles that are covered by the patent at issue, without regard to source.

A general exclusion order may issue in cases where (a) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named respondents; or (b) there is a widespread pattern of violation of Section 337 and it is difficult to identify the source of infringing products. 19 U.S.C. § 1337(d)(2). The statute essentially codifies Commission practice under *Certain Airless Paint Spray Pumps and Components Thereof*, Inv. No. 337-TA-90, Commission Opinion at 18-19, USITC Pub. 119 (Nov. 1981) ("*Spray Pumps*"). *See Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing the Same,* Inv. No. 337-TA-372 ("*Magnets*"), Commission Opinion on Remedy, the Public Interest and Bonding at 5 (USITC Pub. 2964 (1996)) (statutory standards "do not differ significantly" from the standards set forth in *Spray Pumps*).

In *Magnets*, the Commission confirmed that there are two requirements for a general exclusion order: a "widespread pattern of unauthorized use;" and "certain business conditions from which one might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles." The Commission went on to state the following factors as relevant to determining whether there is a "widespread pattern of unauthorized use":

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

(2) the pendency of foreign infringement suits based on foreign patents corresponding to the U.S. patent; [or]

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

Magnets, Commission Opinion on Remedy, the Public Interest, and Bonding at 6 (citing *Spray Pumps*).

In addition, the Commission listed the following factors as relevant to showing whether "certain business conditions" – the second *Spray Pumps* factor – exist:

> (1) the existence of an established demand for the article in the U.S. market and conditions of the world market;
>
> (2) the availability to foreign manufacturers of U.S. marketing and distribution networks;
>
> (3) the cost for foreign entrepreneurs to build a facility that can produce the patented articles;
>
> (4) the number of foreign manufacturers whose facilities could be converted to manufacture the patented article; and
>
> (5) the foreign manufacturers' cost to convert a facility to produce the patented articles.

Id.

Caterpillar seeks the issuance of a general exclusion order that prohibits the importation of grey market excavators bearing the Caterpillar Trademarks. (Memo. at 30.)

1. Widespread Pattern of Unauthorized Use

Caterpillar argues that there is a widespread pattern of unauthorized use as evidenced by (1) the Defaulting Respondents' and other settled respondents importation, offer for sale after importation and sale after importation of grey market excavators; (2) the sheer number of grey market excavators offered for sale or sold and the hundreds of customers that purchased the grey market excavators; (3) the hundreds of other domestic and foreign companies, in addition to the

named respondents, involved in the importation, sale for importation and sale after importation of grey market excavators; and (4) the number of foreign entities from which companies can acquire grey market excavators. (Memo. at 30-33.) Staff agrees. (Staff Resp. at 18.)

The ALJ finds that Caterpillar has sufficiently demonstrated a widespread pattern of unauthorized use. The evidence shows that there are hundreds more domestic and foreign companies involved in the importation, sale for importation, and sale after importation of grey market excavators in addition to the named respondents. [

]

Therefore, the ALJ finds that the evidence shows that there is a widespread pattern of unauthorized use of Caterpillar Trademarks.

2. Business Conditions

Caterpillar argues that certain business conditions exist that warrant a general exclusion order, namely that there is a demand for hydraulic excavators as evidenced by Caterpillar's and respondents' success; that it is good business to import and sell grey market excavators; and that there are numerous sources from which to obtain grey market excavators. (Memo. at 33-35.) Staff agrees. (Staff's Resp. at 18.)

The ALJ finds that certain business conditions exist that warrant a general exclusion order. The evidence shows there is demand for the accused excavators, and there are hundreds, if not thousands, of potential customers in the United States. [

] The evidence further shows that the importation of grey market excavators is extremely profitable [

]

Therefore the ALJ finds that certain business conditions exist that would warrant a general exclusion order. Based on the foregoing, the ALJ finds that the evidence supports the issuance of a general exclusion order.

B. Cease and Desist Order

Section 337 provides that in addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue a cease and desist order as a remedy for violation of section 337. *See* 19 U.S.C. § 1337(f)(1). The Commission generally issues a cease and desist order directed to a domestic respondent when there is a "commercially significant" amount of infringing, imported product in the United States that could be sold so as to undercut the remedy provided by an exclusion order. *See Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293, USITC Pub. 2391, Comm'n Op. on Remedy, the Public Interest and Bonding at 37-42 (June 1991); *Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles*, Inv. No. 337-TA-334, Comm'n Op. at 26-28 (Aug. 27, 1997).

Caterpillar argues that cease and desist order is warranted against the Defaulting Respondents as they are domestic entities that are presumed to maintain significant inventories in the United States. (Memo. at 35-36.) Staff agrees. (Staff Resp. at 19.)

The ALJ finds that a cease desist order against Defaulting Respondents is warranted. The evidence shows that the Defaulting Respondents are located in the United States and maintain inventories of grey market excavators bearing the Caterpillar Trademarks in the United States. (Ex. 47, 48.)

C. Bonding

The Administrative Law Judge and the Commission must determine the amount of bond to be required of a respondent, pursuant to section 337(j)(3), during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to issue a remedy. The purpose of the bond is to protect the complainant from any injury. 19 C.F.R. § 210.42(a)(1)(ii), § 210.50(a)(3).

When reliable price information is available, the Commission has often set the bond by eliminating the differential between the domestic product and the imported, infringing product. *See Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Op. a 24 (1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *See, e.g., Certain Integrated Circuit Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm'n Op. at 41 (1995). A 100 percent bond has been required when no effective alternative existed. *See, e.g., Certain Flash Memory Circuits and Products Containing*

Same, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 26-27 (July 1997)(a 100% bond imposed when price comparison was not practical because the parties sold products at different levels of commerce, and the proposed royalty rate appeared to be *de minimis* and without adequate support in the record).

Caterpillar argues that a bond of 100% is appropriate in this investigation due to the wide variety of price points. (Memo. at 37-38.) Staff agrees. (Staff Resp. at 20.)

The ALJ finds that there is insufficient evidence of an appropriate royalty rate or reliable price information. Therefore, the ALJ recommends a bond of 100%.

Based on the reasons set forth above, the ALJ finds that Caterpillar has shown by reliable, probative and substantive evidence that a violation of Section 337 has occurred. The ALJ further finds that a general exclusion order, cease and desist order and a bond of 100% are appropriate. Therefore, Caterpillar's motion for summary determination is hereby GRANTED.

Pursuant to 19 C.F.R. § 210.38(d), the ALJ hereby CERTIFIES to the Commission the record in this investigation.

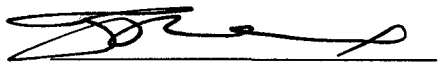
Pursuant to 19 C.F.R.§ 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review of the Initial Determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders, on its own motion, a review of the Initial Determination or certain issues herein.

Within seven days of the date of this document, each party shall submit to the office of the Administrative Law Judge a statement as to whether or not it seeks to have any portion of

this document deleted from the public version. The parties' submissions must be made by hard copy by the aforementioned date.

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

SO ORDERED.



Theodore R. Essex
Administrative Law Judge

CERTAIN HYDRAULIC EXCAVATORS AND COMPONENTS THEREOF **Inv. No. 337-TA-582**

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER 67 INITIAL DETERMATION GRANTING MOTION FOR SUMMARY DETERMINATION CONCERNING VIOLATION OF SECTION 337 REMEDY, BONDIN, AND THE PUBLIC INTEREST** has been served by hand upon Commission Investigative Attorney, **Kecia Reynolds**, Esq.,, and the following parties on February 6, **2009**.

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

COMPLAINANT CATERPILLAR, INC.:

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CERTIFICATE OF SERVICE - PAGE 2

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PUBLIC VERSION

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

In the Matter of	
CERTAIN HYDRAULIC EXCAVATORS AND COMPONENTS THEREOF	**Inv. No. 337-TA-582**

COMMISSION OPINION

I. BACKGROUND

This "gray market" case involves the importation and sale in the United States of hydraulic excavators (the "gray market goods") that are manufactured by complainant Caterpillar, Inc. ("Caterpillar") for sale abroad. Gray market goods are those that bear a legitimate foreign trademark but are sold outside the territory in which that trademark is valid. Such goods infringe the identical U.S. trademark when there are material differences between the product intended by the complainant for domestic sale, and products intended for foreign markets. Under appropriate circumstances, gray market goods may be excluded from the United States in order, *inter alia*, to safeguard the goodwill of the domestic enterprise, and to protect consumers from confusion or deception as to the quality and nature of the product bearing the mark.

The Administrative Law Judge ("ALJ") in his Initial Determination ("ID"), which issued on September 9, 2008, found that Caterpillar had met its burden to establish that "substantially all" of its U.S. sales of hydraulic excavators were materially different from the gray market hydraulic excavators, and that Caterpillar was therefore entitled to relief from the gray market

goods. The Commission finds, however, that in light of our Remand Opinion in *Agricultural Vehicles and Components Thereof*, Inv. No. 337-TA-487 (Aug. 25, 2008) ("*Agricultural Vehicles Remand*"), additional analysis is necessary. We provide that analysis here and determine (1) to reverse the ALJ's finding that Caterpillar did not authorize the sale of certain gray market excavators in the United States; but (2) to affirm the ALJ's alternative finding that these sales, if authorized, were so small in number that "substantially all" of Caterpillar's authorized sales of hydraulic excavators in the United States were materially different from the gray market excavators of which it complains. With respect to remedy, the Commission has determined to issue a general exclusion order against the infringing goods and to issue cease and desist orders against two defaulting respondents.

A. The Original Investigation

The Commission instituted this investigation on September 6, 2006, based on a complaint filed by Caterpillar. 71 *Fed. Reg.* 52577 (Sept. 6, 2006). 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, sale for importation, and sale within the United States after importation of certain hydraulic excavators and components thereof by reason of infringement and dilution of U.S. Registered Trademarks Nos. 2,140,606; 2,421,077; 2,140,605; and 2,448,848 ("the Trademarks at issue"). Twenty-one respondents were named in the Commission's notice of investigation. Nineteen were terminated from the investigation on the basis of settlement agreements and consent orders (the "Settled Respondents"). Two respondents, Barkley Industries, Inc. ("Barkley") and Frontera Equipment Sales ("Frontera") (collectively, the

"Defaulting Respondents") were found to be in default. *See* Order No. 8 (Dec. 1, 2006). On December 26, 2006, the Commission issued notice that it had determined not to review Order No. 8.

Specifically, this case involves sales for importation of certain Caterpillar-branded hydraulic heavy duty earthmoving and construction equipment and components thereof ("hydraulic excavators"), bearing Caterpillar's trademarks, by official and independent Caterpillar dealers in the United States and abroad, as well as by certain wholly owned Caterpillar affiliates in the United States. Many of the excavators sold and imported by official Caterpillar dealers were purchased by the former respondents who reached settlement agreements with Caterpillar in this case (the "Settled Respondents"), all of whom are independent dealers of used equipment, and the two Defaulting Respondents. The ALJ found, and the Commission affirmed, that the Caterpillar Trademarks at issue are valid. *See* Order No. 45 (June 20, 2007); *Notice of Commission Decision Not to Review Initial Determination Contained in Order No. 45* (July 26, 2007).

On September 9, 2008, the ALJ issued his final ID, granting Caterpillar's motion for summary determination of violation of Section 337 and finding that Caterpillar has actively protected and enforced its trademarks and that they are thereby enforceable. No party active in the investigation challenges the enforceability of the Trademarks at issue. It is also undisputed that the Settled and Defaulting Respondents imported gray market hydraulic excavators that were materially different from those intended for sale by Caterpillar in the United States market.

The ALJ also found that Caterpillar had met its burden to rebut the presumption that it had authorized its official dealers to sell gray market hydraulic excavators in the United States. In particular, he found that Caterpillar did not authorize such sales because its dealers were separate corporate entities with separate headquarters, employees and business records and therefore should not be included in the analysis of whether all or substantially all of Caterpillar's sales in the United States were materially different from the gray market goods. ID at 19-20. [

]. ID at 20. [

]. ID at 20-21. Without expressly saying so, the ALJ applied the actual authority standard for authorization, *i.e.* an express manifestation of authorization made by the principal to the agent. The ALJ, on that basis, found that Caterpillar had met its burden to rebut the presumption that the sales of its dealers were authorized; therefore, he did not include these sales in the "all or substantially all" analysis. ID at 21. The ALJ concluded that substantially all of Caterpillar's authorized sales in the United States were materially different from the gray market goods at issue.

The ALJ also recommended the issuance of a general exclusion order, cease and desist orders, and a bond during the period of Presidential review in the amount of 100 percent of the entered value of the goods. No party requested review of the ID.

B. The Commission's Review

The Commission determined to review the ID *sua sponte* on October 30, 2008, and to

request additional briefing from the parties on certain questions and on the issues of remedy, bonding and the public interest. 73 *Fed. Reg.* 65879 (Nov. 5, 2008).

The Commission asked the parties to brief three issues. First, the Commission asked whether Caterpillar had rebutted the presumption, established by the U.S. Court of Appeals for the Federal Circuit in *Bourdeau Bros., Inc. v. International Trade Commission*, 444 F.3d 1317 (Fed. Cir. 2006) on appeal of the Commission's Determination in *Certain Agricultural Vehicles and Parts Thereof,* 337–TA-487 (December, 2004) (*Agricultural Vehicles*), that any sales of gray market goods by official dealers of a complainant were authorized by the complainant. To the extent that the existing record is insufficient to permit that showing, the Commission asked whether Caterpillar could rebut the presumption if given the opportunity to supplement its motion for summary determination of no violation. Second, the Commission asked whether any of Caterpillar's overseas affiliates, subsidiaries, and/or official dealers sell gray market hydraulic excavators to or in the United States and, if so, if Caterpillar rebutted, or if given the opportunity could Caterpillar rebut, the presumption that these dealers had actual or apparent authority to sell these excavators in the United States. The Commission also asked how many gray market sales were made to or in the United States by Caterpillar's overseas affiliates, subsidiaries, and official dealers. Finally, the Commission inquired whether the record indicates the total quantity of gray market sales made in the United States from 2000 to 2006 and, if not, whether Caterpillar could provide this information if given the opportunity to supplement its motion for summary determination of no violation. 73 *Fed. Reg.* 65879 (Nov. 5, 2008).

II. DISCUSSION

A. Summary of Conclusions

The Commission, after carefully considering the standard for authorization in a gray market context and applying the correct standard to the record in this case, has determined that Caterpillar did not rebut the presumption that gray market sales by its official dealers and wholly-owned subsidiaries were authorized.[1] However, given the relatively small number of authorized sales, compared both to the size of the gray market and to the total quantum of Caterpillar sales during the period at issue, and given the very large number of foreign suppliers and domestic importers involved in the gray market trade, the Commission finds that Caterpillar's acts and omissions did not materially contribute to consumer confusion. Caterpillar has therefore met its

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[1] On March 30, 2006, the U.S. Court of Appeals for the Federal Circuit ("the Federal Circuit") vacated and remanded certain parts of the Commission's final determination in *Certain Agricultural Vehicles and Parts Thereof,* 337–TA-487 (December, 2004) ("*Agricultural Vehicles*") on appeal of the Commission's Determination in *Bourdeau Bros., Inc. v. International Trade Commission*, 444 F.3d 1317 (Fed. Cir. 2006) ("*Bourdeau*") . The Federal Circuit remanded the case to the Commission to determine whether complainant Deere & Company ("Deere") authorized the sale of any Deere European-version self-propelled forage harvesters in the United States and, if so, whether all or substantially all of the Deere self-propelled forage harvesters sold in the United States by Deere were North American versions. The Federal Circuit found that the Commission in its original determination had improperly placed the burden of proof concerning gray market infringement on respondents Erntetechnik Franz Becker; Sunova Implement Company; Bourdeau Bros., Inc. and OK Enterprises (collectively, the "Bourdeau respondents"), when that burden properly lay with Deere. *Bourdeau,* 444 F.3d at 1327. In its remand determination, the Commission held that Deere had not met its burden to rebut the presumption that all sales by its official dealers, whether in the United States or in Europe, were authorized. The Commission further held that the appropriate agency standard to apply under such circumstances is that of apparent authority: *i.e.* whether a reasonable third party businessperson, based upon the conduct of the trademark owner, would have reasonably believed that the sales activities of the official dealers were authorized by the trademark owner. *Agricultural Vehicles Comm'n Op. on Remand* at 13.

burden to demonstrate that "all or substantially all" of Caterpillar's sales of hydraulic excavators in the United States during the period examined were U.S.-market versions of these machines.

Accordingly, as discussed in greater detail below, the Commission affirms, albeit on different grounds, the ALJ's initial determination, Order No. 67, granting Caterpillar's motion for summary determination concerning violation of Section 337. With respect to remedy, the Commission has determined to issue a general exclusion order and two cease and desists orders.

B. Caterpillar Has Not Rebutted the Presumption That Its Affiliated Entities and Dealers Had Apparent Authority to Sell Gray Market Excavators in the United States

Caterpillar has admitted that its wholly-owned affiliates Carter Machinery Inc. ("Carter"), Caterpillar Financial Services Corp. ("CAT Financial") and Caterpillar Redistribution Services, Inc. ("CRSI") imported gray market hydraulic excavators and sold them in the United States during the period under examination (2000 to 2006). Caterpillar Resp. at 12-19. These three entities collectively were responsible for the sale of [ ] gray market hydraulic excavators in the United States. In addition, Caterpillar admits that its foreign affiliates were responsible for the sale of an additional [ ] gray market excavators in the United States during the same period. *Id.* In total, then, [ ] hydraulic excavators were imported and/or sold for importation by Caterpillar's wholly-owned affiliates/subsidiaries. *Caterpillar Resp. to Comm'n Det. to Review* at 13, 16 (Nov. 18, 2008). Given the close corporate structure of Caterpillar and its wholly-owned affiliates, and the fact that Caterpillar did not take affirmative steps to prevent those affiliates from selling gray market hydraulic excavators in the United States, we find that

Caterpillar has not met its burden to rebut the presumption that the importation and sale of [ ] gray market hydraulic excavators by Caterpillar's U.S. and foreign affiliates/subsidiaries were authorized by Caterpillar.

Caterpillar also admits that its official dealers sold [ ] gray market excavators in the United States during the period under examination. Caterpillar Resp. at 17. However, Caterpillar asserts that it did not authorize these sales. *Id.* at 4-9. We agree with the ALJ that there is no evidence that Caterpillar expressly granted actual authority to its official dealers to sell gray market hydraulic excavators in the United States. ID at 21. However, as discussed in *Agricultural Vehicles,* when a trademark owner's official dealers also sold gray market goods in United States, it must overcome the presumption that the dealers had apparent authority to sell the gray market goods and thereby contributed to consumer confusion. *Agricultural Vehicles Remand* at 48-51.

The focus of the Commission and the courts in cases involving apparent authority is on the conduct and actions of the principal and how it is perceived by third parties. *See Agricultural Vehicles Remand* at 17. Caterpillar's stress on the formal legal relationship between the company and its official dealers ignores this important aspect of the Commission's apparent authority inquiry in these cases. Apparent authority is created when:

> [T]he principal, either intentionally or by lack of ordinary care, induces third persons to believe that an individual is his agent even though no actual authority, express or implied, has been granted to such individual.

Wells Fargo Business Credit v. Ben Kozloff, Inc., 695 F.2d 940, 945 (5th Cir. 1982). Courts, like the Commission, have defined the central query as whether:

> [S]ome manifestation by the principal causes a third person to reasonably believe an agent possesses authority to act as he does ... such that a reasonably prudent businessman would be led to believe an agency was created.

General Elec. Co. v. Speicher, 676 F. Supp. 1421, 1430, 1431 (N.D. Ind. 1988) (emphasis added) (rev'd on other grounds); *see also Minskoff v. American Exp. Travel Related Co.*, 98 F.3d 703, 708 (2d Cir. 1996) (apparent authority arises from the written or spoken words or any other conduct of the principal which, reasonably interpreted, causes a third person to believe that the principal consents to have an act done on its behalf by the person purporting to act for him).

Caterpillar characterizes the evidence as demonstrating an absence of apparent authority on the part of its affiliates and official dealers to sell hydraulic excavators. We believe, contrary to Caterpillar's representations, that the record is mixed with respect to whether third parties in this case reasonably believed, based on the acts or omission of Caterpillar, that Caterpillar's dealers had apparent authority to sell gray market hydraulic excavators in the United States.

For example, [ ] the president and co-owner of respondent World Tractor and Equipment, LLC, testified at his sworn deposition [

]

[

]

In sum, a preponderance of the evidence indicates that at least some independent and official dealers of used gray market Caterpillar hydraulic excavators, based on the acts and omissions of Caterpillar's wholly-owned affiliates, believed that Caterpillar authorized the sale of gray market excavators in the United States. Those dealers appear to have based their belief, in particular, on their knowledge of the active sale and purchase of gray market goods by CRSI

(undisputed by Caterpillar) and the apparent knowledge of CAT Financial that gray market goods were being sold in the United States. Taken in conjunction with Caterpillar's failure to express an objection to at least some of the Settled Respondents' business practices as gray market importers, Caterpillar's conduct led some dealers to believe that Caterpillar authorized the importation and sale of gray market excavators in the United States.

Based on this record, the Commission therefore finds that Caterpillar has not met its burden of proof to rebut the presumption of authorization that attaches to [ ] gray market sales made by its official dealers and wholly-owned affiliates of gray market hydraulic excavators in the United States.

C. Substantially All of the Caterpillar's U.S. Sales of Hydraulic Excavators Contained the Material Differences

As the Federal Circuit recognized in *SKF*, in order to show that its goods are materially different from the gray market goods, a complainant in a gray market trademark infringement case must establish that all or substantially all of its sales are accompanied by the asserted difference. *SKF United States v. Int'l Trade Comm'n,* 423 F.3d 1307, 1315 (Fed.Cir. 2005). The "'all or substantially all' benchmark recognizes that something less than 100% compliance will suffice and certainly permits a small amount of nonconforming goods." *Id.* at 1316. However, if the record shows that "the trademark owner has placed into the stream of commerce a substantial quantity of goods that are or may be the same or similar to those of an importer, then there is no material difference." *Id.* at 1315 (emphasis added).

Relief for the trademark owner is not appropriate, therefore, when the trademark owner

has sold a substantial quantity of goods in the United States that are the same or similar to the gray market goods of which it complains because "[t]o permit recovery by a trademark owner when less than 'substantially all' of its goods bear the material difference from the gray goods thus would allow the owner itself to contribute to the confusion by consumers that it accuses gray market importers of creating." *Id.* at 1315. What quantum of nonconforming sales by the trademark owner constitutes a "substantial quantity," however, varies according to the facts and circumstances of a given case, including actual evidence of consumer confusion. As courts have explained, "[a] 'trademark' is not that which is infringed. What is infringed is the right of the public to be free of confusion and the synonymous right of a trademark owner to control his product's reputation." *James Burrough Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266, 274 (7th Cir. 1976).

The Court in *SKF* did not define what constitutes a "substantial quantity" of non-conforming product sales by the trademark owners. The Commission has made this determination by taking into account the particular facts and circumstances of each case, eschewing a bright-line quantitative test. Here, substantial evidence on the record supports a finding that the presumptively authorized [

].

The Commission in *Agricultural Vehicles Remand* found salient that the gray market sales for which John Deere was responsible accounted for somewhere between 40 percent and 57 percent of the approximately 350 gray market sales made in the United States during the period

examined in that case. *Id.* at 50-51. Under those circumstances, the Commission concluded that Deere was responsible for introducing a "substantial quantity" of nonconforming goods into the stream of commerce and "thereby contributed significantly to the confusion for which they blame the respondents."

Unlike *Agricultural Vehicles*, the present case involves a very large gray market for the goods at issue [ ][2], compared to which the role played by Caterpillar's affiliates and dealers was very small [ ]. Moreover, Caterpillar's non-conforming sales were very small compared to its overall sales of hydraulic excavators in the United States during the same period [ ]. The relative quantity of non-conforming sales in this case is sufficiently low, in light of evidence of a very large number of foreign suppliers of gray market hydraulic excavators and a wide network of domestic importers, that the Commission finds that Caterpillar, its affiliates, and its official dealers, have not contributed significantly to the consumer confusion for which Caterpillar blamed the Settled Respondents and Defaulting Respondents. We therefore affirm the ALJ's determination that "all or substantially" all of Caterpillar's sales of excavators during the period were conforming goods that contained the material differences.

III. REMEDY[3]

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[2] [ ]

[3] Where a violation of Section 337 has been found, the Commission must consider the issues of remedy, the public interest, and bonding. 19 U.S.C. § 1337 (d) and (f).

The Commission has broad discretion in selecting the form, scope, and extent of the remedy in a Section 337 proceeding. *See Fuji Photo Film v. U.S. Int'l Trade Comm'n*, 386 F.3d 1095, 1106-1107 (Fed. Cir. 2004). Unless the Commission's choice of remedy constitutes an abuse of discretion, the Federal Circuit will sustain the Commission's determination on remedy. *Id.* In this case, the Commission has determined to issue a general exclusion order that prohibits entry of Caterpillar's gray market hydraulic excavators for consumption in the United States. The Commission has also determined that the public interest factors do not preclude issuance of this order and has set a bond during the period of Presidential review in the amount of 100 percent of the entered value of the infringing excavators. Finally, the Commission has determined to issue cease and desist orders to the Defaulting Respondents.

A. General Exclusion Order

Complainant Caterpillar requests that the Commission issue a general exclusion order directed to gray market hydraulic excavators. In the ALJ's recommended determination on remedy, he found that Caterpillar established a widespread pattern of unauthorized use of the Caterpillar trademarks, and that there were numerous foreign sources of the gray market goods, as well as domestic companies willing and able to import and sell the goods. ID at 25-28. For these reasons, he recommended that the Commission issue a general exclusion order in this case. ID at 28. For the reasons discussed below, the Commission agrees with the ALJ's recommendation that a general exclusion order should issue.

The Commission may issue a remedial order excluding the goods of the person(s) found in violation (a limited exclusion order) or, if certain criteria are met, against all infringing goods

regardless of the source (a general exclusion order). The Commission's authority to issue a general exclusion order in a default case such as this one is found in Section 337(g)(2), which provides that the Commission may issue a general exclusion order when no one appears to contest the allegation of violation, a violation is established by substantial, reliable, and probative evidence, and the requirements of Section 337(d)(2) have been met. Section 337(d)(2) grants the Commission the authority to exclude offending articles regardless of their source when certain conditions are met. *Kyocera v. Int'l Trade Comm'n*, 545 F.3d1340 (Fed. Cir. 2008); *see also Vastfame Camera Ltd. v. Int'l Trade Comm'n*, 386 F.3d 1108, 1113 (Fed. Cir. 2004). Section 337(d)(2) provides that:

> The authority of the Commission to issue an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that--
>
> (A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or
>
> (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19 U.S.C. § 1337(d)(2).

In recommending a general exclusion order, the ALJ recited the statutory basis for issuing a general exclusion order set forth in Section 337(d)(2). His analysis, however, was partially based on the Commission's Opinion in *Airless Spray Pumps and Components Thereof*, Inv. No. 337-TA-90, Commission Opinion at 18-19, USITC Pub. 119 (Nov. 1981) ("*Spray Pumps*").[4]

[4] In *Spray Pumps*, the Commission held that a complainant seeking a general exclusion order must show (1) a widespread pattern of unauthorized use of its patented invention and (2) certain business conditions from which one might reasonably infer that foreign manufacturers other than

Consideration of some factual issues or evidence examined in *Spray Pumps* may continue to be useful for determining whether the requirements of Section 337(d)(2) have been met. However, we do not view *Spray Pumps* as imposing additional requirements beyond those identified in Section 337(d)(2). Moreover, notwithstanding his reference to *Spray Pumps,* we find that the ALJ in his ID addressed the requirements for issuance of a general exclusion order that appear in Section 337(d)(2)(B). In particular, he found that (1) there is a large and established market for the trademarked products in the United States; (2) there exists a large number of domestic and

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the respondents to the investigation may attempt to enter the U.S. market with infringing articles. *Spray Pumps* at 18. The Commission further stated that the evidence which might be presented to prove a "widespread pattern of unauthorized used of the patented invention" includes:

> (1) a Commission determination of unauthorized importation into the United States of infringing articles by numerous foreign manufacturers; or
> (2) the pendency of foreign infringement suits based upon foreign patents which correspond to the domestic patent in issue; [or]
> (3) other evidence which demonstrates a history of unauthorized use of the patented invention.

Id.

Evidence which the Commission has identified as relevant to the "business conditions" criterion for issuance of a general exclusion order includes:

> (1) an established demand for the patented product in the U.S. market and conditions of the world market;
> (2) the availability of marketing and distribution networks in the United Stated for potential foreign manufacturers;
> (3) the cost to foreign entrepreneurs of building a facility capable of producing the patented article;
> (4) the number of foreign manufacturers whose facilities could be retooled to produce the patented articles; or
> (5) the cost to foreign manufacturers of retooling their facility to produce the patented articles.

Id.

foreign entities other than the named respondents who are involved in the importation, sale for importation, and sale after importation of infringing excavators; and (3) and there is a widespread pattern of unauthorized use of the Caterpillar trademarks. ID at 25-26. Based on these findings related to Section 337(d)(2), as well as his consideration of additional *Spray Pumps* factors, the ALJ recommended that the Commission issue a general exclusion order if it finds a violation of Section 337.

In our judgement, Caterpillar has satisfied the requirements of Section 337(d)(2)(B) by showing that "there is a pattern of violation of this section and it is difficult to identify the source of infringing products." 19 U.S.C. § 1337(d)(2)(B) (emphasis added). With respect to the "pattern of violation," Caterpillar has identified "thousands" of gray market excavators present in the United States, as well as the existence of hundreds "if not thousands" of customers who have purchased, owned, or served these gray market excavators. *See* Caterpillar Br. at 23, Caterpillar Statement of Facts (SOF) at para. 223. It notes that inventory lists provided by the Settled Respondents have identified [ ] of customers who bought gray market excavators. *Id.*, SOF at para 224. Significantly, the [ ] gray market hydraulic excavators sold by the Settled Respondents between 2000 and 2006 represent a small fraction of the [ ] gray market Caterpillar hydraulic excavators that Caterpillar estimates to have been sold in the United States from 2000 to 2006. Caterpillar Resp. at 2, 17. Consequently, we find that Caterpillar has met its burden to establish the existence of a "pattern of violation" under the statute.

Caterpillar also has met its burden to establish that "it is difficult to identify the source of infringing products." Caterpillar points to record evidence to substantiate its claim that there

were "numerous foreign sources of the gray market excavators unauthorized dealers and brokers offering for sale for importation and/or importing Caterpillar hydraulic excavators into the United States." Caterpillar Resp. at 23. In particular, Caterpillar relies on deposition testimony by the Settled Respondents that there were [ ] of foreign sources from which the Settled Respondents obtained gray market excavators. Caterpillar Br. at 23, SOF at para. 225. In addition, Caterpillar cites to testimonial evidence that in addition to a multitude of foreign sources, there were "[

]." Caterpillar SOF at para. 222, [

] The Commission therefore finds that Caterpillar has established that it would be difficult to identify the source of the infringing products.

In sum, the Commission finds that the statutory requirements for a general exclusion order have been satisfied in this case under Section 337(d)(2)(B) and that it is appropriate to issue a general exclusion order that prohibits entry of Caterpillar's gray market hydraulic excavators for consumption in the United States.

B. Whether Cease and Desist Orders Should Issue

The Commission has also determined to issue two cease and desist orders under 19 U.S.C. § 1337(f). The Commission's practice is to find that cease and desist orders are warranted with respect to domestic respondents that maintain commercially significant U.S. inventories of the infringing product. *See Certain Agricultural Tractors Under 50 Take-Off Horsepower*, Inv. No. 337-TA-380, Comm'n Op. at 31 (Mar. 12, 1997). Where, as here,

domestic respondents are in default – Defaulting Respondents Frontera and Barkely are located, respectively, in Texas and California – the Commission's practice is to presume that the defaulting respondents maintain commercially significant inventory. *Certain Digital Multimeters, and Products with Multimeter Functionality*, Inv. No. 337-TA-588, Comm'n Op. at 7. Consequently, we find that cease and desist orders against the Defaulting Respondents are warranted.

IV. THE PUBLIC INTEREST

The ALJ recommended cease and desist orders against the Defaulting Respondents, and the Commission has determined to issue a default remedy under 19 U.S.C. § 1337(g), which is conditioned on consideration of the public interest. Specifically, the Commission must consider:

> [T]he effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, and production of like or directly competitive articles in the United States, and United States consumers.

Section 337(g)(1). 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. *Id.*

In this case, there is no argument or evidence to suggest that exclusion of the infringing hydraulic excavators would not be in the public interest. The ITC Office of Unfair Imports Investigations ("OUII") argues that there are no public health or welfare implications from the exclusion of the infringing excavators, or that U.S. demand for such equipment could not be met by the current supply of non-gray market machines. It also argues that there is a U.S. public interest in the protection of intellectual property rights. OUII Comments at 16. Caterpillar's

position in support of a general exclusion order was supported by a letter from Volvo Construction Equipment North America ("Volvo"). Volvo argues that the importation of gray market machines, which were produced for other markets, can itself pose safety and quality risks for U.S. consumers, as well as environmental concerns due to differing emissions standards, which are contrary to the public interest. Consequently, the Commission finds that issuance of a general exclusion order is not precluded by consideration of the public interest factors set out in Section 337(g)(1).

V. BOND DURING PERIOD OF PRESIDENTIAL REVIEW

During the 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). The amount of the bond is specified by the Commission and must be an amount sufficient to protect the complainant from any injury. 19 U.S.C. § 1337(j)(3), 19 C.F.R. § 210.50(a)(3). The ALJ recommended a bond of 100 percent during the period of Presidential Review. The record here lacks sufficiently reliable information as to price levels for hydraulic excavators in the United States. When the pricing information is insufficient, the Commission has set the amount of the bond at 100 percent of entered value. *See e.g. Certain Neodymium Iron-Boron Magnets, Magnet Alloys, and Articles Containing the Same*, Inv. No. 337-TA-372, Comm'n Op. on Remedy, Bonding and the Public Interest at 5 at 15. Accordingly, the Commission has determined to set the bond at 100 percent of the entered value of infringing hydraulic excavators to prevent any harm to Caterpillar during the period of Presidential review.

VI. ORDERS

The Commission has determined to issue a general exclusion order that excludes certain hydraulic excavators manufactured by or under the authority of Caterpillar Inc. which bear one or more of U.S. Trademark Reg. Nos. 2,140,605, 2,140,606, 2,421,077, and 2,448,848 and are materially different from hydraulic excavators manufactured by Caterpillar for sale and use in the United States, from entry for consumption into the United States, entry for consumption from a foreign-trade zone, and withdrawal from warehouse for consumption, until such date as the trademarks are abandoned, canceled, or rendered invalid or unenforceable, except under license of the patent owner or as provided by law. The general exclusion order also provides that during the period of Presidential review the referenced hydraulic excavators are entitled to entry into the United States for consumption, entry for consumption from a foreign trade zone, and withdrawal from warehouse for consumption, under bond in the amount of 100 percent of the value of such articles. The order provides the standard exception from exclusion for excavators imported by or for the United States, and to be used by or for the United States.

The Commission has also determined to issue cease and desist orders to the Defaulting Respondents.

By order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: February 3, 2009

CERTAIN HYDRAULIC EXCAVATORS AND COMPONENTS THEREOF **337-TA-582**

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, Rett Snotherly, Esq., and the following parties as indicated, on February 3, 2009.

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN HYDRAULIC EXCAVATORS AND COMPONENTS THEREOF**	**Investigation No. 337-TA-582**

NOTICE OF COMMISSION DECISION NOT TO REVIEW AN INITIAL DETERMINATION FINDING RESPONDENTS BARKLEY INDUSTRIES LLC AND FRONTERA EQUIPMENT SALES IN DEFAULT

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 the presiding administrative law judge's ("ALJ") initial determination ("ID") (Order No. 8) finding Respondents Barkley Industries LLC ("Barkley") and Frontera Equipment Sales ("Frontera") in default for failure to respond to the complaint and notice of investigation in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Jonathan J. Engler, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3112. Copies of the ALJ's ID and all other 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 August 29, 2006, the Commission instituted this investigation, based on a complaint filed by Caterpillar Inc. ("Caterpillar") of Peoria, Illinois. The complaint alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain hydraulic excavators and components thereof by reason of infringement of U.S. Trademark Registration Nos. 2,140,606; 2,421,077; 2,140,605; 2,448,848. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337. The complainant

requested that the Commission issue a general exclusion order and cease and desist orders. The complaint named twenty (20) firms as respondents, including Barkley and Frontera.

On October 23, 2006, Caterpillar filed a motion for an order to show cause why Barkley and Frontera should not be found in default for failure to respond to the complaint and notice of investigation. Complainant's motion also requested issuance of an ID finding these two respondents in default upon failure to show cause and an immediate entry of a limited exclusion order, cease and desist order, and/or other appropriate relief upon finding the above named respondents in default. No party opposed the motions. The Commission investigative attorney supported the motions, but submitted that Caterpillar's request for the immediate entry of exclusion orders and cease and desist orders against Barkley and Frontera should be rejected because there are other active respondents in this case and limited remedial orders should not be issued *seriatim* prior to the final determination by the Commission.

On November 3, 2006, the ALJ issued Order No. 6, in which he required Barkley and Frontera to show cause by November 23, 2006, why they should not be found in default, and to serve discovery statements, as required by Order No. 5, on the ALJ and the other parties. Neither Barkley nor Frontera responded to the show cause order or served discovery statements. On December 1, 2006, the ALJ issued the subject ID, finding Barkley and Frontera in default. With respect to remedy, the ALJ found the immediate entry of an exclusion order and cease and desist order against the two default respondents to be unnecessary. No party petitioned for review of the ID.

Having examined the record of this investigation, the Commission has determined not to review the ALJ's ID finding Barkley and Frontera in default.

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 to the Commission

Issued: December 26, 2006

CERTAIN HYDRAULIC EXCAVATORS AND COMPONENTS THEREOF 337-TA-582

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF COMMISSION DECISION NOT TO REVIEW AN INITIAL DERTERMINATION FINDING RESPONDENTS BARKLEY INDUSTRIES LLC AND FRONTERA EQUIPMENT SALES IN DEFAULT** has been served on upon the Commission Investigative Attorney Rhett Snotherly, and all parties via first class mail and air mail where necessary on December 26, 2006.

Marilyn R. Abbott

Marilyn R. Abbott, Secretary
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Page 2- certificate of service

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Donna, TX 78537

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

Before the Honorable Robert L. Barton, Jr.
Administrative Law Judge

In the Matter of	
CERTAIN HYDRAULIC EXCAVATORS AND COMPONENTS THEREOF	Inv. No. 337-TA-582

ORDER NO. 8: INITIAL DETERMINATION FINDING RESPONDENTS BARKLEY INDUSTRIES LLC AND FRONTERA EQUIPMENT SALES IN DEFAULT

(December 1, 2006)

I. SUMMARY

On November 3, 2006, I issued Order No. 6, in which I ordered Respondents Barkley Industries, Inc. ("Barkley") and Frontera Equipment Sales ("Frontera") to show cause why they should not be found in default for failure to respond to the Complaint and Notice of Investigation and to serve discovery statements on myself and the other parties. Neither Barkley nor Frontera complied with this order. Therefore, pursuant to Commission Rules 210.16(a) and 210.33(b), I find Respondents Barkley Industries, Inc. and Frontera Equipment Sales in default.

II. PROCEDURAL HISTORY

On August 29, 2006, the Notice of Investigation ("Notice") was published in the Federal Register. 71 Fed. Reg. 52577. On September 1, 2006, the Secretary served the Complaint and Notice of Investigation on Respondents Barkley and Frontera by certified mail, return receipt requested. Ex. A. to Motion 582-002. Service of the Complaint and Notice to Barkley was confirmed by return receipt. Id. It does not appear that a return receipt has been received with respect to Frontera. However, Caterpillar has provided receipt confirmation of written discovery sent to Frontera at the same address to which the Complaint and Notice were sent. Ex. C. to Motion 582-002.

Barkley and Frontera have not filed a response to the Complaint and Notice, although such responses were due on September 26, 2006, pursuant to Commission Rules 201.16 and 210.13(a). In addition, Barkley and Frontera failed to respond to written discovery (requests for production of documents and interrogatories) served by Caterpiller; which responses were due September 21, 2006. Motion at 2; Exs. B and C to Motion 582-002. Furthermore, Barkley and Frontera failed to submit a discovery statement pursuant to Order No. 5 which issued on October 18, 2006.

On October 23, 2006, Complainant Caterpillar Inc. ("Caterpillar") filed a motion for (1) an order requiring Respondents Barkley and Frontera to show cause why each should not be found in default for failure to respond to the Complaint and Notice of Investigation, as prescribed in 19 C.F.R. § 210.13; and (2) upon failure of either Barkley or Frontera to show such cause, to issue an initial determination finding such Respondents in default [Motion Docket No. 582-002]. Caterpillar later asked that if the Commission finds that any or all of the Respondents are in default, the Commission immediately enter an exclusion order and a cease and desist order again each of the Respondents found in default. Motion 582-002 p. 1.

On November 2, 2006, Commission Investigative Staff ("Staff") filed a response supporting the motion in part. Specifically, Staff submits that pursuant to Commission Rule 210.16(a)(1) an order to show cause why Barkley and Frontera should not be held in default is appropriate. However, Staff submits that if Barkley and Frontera were to be found in default, Caterpillar's request for the immediate entry of exclusion orders and cease and desist orders against Barkely and Frontera should be rejected, because there are other active respondents in this case and limited remedial orders should not be issued *seriatim* prior to the final determination by the Commission. Staff Response to Motion 582-002 at 3-4.

On November 3, 2006, I issued Order No. 6 in which I required Barkley and Frontera to show cause why they should not be found in default by November 23, 2006. I also ordered Barkley and Frontera to serve discovery statements, as required by Order No. 5, on the Judge and the other parties, accompanied by a pleading stating why such a late statement should be accepted by November 14, 2006. Neither Barkley nor Frontera responded to the show cause order or served discovery statements.

III. DISCUSSION

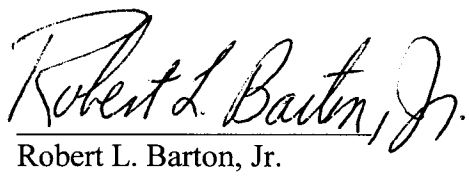
Commission Rule 210.16(a)(1) provides that a respondent shall be found in default if it fails to respond to the complaint and notice of investigation in the manner prescribed in Commission Rules 210.13 or 210.59(c), or otherwise fails to answer the complaint and notice, and fails to show cause why it should not be found in default. 19 C.F.R. § 210.16(a)(1). Under Commission Rule 210.16(b)(1), a party may file a motion for an order to show cause why a respondent should not be held in default for failing to respond to the complaint. If the respondent ultimately fails to make the necessary showing, the judge shall issue an initial determination finding the respondent in default for failing to respond to the complaint and notice. 19 C.F.R. § 210.16(b)(1). Further, a default may be entered against a party that fails to obey a discovery order issued by the Administrative Law Judge. See 19 C.F.R. § 210.33(b).

Respondents Barkley and Frontera have not responded to the Complaint or Notice. They have also not complied with my orders, specifically Orders Nos. 5 and 6. Therefore, I am finding Respondents Barkley and Frontera in default pursuant to Commission Rules 210.16(a) and 210.33(b). Pursuant to Commission Rule 210.16(c), a party found in default shall be deemed to have waived its right to appear, to be served with documents, and to contest the allegations at issue in the

investigation. Upon a finding of default, the Commission may issue an exclusion order, a cease and desist order, or both, against the defaulting respondents after considering the effect of such an order upon the public health and welfare, competitive conditions in the U.S. economy, and the production of like or directly competitive articles in the United States. 19 C.F.R. § 210.16(c). However, I agree with Staff that Caterpillar has not shown why the immediate entry of an exclusion order and cease and desist order against Barkley and Frontera is necessary. Therefore, I am not recommending that these issue at this time.

Pursuant to 19 C.F.R. § 210.42(h)(3), this initial determination shall become the determination of the Commission 30 days after its date of service unless the Commission within those 30 days shall have ordered review of this ID, or certain issues herein, pursuant to 19 C.F.R. § 210.43(d) or § 210.44.

SO ORDERED.



Robert L. Barton, Jr.
Administrative Law Judge

CERTAIN HYDRAULIC EXCAVATORS AND COMPONENTS THEREOF

Inv. No. 337-TA-582

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER** was served upon, Rett Snotherly, Esq., Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on December 1, 2006.

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CERTAIN HYDRAULIC EXCAVATORS AND COMPONENTS THEREOF

Inv. No. 337-TA-582

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CERTAIN HYDRAULIC EXCAVATORS AND COMPONENTS THEREOF

Inv. No. 337-TA-582

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