

In the Matter of

**CERTAIN AIRLESS PAINT SPRAY PUMPS
AND COMPONENTS THEREOF**

Investigation No. 337-TA-90



USITC PUBLICATION 1199

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United States International Trade Commission / Washington, D.C. 20436

UNITED STATES INTERNATIONAL TRADE COMMISSION

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COMMISSION ACTION AND ORDER

Introduction

The United States International Trade Commission has concluded its investigation under section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) of alleged unfair methods of competition and unfair acts in the unauthorized importation into the United States of certain airless paint spray pumps and components thereof or in their sale by the owner, importer, consignee, or agent of either, the alleged effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. The Commission's investigation concerned allegations that airless paint spray pumps imported or sold by respondents Larius DiCastagna and C., S.N.C., Ltd., Imperial Paint Applicators, Ltd., Karmichael Industries, Ltd., and Simco Brush & Tool Corp. infringe certain claims of U.S. Letters Patent 3,254,845, U.S. Letters Patent 3,367,270, and U.S. Reissue Patent 29,055. These patents are owned by the complainant, Wagner Spray Tech Corp.

This Action and Order provides for the final disposition of investigation No. 337-TA-90 by the Commission. It is based upon the Commission's

determination, made in public session at the Commission meeting of November 4, 1981, that there is a violation of section 337.

Action

Having reviewed the record and the recommended determination of the Administrative Law Judge in investigation No. 337-TA-90, the Commission, on November 4, 1981, determined 1/ that--

1. There is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation and sale of certain airless paint spray pumps which infringe claims 1, 22, and 23 of U.S. Letters Patent 3,254,845, claims 12 and 19 of U.S. Letters Patent 3,367,270, and claims 40, 41, and 42 of U.S. Reissue Patent 29,055, the tendency of which is to substantially injure an industry, efficiently and economically operated, in the United States;
2. The appropriate remedy for such violation of section 337 is an exclusion order, pursuant to subsection (d) of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337(d)), preventing the importation of airless paint spray pumps and components thereof manufactured by Larius DiCastagna and C., S.N.C., Ltd., of Lecco, Italy, or any of its affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns, which infringe claims 1, 22, or 23 of U.S. Letters Patent 3,254,845, claims 12 or 19 of U.S. Letters Patent 3,367,270, or claims 40, 41, or 42 of U.S. Reissue Patent 29,055;
3. The public-interest factors enumerated in subsection (d) of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337(d)) do not preclude the issuance of an exclusion order in this investigation; and
4. As provided in subsection (g)(3) of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337(g)(3)), the appropriate bonds during the period this matter is pending before the President are in the following amounts: (1) 17.8 percent of the c.i.f. value of the "Larius 8000" pump, (2) 28.1 percent of the c.i.f. value of the "Larius 3000" pump, (3) 50.6 percent of

1/ Commissioners Calhoun and Frank dissenting on the issue of remedy; Commissioner Eckes not participating.

the c.i.f. value of the "Larriette" pump, and (4) 32 percent of the c.i.f. value of any other articles subject to the Commission's exclusion order.

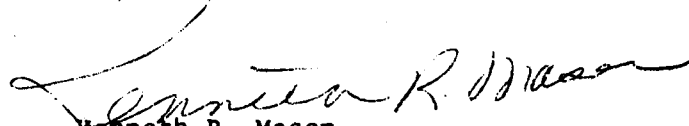
Order

Accordingly, it is hereby ORDERED THAT--

1. Airless paint spray pumps and components thereof which are manufactured by Larius DiCastagna and C., S.N.C., Ltd., of Lecco, Italy, or any of its affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns, which infringe claims 1, 22, or 23 of U.S. Letters Patent 3,254,845, claims 12 or 19 of U.S. Letters Patent 3,367,270, or claims 40, 41, or 42 of U.S. Reissue Patent 29,055, be excluded from entry into the United States for the remaining terms of the patents, except where such importation is licensed by the patent owner;
2. The articles to be excluded from entry into the United States shall be entitled to entry under bond in the following amounts: (1) 17.8 percent of the c.i.f. value of the "Larius 8000" pump, (2) 28.1 percent of the c.i.f. value of the "Larius 3000" pump, (3) 50.6 percent of the c.i.f. value of the "Larriette" pump, and (4) 32 percent of the c.i.f. value of any other articles subject to the Commission's exclusion order, from the day after this order is received by the President pursuant to subsection (g) of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337(g)) until such time as the President notifies the Commission that he approves or disapproves this action, but, in any event, not later than 60 days after the date of receipt;
3. Notice of this Action and Order be published in the Federal Register;
4. A copy of this Action and Order and of the Commission Opinions issued in connection therewith be served upon each party of record to this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and the Secretary of the Treasury; and

5. The Commission may amend this Order in accordance with the procedure described in section 211.57 of the Commission's Rules of Practice and Procedure (46 F.R. 17533, Mar. 18, 1981; to be codified at 19 CFR § 211.57).

By order of the Commission.


Kenneth R. Mason
Secretary

Issued: November 24, 1981 1/

1/ This Commission action and order was originally scheduled to be issued on November 23, 1981, but was not because the Commission lacked authority to do so in the absence of appropriated funds.

COMMISSION OPINION 1/

Procedural History 2/

This investigation is based upon a complaint filed on behalf of Wagner Spray Tech Corporation, of Minneapolis, Minnesota, alleging that section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) had been violated. Specifically, the complaint asserted that unfair methods of competition and unfair acts exist in the importation into, or sale in, the United States of certain airless paint spray pumps and components thereof. These articles are alleged to infringe claims 1, 22 and 23 of U.S. Letters Patent 3,254,845, claims 12 and 19 of U.S. Letters Patent 3,367,270, and claims 40, 41 and 42 of U.S. Reissue Patent 29,055. The alleged effect or tendency of such infringement is to destroy or substantially injure an industry efficiently and economically operated in the United States.

On the basis of this complaint, the Commission voted to institute the instant investigation on November 6, 1980. Notice of the investigation was published in the Federal Register of November 21, 1980 (45 F.R. 77190-91).

The complainant in this investigation is Wagner Spray Tech Corporation, which manufactures and sells airless diaphragm paint spray equipment. Complainant has licensed the patents in issue here to a Canadian company, HERO, which exports to and sells in the United States pumps which correspond

1/ Commissioner Eckes did not participate.

2/ The following abbreviations will be used in this opinion: (1) ALJ for Administrative Law Judge, (2) R.D. for the Recommended Determination of the ALJ, (3) Tr. for transcript of the hearing before the ALJ, and (4) CX for complainant's exhibit.

to complainant's ST 3000 pump. 1/ The four respondents in this investigation are: (1) Larius Di Castagna & C., S.N.C., which manufactures airless diaphragm paint spray equipment in Italy and exports such equipment to, and sells it in, the United States; (2) Imperial Paint Applicators, Ltd.; (3) Karmichael Industries, Ltd.; and (4) Simco Brush & Tool Corp., all of which import and sell Larius airless diaphragm paint spray equipment in the United States. None of these respondents participated in any way in this investigation. R.D. 2-3.

The product in question is a commercial paint spray device. The primary purchasers of these devices are professional painting contractors. Tr. 84. Respondents manufacture and sell in the United States three separate types of pump, each of which compares in structure and function to a pump produced by the complainant. Respondents' "Lariette" pump corresponds to complainant's "ST 2000"; respondents' "Larius 3000" pump corresponds to complainant's "ST 3000" or "Mauler"; respondents' "Larius 8000" pump corresponds to complainant's "ST 8000" or "Spoiler". Tr. 21-22.

During the hearing before the Administrative Law Judge (ALJ), witnesses for the complainant testified that there were several foreign companies, in addition to the respondents, which were either on the verge of entering, or had already entered, the U.S. airless paint spray pump market. No attempt was made by complainant to have these foreign firms added as parties to the Commission's investigation. Nevertheless, the Commission notified these

1/ In September, 1981, after the close of the record, complainant granted similar licenses to Seeger Company.

companies of their right to apply to intervene in the investigation. 1/ Only one such company, Taiver, of Italy, indicated that it wished to participate. However, it subsequently notified the Commission that it had decided not to file a motion to intervene.

After a hearing, the ALJ, on June 27, 1981, issued his recommended determination that section 337 had been violated as alleged. On September 17, 1981, a public hearing was held before the Commission to hear oral argument on the ALJ's recommended determination and the issues of relief, bonding, and public interest. On November 4, 1981, the Commission determined by a vote of 5-0 2/ that a violation of section 337 did exist. The Commission also determined by a vote of 3-2 3/ that the most appropriate remedy for the violation found was an order prohibiting entry into the United States of articles which are manufactured by Larius and which infringe the patents in question.

Additionally, the Commission determined by a vote of 5-0 that the public interest as defined by subsection 337(d) does not preclude the issuance of the remedy stated above. Finally, the Commission established by a vote of 5-0 an appropriate bond during the period of Presidential review.

Violation

Standard of proof

Although respondents in this investigation have failed to appear to contest the complainant's allegations, their default does not resolve the

1/ By Commission action, a letter was addressed to these companies.

2/ Commissioner Eckes not participating in this investigation.

3/ Vice-Chairman Calhoun and Commissioner Frank dissenting.

issues in the investigation. Certain Attache Cases, Inv. No. 337-TA-45, USITC Pub. No. 345, pp. 5-6 (1979). The Commission requires that a complainant make a reasonable effort to establish a prima facie case of violation of section 337 by the respondents. Certain Window Shades and Components Thereof, Inv. No. 337-TA-83, USITC Pub. No. 1152, p. 5 (1981). In Certain Electric Slow Cookers, Inv. No. 337-TA-42, USITC Pub. No. (1979), the Commission listed the following examples of the type of proof available to a complainant to prove its prima facie case:

- (1) Physical samples of the allegedly infringing goods;
- (2) Customs invoices establishing importation; or
- (3) Affidavits of former customers verifying lost sales.

The requirement that a complainant establish a prima facie case should not be allowed to encourage respondents to default for the purpose of denying the complainant essential evidence. Small gaps in the complainant's case may not require the drawing of adverse inferences when there is evidence of a reasonable effort by complainant to obtain such information. Certain Food Slicers and Components Thereof, Inv. No. 337-TA-76, USITC Pub. No. 1159, pp. 6-7 (1981). Conversely, when the complainant is in possession of the missing information or when there is no evidence that complainant has made a reasonable effort to secure such information, the Commission may draw an appropriate adverse inference contrary to the complainant's position.

Pump technology

The airless diaphragm paint spray pump described in the three patents in issue here represents the culmination of a long technological development. Paint spray pumps are divided into those which use air and those which do

not. An air pump compresses air. The compressed air siphons paint into an airstream which is propelled out of the spray pump. Tr. 27. In contrast, an airless pump directly propels paint without use of an airstream. Airless paint spray devices may be divided into those that use piston pumps and those that use diaphragm pumps. A piston pump contains a single pump chamber in which a piston pushes directly against the paint, forcing it out of the pump. Tr. 30. A diaphragm pump contains a single pump chamber which is divided by a rubber or plastic diaphragm into two parts, a paint subchamber and a driving subchamber. 1/ The driving subchamber contains hydraulic liquid and houses a piston. The diaphragm pump works by first withdrawing the piston from the driving subchamber. This motion pulls the diaphragm back, expanding the volume of the paint subchamber and thereby sucking paint through an entrance from a source-container into the paint subchamber. The piston then reenters the drive subchamber, forcing the membrane outward. This motion causes the volume of the paint subchamber to contract, propelling the paint out of the pump's exit in a desired direction.

Airless diaphragm paint spray pumps are also divided into three categories depending upon their "standby conditions". The standby condition occurs when the piston in the drive subchamber is still operating, but no paint is being pumped. Tr. 27. This standby condition is desirable when a painter pauses briefly in his work. One type of diaphragm pump does not have a standby condition and continues to pump paint as long as the piston operates. Tr. 31.

1/ The diaphragm pump is superior to the piston pump because the latter requires contact between the piston and the paint which corrodes the piston.

The second type of diaphragm pump is called a recirculating pump. The paint subchamber of such a pump contains a pressure release valve. During the standby condition, when the piston continues to operate but no paint is propelled, this valve opens to permit the paint in the paint subchamber to recirculate back to the source-container. 1/ Tr. 32. Such pumps cause two problems: first, the recirculation of the paint to the source-container consumes a great deal of power; second, the repumping of paint causes the pump to overheat resulting in damage to some types of paint. Tr. 40. The third type of diaphragm pump has a self-regulating standby state. With such a pump the piston may operate, but there is neither propulsion nor recirculation of paint. The '845 and '270 patents teach that this desirable result can be achieved through the application of the principle of cavitation. 2/ These patents describe an airless diaphragm spray pump in which the opening for the hydraulic liquid to enter the paint subchamber is restricted so that its flow capacity is less than that through the pressure release valve by which the hydraulic liquid exits the drive subchamber. Tr. 42, 43, 64. This structure permits the beneficial use of the principle of cavitation. As the piston withdraws from the drive subchamber, the pressure in that subchamber drops. With the drop in pressure, air, which had been dissolved in the hydraulic liquid, comes out of the solution and forms bubbles which burst, filling the

1/ One variety of recirculating pump positions the pressure release valve in the drive subchamber and recirculates the hydraulic fluid instead of the paint to compensate for the movement of the piston. Tr. 38.

2/ There are two forms of cavitation. In gaseous cavitation, gas dissolved in a liquid comes out of solution due to an atmospheric pressure drop, and forms bubbles which then collapse. In vaporous cavitation, the liquid boils, and bubbles rise to the surface where they burst.

space in the drive subchamber not filled by the hydraulic liquid. That empty space cannot be filled by additional hydraulic liquid because of the restricted entrance to the drive subchamber. When the piston reenters the drive subchamber, pressure increases forcing the air back into solution with the hydraulic liquid. In essence, by utilizing the principle of cavitation, the devices described in the '845 and '270 patents use air dissolved in the hydraulic liquid as a substitute for additional hydraulic liquid and are therefore obliged to pump less hydraulic liquid into the drive subchamber. The result is a saving of power and the generation of less heat. Tr. 141-161.

The invention described in the '055 reissue patent improves upon on the '845 and '270 patents in two respects. First, the movement of the piston as it withdraws from the drive subchamber is limited so that the pressure never causes the liquid to go above the boiling point of the hydraulic liquid. Vaporous cavitation, therefore, does not occur. Tr. 159, 160-161 and 163. Second, the "eccentric member," which drives the piston, is submerged in the hydraulic liquid where it agitates that liquid forcing additional air into it. This technique increases gaseous cavitation. Tr. 65. Although the structure of the '055 reissue patent reduces pumping efficiency, it also reduces the power required for the standby state and lowers pump temperature. Tr. 172-178.

Patent validity

The ALJ has recommended that the Commission determine that the '845, '270 and '055 patents are valid in view of the fact that no evidence was presented

to rebut their statutory presumption of validity. 35 U.S.C. § 282. We concur with his judgment and adopt his findings on this issue.

Indeed, the statutory presumption of validity is strengthened with respect to the '845 and '270 patents by the fact that they have been previously litigated and found to be valid. Panther Pumps & Equipment Co., Inc. v. Hydrocraft, Inc., 468 F.2d 225 (7th Cir. 1972), cert. denied, 711 U.S. 1013 (1978). Further, the complainant presented affirmative testimony that the principles taught in the '845 and '270 patents are nonobvious. Tr. 144-145. Finally, our own independent review of the '845 and '270 patents and their prosecution histories reveals no basis for a finding of invalidity.

Although the '055 patent has not been tested by prior litigation, it is nevertheless entitled to the statutory presumption of validity noted above. 35 U.S.C. § 282. In addition, the complainant presented affirmative evidence that the invention described in the '055 patent is useful, novel and nonobvious, the fundamental criteria for patentability. Tr. 40, 144-145, 252. And as with the '845 and '270 patents, we have found no basis to conclude that the '055 patent is invalid.

Infringement

An article literally infringes a patent if it uses the same means, in the same manner, to achieve the same result, as described in a specific claim of the patent. Alternatively, an article may infringe a patent under the doctrine of equivalents if it uses substantially the same means, in substantially the manner, to achieve substantially the same result. Graver Tank & Manufacturing Co. v. Linde Air Products, 339 U.S. 605, 608 (1950). The

ALJ found that the Larius 8000, the Larius 3000, and the Lariette pumps each infringe, either literally or under the doctrine of equivalents, each of the patents in issue. We have compared these three models with the patent claims in issue, element by element, and adopt the ALJ's findings on this issue.

Domestic industry

In patent-based section 337 investigations, the domestic industry is ordinarily defined as those facilities of the patentee and of its licensees which are devoted to the lawful manufacture and/or sale of products which are covered by the patent(s) in issue. Certain Spring Assemblies and Components Thereof, and Methods for Their Manufacture, Inv. No. 337-TA-88, p. 40 (1981); Chain Door Locks, Inv. No. 337-TA-5, p. 35 (1976); Trade Reform Act of 1973: Report of the Committee on Ways and Means, H. Rept. 93-571, 93d Cong., 1st sess., p. 78 (1973). In Certain Apparatus for the Continuous Production of Copper Rod, Inv. No. 337-TA-52, pp. 54-55 (1979), the Commission defined the domestic industry as that portion of complainant's business devoted to the development, sale, servicing, and licensing of the copper rod producing systems in issue, as well as that part of the business of subcontractors devoted to the manufacture of parts for the copper rod systems.

The ALJ applies this analysis and concludes that complainant represents the major portion of a domestic industry for purposes of section 337. 1/ We concur with the ALJ, but only in part. It is true that the complainant is the owner of the patents in issue and that it manufactures and sells in the United

1/ According to the ALJ, complainant's licensee, HERO constitutes the balance of the domestic industry. The role of HERO in this investigation is discussed below.

States pumps which fall within the teachings of those patents. Nevertheless, only half of its manufacturing and marketing facilities is devoted to pumps which are covered by the patents in issue. It is therefore appropriate to include only this portion of complainant's total operation in the domestic industry.

The ALJ recommends that HERO, complainant's licensee under the subject patents, be included within the domestic industry. HERO is a Canadian company which manufactures pumps covered by the subject patents. It sells a significant number of the subject pumps in the United States to small businesses which in turn rent them to contractors. ^{1/} CX 200(2); Tr. 330. HERO employs 2 salesmen and 25 distributors in the United States. Tr. 331. These distributors store HERO pumps, demonstrate them to prospective buyers, and service HERO pumps under warranty. Tr. 330-331, 347.

The parties and the ALJ rely upon the Commission Opinion in Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69 (1981) for their characterization of HERO's U.S. operations as part of the domestic industry. This reliance is well-placed. The value added (in the form of warranty repairs) by HERO distributors in the United States to the Canadian-made product is indistinguishable from that added by complainant in the United States to its foreign-manufactured product in Airtight Cast-Iron Stoves. Inasmuch as the value added to a product in the United States is a significant factor in determining whether the U.S. operation of a foreign corporation is part of the domestic industry, the frequent servicing required by the pump in

^{1/} There is no evidence of record regarding the percentage of HERO's production which is exported to the United States.

issue over its lifetime demonstrates that HERO's U.S. operation related to the patents in issue is part of the domestic industry in this case.

Efficient and economic operation of the domestic industry

The ALJ concludes that the domestic industry is "efficiently and economically operated" within the meaning of section 337. If the domestic industry is limited to that portion of the complainant's operation which produces pumps covered by the patents in issue, his conclusion is manifestly correct.

Complainant's factory is modern and efficient, featuring a highly sophisticated computerized machining center. 1/ Tr. 273-274, 280. The operation of complainant's facility, including its inventory management, is regulated by a computerized planning system. Tr. 280-281. This computerization results in a significant saving in production costs. Tr. 280-281.

The efficiency of complainant's operation is also reflected in the composition of its work force. From 1976 to 1979, the number of employees associated with actual manufacturing and engineering of complainant's pumps increased significantly faster than did the number of employees assigned to the administration and marketing divisions. CX 204(5).

Nationally, the average research and development expenditure as a percentage of sales for firms with less than 1000 employees was 1.5 percent in 1975 and has declined in each successive year. Tr. 379. In contrast,

1/ One witness testified that the efficiency of complainant's factory compared quite favorably with that of the Larius facility. Tr. 274-275.

complainant maintains a large staff of engineers and has made significant investments in research and development. Tr. 275, 278.

There is no direct evidence on the record to indicate that HERO's U.S. operation is well-run. However, there was testimony to the effect that HERO competes effectively in the high-risk rental market. The fact that HERO's product is price competitive in that market and that its level of importation into the United States has generally increased in recent years is at least indirect evidence that its U.S. operation is efficiently and economically operated. Even if HERO were inefficiently managed, its small share of the domestic market would not alter our conclusion in this investigation that the domestic industry as a whole is efficiently and economically operated. CX 200(2), 204(12).

Effect or tendency to substantially injure, or to prevent the establishment of, a domestic industry

The ALJ recommends that the Commission determine that the unfair acts complained of herein have the effect or tendency of substantially injuring the domestic industry. He also recommends that the Commission determine that the alleged importation has the effect or tendency of preventing the establishment of an industry in the United States. We find complainant's evidence of present injury to the domestic industry to be unconvincing. However, on the facts of this investigation, we believe that complainant has established a prima facie case of tendency to substantially injure. Finally, we determine that the domestic industry is too well established to permit a finding of the prevention of the establishment of a domestic industry.

Complainant has presented evidence of present injury to the domestic industry from the unfair acts alleged. However this evidence does not establish a case for present substantial injury. Since January 1980, complainant has lost a small number of sales to the respondents in Southern New England and in California. CX 203(6), 206(4). Although complainant argues that these customers may represent only a small portion of total lost sales, it was unable to demonstrate the likelihood that significant lost sales had occurred.

Complainant also presented expert testimony to the effect that respondents' presence in the U.S. market has restrained complainant's ability to raise its prices to meet increased costs. CX 204(17-22). Complainant arrives at this conclusion by comparing the pricing patterns of its ST-8000, ST-3000 and ST-2000 models which compete with respondents' products, and of complainant's ST-1000 which does not compete. During the period immediately before the importation complained of, complainant was able to raise the prices of the ST-8000, ST-3000 and ST-2000 faster than its price for the ST-1000. After the importation, the price of the ST-1000 increased faster than did the prices for the ST-8000, ST-3000 and ST-2000. Complainant's witness expressed his belief that the different rates of price increases between those product lines which compete with the imported product and the one which does not are attributable to price restraint pressure on complainant as a result of the unfair competition alleged. The witness testified that a declining rate of price increases and growing costs of production are destroying complainant's profits and may drive it out of business.

There are at least two problems with complainant's argument. First, the accounting figures are singularly subject to manipulation, particularly in a default case. Second, complainant's analysis has not established a causal relationship between the alleged pricing pattern and the subject imports, nor has it supplied information sufficient for us to draw an inference of a causal relationship.

Other evidence regarding complainant's financial condition is ambiguous. One witness testified that complainant was experiencing excess capacity because of the imports. Tr. 272. Yet there was other testimony suggesting that complainant intended to use this unutilized capacity to produce pump components which have heretofore been imported. Tr. 273. The employment figures do not suggest that complainant has difficulties resulting from the complained of importations. CX 204(7). Finally an examination of complainant's gross profitability indicates that complainant is more successful with those pumps which compete with the imports than with those that do not. CX 204(13).

While complainant has not been able to determine the level of market penetration by respondents, it has established that the imports significantly undersell the domestic product. Complainant has received numerous complaints from customers and distributors regarding this margin of underselling. CX 214; Tr. 292, 320. The Commission investigative attorney has calculated the following retail price differentials for the three sets of corresponding models:

<u>Complainant's Models</u>		<u>Respondents' Models</u>		<u>Differential</u>
ST 2000	\$1,750	Larriette	\$1,127	\$623
ST 3000	\$2,200	3000	\$1,716	\$484
ST 8000	\$2,700	8000	\$2,299	\$401

The most serious complaint has come from Rubberset Co., which has threatened to transfer its account from the complainant to the respondents. Rubberset is a buyer for Sherwin-Williams Corp., the largest distributor of paint spray equipment in the United States. Tr. 269. Respondents have already offered to sell to Rubberset pump equipment identical to complainant's at a price lower than that offered by complainant. CX 210; Tr. 305. Rubberset has demanded that complainant defend its patents or face the loss of Rubberset's business. CX 209, CX 210; Tr. 294, 302, 305-307. In view of the fact that Rubberset has accounted for a substantial percentage of complainant's sales of professional airless diaphragm paint spray equipment over the last few years, such a loss would be devastating to the domestic industry. Tr. 307, 311.

This tendency to injure is made more credible by respondents' capacity to produce infringing pumps. Although respondent Larius has refused to answer requests for admissions, one expert has estimated its potential production capacity to be approximately 15,000 to 20,000 professional pumps per year. Tr. 14, 84. Coupled with this capacity is a clear intent to enter the U.S. market. Respondents annually distribute 10,000 catalogues to potential customers in the United States. Tr. 289. Although there is no specific evidence regarding injury to HERO's U.S. operation, their operation is too small a portion of the domestic industry to alter our analysis of tendency to injure the domestic industry. CX 200(2).

There is no allegation in the notice of investigation that the unfair acts complained of have the effect or tendency of preventing the establishment

of a domestic industry. However, during the prehearing conference, complainant requested the ALJ to add such an allegation to the notice. The ALJ has recommended that complainant's request be granted 1/ and further, that the Commission determine that the establishment of a domestic industry is in fact being prevented.

We grant complainant's request to amend the notice. However, with respect to the substantive issue of "prevention" itself, we disagree with the ALJ. The "prevention of establishment" provision of section 337 may be applied to a complainant which has "just begun manufacturing operations and for which § 337 violations would have the effect or tendency of frustrating efforts to stabilize such operations." Certain Ultra-Microtome Freezing Attachments, Inv. No. 337-TA-10, p. 10 (1976). Admittedly, complainant began producing the subject pumps as recently as 1977 and is still quite small compared to some pump manufacturers. However, it is by no means a nascent enterprise struggling to stabilize its operation. As discussed below, it operates a sophisticated modern factory. Its business relations show every indication of being effectively managed. Finally, its total sales have been quite stable over the past 5 years. CX 204(12).

1/ Amending the pleadings (i.e., the notice) to conform to the evidence is governed by section 210.22(b) of the Commission's Rules of Practice and Procedure which states in pertinent part:

When issues not raised by the pleadings or notice of investigation, but reasonably within the scope of the pleadings and notice, are considered during the taking of evidence by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings and notice.

Remedy, bonding, and the public interest

1. Remedy

Both the complainant and the Commission investigative attorney recommend that the Commission issue a general or "blanket" exclusion order in the event that it determines that section 337 has been violated. We believe, however, that a limited exclusion order directed solely against infringing pumps manufactured by Larius is the most appropriate remedy.

Upon the determination of a section 337 violation based upon infringement of a U.S. patent, the Commission, having decided that an exclusion order is the appropriate remedy, has traditionally resorted to the remedy of a general exclusion order when the patent in question is of a sort which might readily be infringed by foreign manufacturers who are not parties to the Commission's investigation. However, we must recognize that such broad exclusion orders may, in addition to protecting a U.S. patent owner from infringing imports, unintentionally stifle the flow of legitimate trade. First, there is the practical reality that customs officials burdened with massive workloads may not be able to perform accurately the often complex analysis necessary to determine infringement. When in doubt about whether an imported product is infringing in such cases, a prudent customs official may decide to exclude the articles, in effect shifting the burden on the question of infringement to importers who may not have been participants in our proceeding. Although the importer of such noninfringing articles may appeal their exclusion, that process is slow, costly and uncertain. Second, a foreign manufacturer of noninfringing articles, who is merely contemplating entry into the U.S.

market, may decide not to do so because of the business uncertainties created by the general exclusion order. In that instance, such broad relief would have an unintended chilling effect upon foreign trade.

On the other hand, a domestic patentee should not be compelled to file a series of separate complaints against several individual foreign manufacturers as it becomes aware of their products in the U.S. market. Such a practice would not only waste the resources of the complainant, it would also burden the Commission with redundant investigations.

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

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

1/ It is hoped that this suggested category of evidence will encourage complainants to include in an investigation all those foreign manufacturers which it believes have entered, or are on the verge of entering, the domestic market with infringing articles.

- (2) the pendency of foreign infringement suits based upon foreign patents which correspond to the domestic patent in issue;
- (3) other evidence which demonstrates a history of unauthorized foreign use of the patented invention.

Among the evidence which might be presented to prove the "business conditions" referred to above would be:

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

Applying this balancing test to the facts of the instant case, we determine that the complainant has not established a widespread pattern of unauthorized use of the patented article nor such business conditions as would suggest that foreign manufacturers other than respondent Larius will enter the U.S. market with infringing articles. Although there are several foreign patents which correspond to those in issue here, there is no evidence of

infringement suits based upon those foreign patents. Second, the Commission's finding of infringement is based upon the acts of only one foreign manufacturer. While there is a history of use of the patented inventions abroad, such use appears, for the most part, to be authorized rather than adverse. Although the list of factors discussed above is not exclusive, nor is any of these factors to be considered determinative, the record before us does not reveal a widespread pattern of unauthorized use in the world market of the patented invention.

With respect to the question of business conditions which would encourage future unauthorized importation of infringing pumps, the complainant has presented little evidence. Further, complainant has not established that the technological skills necessary to manufacture pumps under the patents are so widespread that further infringing imports can be expected.

2. Public interest

The Commission may order a remedy only "after considering [the remedy's] effect . . . upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers" 19 U.S.C.

§ 1337(d)-(f). Consideration of these public-interest factors is "paramount in the administration of the statute." S. Rep. No. 93-1298, 93d Cong., 2d Sess. 193 (1974). The Commission solicited comments with respect to the public interest in its published notice of the final hearing. Comment was received only from the complainant and the Commission investigative attorney who argued in favor of relief.

Our limited exclusion order will have no adverse impact on the public health and welfare. Spray pumps are not an essential item for the preservation of the public health and welfare. Cf., Acceleration Tubes, Inv. No. 337-TA-67 (1980); Crankpin Grinders, Inv. No. 337-TA-60 (1979).

There will be no adverse impact on competitive conditions in the U.S. economy, on the production of like or directly competitive articles in the United States, or on the consumer. While exclusion of infringing imports will eliminate from the marketplace a lower-priced alternative to the complainant's pumps, there are many other noninfringing pumps available to the consumer that directly compete with complainant's products. Complainant's ability to raise prices after its patent monopoly is restored will therefore be tempered by other competitive forces. ^{1/} Additionally, complainant has the ability to satisfy the entire U.S. market demand for its patented product.

In conclusion, we determine that there are no foreseeable effects on the competitive conditions in the U.S. economy, on the production of like or directly competitive articles in the United States, or on the consumer that are so adverse as to outweigh the need to remedy the unfair acts we have found to exist.

3. Bonding

Section 337(g)(3) permits entry of articles under bond during the Presidential review period. Although no explicit standards are set for the

^{1/} Commissioner Bedell notes that there has been no persuasive information developed during the course of this investigation regarding complainant's ability, if any, to raise prices, and further notes that there has been no suggestion that complainant may by its pricing practices abuse its patent rights should relief be granted. In the absence of such information in this investigation, Commissioner Bedell concludes there will be no adverse impact on United States consumers by her recommended remedy.

level of the bond in the statute, the Senate Finance Committee Report on the 1974 amendments to section 337 indicates that the bond is to be set at a level sufficient to "offset any competitive advantage resulting from the unfair method of competition or unfair act enjoyed by the persons benefiting from the importation." S. Rep. No. 98, 1298, 93d Cong., 2d Sess. 198 (1974).

Complainant has requested that a bond be set at 100 percent of the value of subject pumps. But the only justification offered in support of this figure is that the imported pumps undersell the domestic product. The Commission investigative attorney recommends a 32 percent bond on the ad valorem price of the subject pumps. He arrives at this figure by calculating the retail price differential between the three types of domestic pumps and their imported counterparts. These differentials are:

- (1) 17.8 percent of the Larius 8000;
- (2) 28.1 percent of the Larius 3000; and
- (3) 50.6 percent of the Larriette.

The 32 percent figure represents the average of these differentials.

We believe that the bond in this investigation should be determined on the basis of price differentials, but there is no reason to average the differentials. A separate bond for each model is more appropriate. We have therefore ordered that.

ADDITIONAL VIEWS OF VICE CHAIRMAN MICHAEL J. CALHOUN
AND COMMISSIONER EUGENE FRANK

We well understand and concur with the policy, relied upon by the majority, which perceives a general exclusion order as an extraordinary measure. As responsible parties in an integrated international trading system, the exercise of discretionary authority ought to be managed so that conflicts with our trading partners are minimized. In this connection, general exclusion orders can, as the majority observes, "unintentionally stifle the flow of legitimate trade." Therefore, we join in the majority's views except with regard to the recommendation for and discussion of remedy. However, for the reasons discussed below, it is our view that a general exclusion order is the most appropriate remedy for this industry.

A general exclusion order in this case presents no significant risk of "chilling" the flow of legitimate trade. As a practical matter, customs officials need apply initially only the simple test of operating the imported pump. The overwhelming majority of airless paint spray pumps which maintain a low temperature level during the "standby state," as does complainant's product, would be in violaton of the patents at issue here. This test can be administered quickly by customs officials to determine the possibility of infringement. 1/ With this knowledge alone, it would seem that our public interest responsibilities would be better served by the recommendation of a general, as opposed to a limited, exclusion order. On closer inspection, however, reviewing the issue on the merits compels such a recommendation.

1/ Admittedly, more complex tests would be necessary to confirm infringement.

On the merits, the prospect of additional foreign firms shipping infringing pumps into this market is such as to render a remedy other than a general exclusion order inadequate and an unfair and unnecessary hardship on complainant. We believe a limited exclusion order to be an inadequate remedy for several reasons. Although the parties did not specifically address the question of world capacity to produce spray pumps, we may infer from evidence in the record regarding four large Japanese and two large Italian firms that there are many companies in the world producing spray pumps: Spray pumps are widely used. Spray pump manufacturing is not especially complex. Indeed, the cost is small for any spray pump maker to retool to make spray pumps covered by the patents in issue. Further, while the relevant technology for producing under the instant patents may appear complicated to the lay person, it is readily accessible to foreign companies already in the paint pump industry. Therefore, the patented spray pump in question here lends itself to rather easy manufacture by a great number of invisible foreign producers.

In addition, the ease of market entry is an incentive for foreign companies to export infringing pumps to the United States. The experience of Larius in significantly underselling the complainant in the U.S. market indicates that this market is lucrative and readily accessible. The pump at issue does not require significant further investment to produce and is a comparatively small expense item for the consumer, typically a construction contractor with substantial capital investments. In addition, the mail order network through which imported pumps may be marketed makes it difficult for complainant to detect further infringing imports.

We believe the limited exclusion order favored by the majority, in requiring the complainant to file a new petition for each new infringer they are required to ferret out, is an unnecessary burden and is patently unfair. First, it compels complainant, after winning a remedy, to continue to police the market for the same infringement perpetrated by different companies. Where the dynamics of the conditions in the market support further infringement rather than discourage it or is neutral to it, placing such a burden on the successful complainant is a hardship that ought to be demanded only for the most compelling reasons. Second, the majority's order would require that with each such discovery the successful complainant must undertake additional time-consuming and costly actions before us. Such a burden is onerous. It is at least as burdensome as requiring an importer to overcome an overly broad application of our remedy. In this case, however, there is little likelihood that an importer would ever be confronted with such a problem, so the burden imposed upon the complainant by the majority's remedy seems to us to be unnecessary.

Thus, the majority offers no compelling argument for imposing this considerable inconvenience and disadvantage on complainants other than the general interest in avoiding a chilling effect on legitimate trade. We feel that since a general exclusion order introduces no such discouragement here, coupled with evidence of the susceptibility of this industry to further infringement, our remedy is preferable if not compelled by sound policy and fairness. The practical result of the majority's remedy, in this case, then, is to emasculate the legitimate protection afforded U.S. patent holders under section 337 against the harm caused by infringing imports.

As a further matter, in Certain Headboxes and Papermaking Machine Forming Sections for the Continuous Production of Paper and Components Thereof, Inv. No. 337-TA-82, USITC Pub. No. 1138 (1981), the Commission reversed itself on the recommendation of a limited versus a general exclusion order, recommending, in the end, a limited order. The case before us can be distinguished from the Headboxes case in several respects: The articles in that investigation were large, expensive machines requiring a rather extended manufacturing period. These two factors operate as considerable disincentives to foreign manufacturers considering exportation to the United States in the face of an exclusion order issued to a different producer. Furthermore, only one such machine is sold in the United States every 2 or 3 years. Given the lag in time between the contract for sale of such a complex machine, and its actual delivery to the United States, together with the notice such a sale would attract, the domestic industry would have ample opportunity to return to the Commission for necessary relief. The self policing responsibilities faced by complainant would be minimal.

In contrast, as we observed above, the article in question here is quite simple. The technology required to produce pumps under the instant patents is immediately applicable by any number of foreign manufacturers already in the business. The cost of retooling to such a foreign company would be small. Moreover, there is little or no lag time between the order and delivery of the pump. Finally, the price of the pump is not a major investment for its domestic purchaser. Thus, an unknown foreign pump manufacturer could quietly retool its facility, applying complainant's inventions, to produce infringing pumps. The manufacturer could, then, export to and sell in the United States the infringing articles long before the complainant might become aware of the importation. This could do complainant considerable harm before complainant could bring yet another action before us for a remedy.

The prospect of quiet and quick additional injury to a domestic industry for which a tendency to be substantially injured has already been found seems, to us, to require the imposition of a general exclusion order. Our conclusion is consistent with sound policy, fairness to the industries the statute is designed to assist, and consistent with a long line of Commission precedent from which the majority now departs. 1/ In this regard, we cannot avoid observing that the majority's announcement that complainant bears the burden of proof in winning general exclusion orders 2/ is a departure from Commission practice with which we have grave concern.

It is our understanding that the parties together with the Commission share the responsibility to develop an adequate record for action under section 337. Further, the Commission, in its recommendation to the President, ought to draw from the record as a whole not just from that part of the record made by a particular party. Indeed, the heart of the Commission's function and the value of our effort is to make recommendations based upon our sound judgment as experts. While our judgment and assessment must be properly supported by the record, it of necessity must be greater than any specific fact on the record. Thus, the majority's new requirement that "complainant seeking a general exclusion order prove both a widespread pattern of unauthorized use of its patented invention and certain business conditions..." is startling in its implication about the way in which the Commission will exercise its judgment in future section 337 cases.

Public Interest

As noted by the majority, the Commission may order relief only after it has determined that such relief would not adversely affect the public

1/ Recent examples of that case law are Certain Apparatus for the Continuous Production of Copper Rod, Inv. No. 337-TA-89, USITC Pub. No. 1132 (1981); Spring Assemblies and Components Thereof, and Methods for Their Manufacture, Inv. No. 337-TA-88, USITC Pub. No. 1172 (1981); and Certain Window Shades and Components Thereof, Inv. No. 337-TA-83, USITC Pub. No. 1152 (1981).

2/ See page 18.

interest as defined by subsection 337(d). An examination of the public interest factors recited in that subsection reveals that the general exclusion order which we recommend would not have an adverse effect on the public interest.

Exclusion of all infringing pumps would not affect the public health and welfare in any sense. There would be no adverse impact on the competitive conditions in the U.S. economy, or on the production of like or directly competitive articles in the United States. Complainant retains the capacity to satisfy the entire U.S. market for its patented pumps. Moreover, there are many producers of noninfringing paint spray pumps to meet the public demand. For these reasons, we also conclude that the public interest does not preclude the imposition of the limited exclusion order favored by the majority.



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