In the Matter of

CERTAIN FLOPPY DISK DRIVES AND COMPONENTS THEREOF

Investigation No. 337-TA-203

USITC PUBLICATION 1756

SEPTEMBER 1985

United States International Trade Commission / Washington, DC 20436

UNITED STATES INTERNATIONAL TRADE COMMISSION

COMMISSIONERS

Paula Stern, Chairwoman
Susan W. Liebeler, Vice Chairman
Alfred E. Eckes
Seeley G. Lodwick
David B. Rohr

Address all communications to
Kenneth R. Mason, Secretary to the Commission
United States International Trade Commission
Washington, DC 20436

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

In the Matter of CERTAIN FLOPPY DISK DRIVES AND COMPONENTS THEREOF	Investigation No. 337-TA-203

COMMISSION ACTION AND ORDER

Background

On August 27, 1984, the Commission voted to institute the above-captioned investigation to determine whether there is a violation of section 337(a) in the unlawful importation of certain floppy disk drives and components thereof, or in their sale, by reason of alleged (1) breach of fiduciary duty and conspiracy to breach fiduciary duty; (2) misappropriation of trade secrets and proprietary information; (3) industrial espionage and sabotage of equipment and property; (4) fraud, conspiracy to defraud, and constructive fraud; (5) breach of contract, tortious breach of implied covenant of good faith and fair dealing, and interference with contract and prospective advantage; and (6) theft of property and conversion, the effect or tendency of which is to destroy or substantially injure an efficiently and economically operated domestic industry and/or to prevent the establishment of an industry in the United States.

The complainant is Tandon Corporation (Tandon) of Chatsworth, California. The respondents are the Lucky Gold-Star Group, Gold Star Tele-Electric Co., Ltd. (GST), Gold Star Co., Ltd., Lucky-Goldstar International Corp. (LGIC), Lucky-Goldstar International (Pacific), Inc., Lucky-Goldstar International, Inc. (America), Format Corporation (Format), Felix Markhovsky, Herbert Berger, G. Edward Wilka, Jay J. Ahn, and Mikhail Anisimov. Respondents Berger, Wilka, and Ahn were terminated February 5, 1985, based upon consent orders and settlement agreements.

On January 7, 1985, respondents LGIC, Lucky-Goldstar International, Inc. (America), Gold Star Co., Ltd., Lucky-Goldstar International (Pacific) Inc., Lucky-Goldstar Group, GST, Format, Anisimov, and Markhovsky filed motions for summary determination. (Motion Nos. 203-33 through -39). Some of the respondents requested that attorney's fees be awarded to them. Complainant Tandon filed responses in opposition to respondents' motions. The IA filed a response in partial support of and in partial opposition to the motions and a cross motion for termination. (Motion No. 203-46). The motions were opposed by Tandon.

On April 26, 1985, the ALJ issued an ID granting respondents' motions for summary determination based on the lack of a causal nexus between the accused imports or sales and any substantial injury, tendency to substantially injure, or prevention of establishment, with regard to complainant Tandon. As to the other issues on which summary determination was requested, the ALJ determined that there were genuine issues of material fact which precluded the granting of summary determination. The ALJ denied respondents' requests for attorney's fees.

Respondent GST, on May 6, 1985, appealed to the Commission the ALJ's denial of GST's motion for summary determination on the issue of domestic industry. On May 13, 1985, the IA and complainant Tandon filed responses in opposition to GST's appeal.

No petitions for review of the ID were received nor were comments received from other government agencies or the public. However, on May 29, 1985, the Commission decided to review the ID on its own motion on the question of a causal nexus between any alleged injury to complainant Tandon and respondents' imports or sales of the subject floppy disk drives.

Action

Having considered the record in this investigation, the Commission has determined to affirm the ALJ's determination that there is no violation of section 337 of the Tariff Act of 1930, including affirmance of the ALJ's denial of GST's motion for summary determination on the issue of domestic industry.

Order

Accordingly, it is hereby ORDERED THAT—

1. The ALJ's ID is affirmed in its finding of no violation of section 337;

2. The ALJ's denial of GST's motion for summary determination on the issue of domestic industry is affirmed; and

3. The Secretary shall serve copies of this Commission Action and Order upon each party of record to this investigation and publish notice thereof in the Federal Register.

By order of the Commission.

Kenneth R. Mason
Secretary

Issued: August 29, 1985

Certificate of Service

I, Kenneth R. Mason, hereby certify that the attached NOTICE OF COMMISSION DECISION OF NO VIOLATION OF SECTION 337 OF THE TARIFF ACT OF 1930, was served upon Victoria Partner, Esq., and upon the following parties via first class mail and air mail where necessay, on August 30, 1985.

Kenneth R. Mason, Secretary
U.S. International Trade Commission
701 E Street, N.W.
Washington, D.C. 20436

For Complainant Tandon Corporation.:

R. V. Lupo, Esq.
Jack Q. Lever, Jr., Esq.
Levine, Lupo, Lipman and Lever
1025 Connecticut Avenue, N.W., Suite 712
Washington, D.C. 20036

James A. Hamilton, Esq.
Thomas K. Bourke, Esq.
Riordan, Caps, Carbone and McKinzie
523 West Sixth Street, Suite 1234
Los Angeles, California 90014

Raymond A. Bogucki, Esq.
Louis A. Mok, Esq.
Fraser and Bogucki
3345 Wilshire Boulevard, Suite 704
Los Angeles, California 90010-1868

RESPONDENTS

For Gold Star Tele-Electric Co., Ltd.; Lucky-Goldstar International Corp.; Lucky-Goldstar International (Pacific), Inc.; Lucky-Goldstar Group.; Gold Star Company, Ltd.; Lucky-Goldstar International (America, Inc.).:

Andrew S. Newman, Esq.
Jeff Turner, Esq.
Patton, Boggs and Blow
2550 M Street, N.W.
Washington, D.C. 20037

Charles Owen Verrill, Jr., Esq.
Wiley and Rein
1776 K Street, N.W.
Washington, D.C. 20006

For Gold Star Tele-Electric Co., Ltd.:

Orville A. Armstrong, Esq.
MacDonald, Halsted and Laybourne
1200 Wilshire Boulevard
Los Angeles, California 90017

For Format Corporation.; Felix Markhovsky.; Mikhail Anisimov.; Herbert Berger.; Jay J. Ahn.; and G. Edward Wilka.:

Larry E. Klayman, Esq.
Michael R. Levy, Esq.
Law Offices Of Larry E. Klayman
1050 Connecticut Avenue, N.W.
Washington Square, Suite 300
Washington, D.C. 20036

Howard B. Brown, Esq.
Brown and Brown, P.C.
10100 Santa Monica Boulevard
Suite 2080
Los Angeles, California 90067

GOVERNMENT AGENCISE:

Mr. Charles S. Stark
Antitrust Div/U.S. Dept of Justice
Room 7115, Main Justice
Pennsylvania Avenue & Tenth Street, N.W.
Washington, D.C. 20530

Edward F. Glynn, Jr., Esq.
Asst Dir for Intl Antitrust
Federal Trade Commission
Room 502-4, Logan Building
Washington, D.C. 20580

Darrel J. Grinstead, Esq.
Dept of Health and Human Svcs.
Room 5362, North Building
330 Independence Avenue, S.W.
Washington, D.C. 20201

Richard Abbey, Esq.
Chief Counsel
U.S. Customs Service
1301 Constitution Avenue, N.W.
Washington, D.C. 20229

PUBLIC VERSION

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

CERTAIN FLOPPY DISK DRIVES AND COMPONENTS THEREOF	)	Investigation No. 337-TA-203

COMMISSION MEMORANDUM OPINION

On April 26, 1985, the presiding administrative law judge (ALJ) issued an initial determination (ID) that there is no violation of section 337 in this investigation which concerns floppy disk drives. Respondent Gold Star Tele-Electric Co. Ltd. filed an appeal to the Commission of the ALJ's denial of summary determination on the issue of domestic industry. The Commission investigative attorney (IA) and complainant filed responses to the appeal. No petitions for review were filed.

On May 29, 1985, the Commission determined on its own motion to review one issue raised by the ID: "Whether the importation or sale of respondents' floppy disk drives has caused substantial injury, or has the tendency to substantially injure, or has prevented the establishment of an industry . . . in the United States." 1/

Upon review, the Commission has determined that there is no violation of section 337 of the Tariff Act of 1930. The reasons for the Commission's determination are discussed below.

1/ 50 Fed. Reg. 24,714 (1985).

Procedural History

This investigation was instituted to determine whether there is a violation of section 337 by the unlawful importation or sale of certain floppy disk drives in the United States by reason of certain alleged unfair acts. The alleged unfair acts are (1) breach of fiduciary duty and conspiracy to breach fiduciary duty; (2) misappropriation of trade secrets and proprietary information; (3) industrial espionage and sabotage of equipment and property; (4) fraud, conspiracy to defraud, and constructive fraud; (5) breach of contract, tortious breach of implied covenant of good faith and fair dealing, and interference with contract and prospective advantage; and (6) theft of property and conversion, the effect or tendency of which is to destroy or substantially injure an efficiently and economically operated domestic industry and/or to prevent the establishment of such an industry. 2/

The complainant is Tandon Corporation (Tandon) of Chatsworth, California. The respondents are the Lucky Gold-Star Group, Gold Star Tele-Electric Co., Ltd. (GST), Gold Star Co., Ltd., Lucky-Goldstar International Corp. (LGIC), Lucky-Goldstar International (Pacific), Inc., Lucky-Goldstar International, Inc. (America), Format Corporation (Format), Felix Markhovsky, Herbert Berger, G. Edward Wilka, Jay J. Ahn, and Mikhail Anisimov. 3/

2/ 49 Fed. Reg. 35,257 (1984).

3/ Respondents Berger and Wilka on November 14, 1984, and respondent Ahn on December 6, 1984, filed motions requesting that the investigation be terminated based upon consent orders and settlement agreements. (Motions Nos. 203-22 and 203-31). On December 28, 1984, the ALJ issued IDs terminating the investigation as to respondents Berger, Wilka, and Ahn. (Orders Nos. 22 and 23). The Commission decided on February 5, 1985, not to review those IDs. 50 Fed. Reg. 6,073 (1985).

On December 6, 1984, complainant Tandon filed a motion (Motion No. 203-30) to terminate the investigation "without prejudice." Tandon urged that the public interest would best be served if the investigation was terminated because respondents were no longer a competitive threat. Tandon's motion was based on the facts that (1) respondents had no current shipments of the subject disk drives to the United States; (2) respondents had made no shipments to the United States for the past few months; and (3) [* * * * * * * * * * * * * * * * * * *]

With regard to complainant Tandon's motion, respondents moved that the investigation should be terminated, but with prejudice. (Motion No. 203-32). The IA filed a response urging that the investigation be terminated on the basis that no violation of section 337 had occurred. 4/ On January 28 and 31, 1985, the ALJ stated that termination of the investigation would be appropriate if a factual record were developed, such as by motions for summary determination. (Orders Nos. 28 and 29). 5/

On January 7, 1985, respondents LGIC, Lucky-Goldstar International, Inc. (America), Gold Star Co., Ltd., Lucky-Goldstar International (Pacific) Inc., Lucky-Goldstar Group, GST, Format, Anisimov, and Markhovsky filed motions for summary determination. (Motions Nos. 203-33 through -39). Some of the respondents requested that attorney's fees be awarded to them. Complainant

---

4/ The IA argued that the Commission has the authority to terminate an investigation on the basis of no violation of section 337 and also reserve the right to reopen the investigation if circumstances change. For example, the IA stated that if respondents resumed shipments to the United States, the investigation could be reopened.

5/ Under Commission rule 210.50, summary determination is granted to the moving party (respondents in this investigation) as a matter of law if there is no genuine issue as to any material fact. 19 C.F.R. § 210.50(b).

Tandon filed responses in opposition to respondents' motions. The IA filed a response in partial support of and in partial opposition to the motions together with a cross motion for termination. (Motion No. 203-46).

On April 26, 1985, the ALJ issued an ID granting respondents' motions for summary determination based on the lack of a causal nexus between the accused imports and any injury to complainant Tandon. More specifically, the ALJ determined that complainant could not establish that respondents' importations or sales were a cause of substantial injury to, or had prevented the establishment of a domestic industry. With regard to tendency to substantially injure, the ALJ determined that the market conditions were such that future injury could not be inferred. As to the other issues on which summary determination was requested, the ALJ determined that there exist genuine issues of material fact which precluded the granting of summary determination. The ALJ denied respondents' requests for attorney's fees.

Respondent GST filed an appeal to the Commission of the ALJ's denial of GST's summary determination motion on the issue of domestic industry. On May 13, 1985, the IA and complainant Tandon filed responses in opposition to GST's appeal. No petitions for review or comments from other government agencies were received.

On May 29, 1985, the Commission decided to review the ID on its own motion on the question of a causal nexus between any alleged injury to complainant Tandon and respondents' importations or sales of the imported subject floppy disk drives. 50 Fed. Reg. 24714 (1985).

Complainant, the IA, and GST filed briefs with the Commission on review. Complainant, on June 21, 1984, moved to strike GST's entire brief as non-responsive to the issue under review. In the alternative Tandon requested

that pages 5-17 of GST's brief be stricken as not directed to the issue under review. GST responded to Tandon's motion, arguing that its brief should not be stricken because it included discussions of issues subsidiary to the single review issue specified by the Commission.

GST's appeal of the domestic industry issue

With regard to GST's appeal of the ALJ's denial of summary determination on the issue of domestic industry, we affirm the ALJ's denial of summary determination on this issue. 6/ The thrust of GST's argument is that Tandon does not use any of the trade secrets allegedly misappropriated. According to GST, Commission precedents require that the domestic industry be defined as that portion of complainant's business devoted to the exploitation of the intellectual property rights at issue. GST argues that since Tandon does not utilize the intellectual property at issue, there is no domestic industry.

The ALJ denied summary determination on this issue because the evidence presented was conflicting. For example, evidence was presented that Tandon adds significant value to those floppy disk drives it manufactures offshore and that one of the Tandon drives is functionally equivalent to the disk drive that would have been produced by Tandon if the alleged trade

---

6/ Commissioner Rohr concurs that it was proper for the ALJ to deny summary judgment on the issue of domestic industry because there were significant factual issues left to to be resolved. He disagrees, however, with the Commission's procedural handling of this issue. The Commission took the position that because the ALJ ruled negatively on the issue of domestic industry, the decision on this issue was not to be considered part of the overall initial determination (ID) that the ALJ made on the issue of summary determination. Commissioner Rohr notes that there is some ambiguity in the Commission's rules. He believes, however, that the better interpretation of the rules is that all issues on which the ALJ rules in the course of granting a motion for summary determination should be considered part of the ID. See Rules 210.50, 210.52, 210.53(c), and 210.53(d).

secrets had not been misappropriated. 7/ We, therefore, affirm the ALJ's finding that there are significant factual issues remaining that preclude summary determination on this issue.

Tandon's motion to strike GST's brief

We have determined to deny complainant Tandon's motion to strike GST's brief. The Commission's notice with regard to review stated that we would review the following issue:

> Whether the importation or sale of respondents' floppy disk drives has caused substantial injury, or has the tendency to substantially injure, or has prevented the establishment of an "industry . . . in the United States." 8/

Parties must, of course, limit their submissions on review to the issues specified by the Commission in its notice of review. While the intent of the Commission, in the present investigation, is to review the ID on the issue of causation, we recognize that there are subsidiary issues that may necessitate a party discussing issues beyond that of causation. For example, in order for the Commission to review the causation issue in the present investigation, the Commission must assume for the sake of argument, as the ALJ did, that the other elements of a section 337 violation are present, i.e., unfair acts, importation or sale, existence of a domestic industry, and economic injury. GST, therefore, may have considered it necessary to discuss the domestic industry issue in order to fully brief the causation issue. 9/ For these reasons, we have determined to deny Tandon's motion to strike GST's brief.

7/ ID at 44-47.

8/ 50 Fed. Reg. 24714.

9/ We note that a significant portion of complainant's submission on review is directed toward establishing the allegedly unfair acts of respondents.

Injury and causation

For purposes of our review, we have assumed that the respondents have committed unfair acts, that there is an efficiently and economically operated domestic industry, and that complainant has suffered substantial injury. We have analyzed the facts of the present investigation against this background to determine whether respondents' importations or sales of imported floppy disk drives have caused substantial injury, have a tendency to substantially injure, or have prevented the establishment of a domestic industry. Based on our analysis, we affirm the ALJ and conclude that respondents' importations or sales have not caused substantial injury nor prevented the establishment of a domestic industry. With regard to tendency to substantially injure, we affirm the ALJ and conclude that the current market conditions indicate that future injury is unlikely and that there is no tendency to substantially injure the domestic industry. We have, therefore, concluded that there is no violation of section 337.

The ALJ stated in his discussion concerning substantial injury that "§ 337 is not violated when the unfair acts and injury are substantially separated in time from the imports so that there is no relationship between the economic injury and the importation of the articles in issue." 10/ The statement is correct in conveying the idea that a causal nexus must exist between imports or sales and economic injury. However, lest the statement be misunderstood, we note that that causal nexus is not time dependent. In the present investigation, the alleged unfair acts are, inter alia, misappropriation of trade secrets and proprietary information, and the

10/ ID at 54.

alleged injury is the economic loss which complainant experienced when the alleged unfair acts made complainant unable to compete for the business of original equipment manufacturers during a "window of opportunity" which existed at that time. It is a fact that these alleged unfair acts and this alleged injury occurred approximately one-year before respondents' allegedly competing products were imported. That fact is irrelevant with regard to causation. What is relevant and dispositive is that complainant has not established that respondents' imports/sales, no matter when they occurred, have caused substantial injury to the domestic industry. Thus, we affirm the ALJ's determination that respondents' imports/sales have not caused substantial injury to the domestic industry.

PUBLIC INSPECTION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN FLOPPY DISK DRIVES AND COMPONENTS THEREOF

Investigation No. 337-TA-203

INITIAL DETERMINATION

Sidney Harris, Administrative Law Judge

This is the administrative law judge's Order of Summary Determination in the Matter of Certain Floppy Disk Drives and Components Thereof, Motion Nos. 203-33 through 203-39 and 203-46. An order of summary determination by an administrative law judge shall constitute an initial determination. 19 C.F.R. §§ 210.50(f), 210.53(c).

The administrative law judge hereby determines that a genuine issue of material fact exists in this investigation with respect to the alleged unfair methods of competition or unfair acts and the alleged existence of an industry, efficiently and economically operated, in the United States such that movants are not entitled to summary determination as to these issues as a matter of law. The administrative law judge, however, also determines that movants are entitled to summary determination as to the alleged effect or tendency of the unfair acts to destroy or substantially injure the alleged domestic industry and/or to prevent the establishment of such an industry in the United States.

For the above reason, it is the administrative law judge's Initial Determination that there is no violation of § 337 of the Tariff Act of 1930, as amended.

TABLE OF CONTENTS

I. PROCEDURAL HISTORY

On August 1, 1984, Tandon Corporation, Chatsworth, California, filed a complaint and a motion for temporary relief under section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337). A supplement to the complaint was filed on August 13, 1984. The complaint, as supplemented, alleges unfair methods of competition and unfair acts in the importation of certain floppy disk drives and components thereof into the United States, or in their sale, by reason of alleged (1) breach of fiduciary duty and conspiracy to breach fiduciary duty, (2) misappropriation of trade secrets and proprietary information, (3) violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68, (4) industrial espionage and sabotage of equipment and property, (5) fraud, conspiracy to defraud, and constructive fraud, (6) breach of contract, tortious breach of implied covenant of good faith and fair dealing, and interference with contract and prospective advantage, and (7) theft of property and conversion. The complaint further alleges that the effect or tendency of the unfair methods of competition and unfair acts is to destroy or substantially injure an efficiently and economically operated domestic industry and to prevent the establishment of an industry in the United States.

On August 27, 1984, the Commission ordered pursuant to 19 U.S.C. § 1337(b) that an investigation be instituted to determine whether there is a violation of 19 U.S.C. § 1337(a) with respect to the subject articles by reason of alleged (1) breach of fiduciary duty and conspiracy to breach fiduciary duty, (2) misappropriation of trade secrets and proprietary information, (3) industrial espionage and sabotage of equipment and property, (4) fraud,

conspiracy to defraud, and constructive fraud, (5) breach of contract, tortious breach of implied covenant of good faith and fair dealing, and interference with contract and prospective advantage, and (6) theft of property and conversion, the effect or tendency of which is to destroy or substantially injure an efficiently and economically operated domestic industry and/or to prevent the establishment of an industry in the United States. Notice of Investigation, 49 Fed. Reg. 35,257 (Sept. 6, 1984). The Commission pursuant to 19 C.F.R. § 210.24(e), also forwarded to the Office of the Administrative Law Judges complainant's motion for temporary relief under 19 U.S.C. §§ 1337(e) and (f) for an initial determination under 19 C.F.R. § 210.53(b). Id. The Notice of Investigation and complaint were served on parties and interested government agencies either by first-class mail or air mail on August 31, 1984. The Notice of Investigation was published in the Federal Register on September 6, 1984.

The following persons were named as respondents in this investigation:

The Lucky-Goldstar Group
537 Namdaemun-ro 5-ga
Jung-gu, Seoul 100, Korea

Gold Star Tele-Electric Co., Ltd.
60-1 Chungmu-ro 3-ga
Jung-gu, Seoul 100, Korea

Gold Star Co., Ltd.
537 Namdaemun-ro 5-ga
Jung-gu, Seoul 100, Korea

Lucky-Goldstar International Corp.
537 Namdaemun-ro 5-ga
Jung-gu, Seoul 100, Korea

Lucky-Goldstar International (Pacific), Inc.
13013 East 166th Street
Cerritos, California 90701

Lucky-Goldstar International, Inc.
1050 Wall Street West
Lyndhurst, New Jersey 070701

Format Corporation
2630 Townsgate Road
Building A
Westlake Village, California 91307

Felix Markhovsky
23447 Mobile Street
Canoga Park, California 91307

Herbert Berger
766 East Lakefield Road
Westlake Village, California 91361

G. Edward Wilka
3480 Brokenhill
Newbury Park, California 91320

Jay J. Ahn
c/o Lucky Goldstar Imports/Exports
1281 Oakmead Parkway
Sunnyvale, California 94086

Victoria L. Partner, Esq., Unfair Import Investigations Division, was designated the Commission investigative attorney. 49 Fed. Reg. 35,257 (Sept. 6, 1984). The Commission investigative attorney is a separate and independent party to this proceeding. 19 C.F.R. § 210.4(b).

Chief Administrative Law Judge Janet D. Saxon designated Administrative Law Judge Sidney Harris to preside over this investigation.

On September 17, 1984, respondents Gold Star and Lucky-Goldstar International (America) filed separate motions to dismiss each as a party to this investigation. Motion Nos. 203-2, 203-3. Both respondents asserted that they have no connection with the events that are the subject of this investigation. Order No. 3, issued September 26, 1984, considered these

motions as requests for summary determination and found that respondents had failed to show that there was no genuine issue as to any material fact which would entitle them to summary determination as a matter of law.

On September 18, 1984, respondent The Lucky-Goldstar Group filed a motion to dismiss it as a party to this investigation. Motion No. 203-4. Respondent asserted that it cannot be a respondent because it does not exist as a legal entity under the law of the Republic of Korea and thus cannot be an owner, importer, consignee or agent of the subject articles. The administrative law judge held that the assertion that The Lucky-Goldstar Group does not legally exist under Korean law is not determinative of its capacity to be named as a respondent in this investigation under the Commission's Rules of Practice and Procedure and the laws of the United States. Capacity to sue and be sued are rules of procedure to be determined by the forum. See Fed. R. Civ. P. 17. A respondent is defined as any person named in the notice of investigation (19 C.F.R. § 210.4(f)), while a person is defined as an individual, partnership, corporation, association, or public or private organization (19 C.F.R. § 201.2(i)). Order No. 4, issued September 26, 1984, held that respondent may be a partnership or association and certainly had all the indicia of a private organization.

On September 24, 1984, Tandon filed a motion to add as respondents in this investigation individuals identified as chief executives for The Lucky-Goldstar Group. Motion No. 203-6. Complainant asserted that these individuals should be added as respondents because of the control exercised by The Lucky-Goldstar Group over the other Korean respondents and its uncertain legal status under Korean law. A person will be joined as a party if in his

absence complete relief cannot be accorded among those already party to the action. Fed. R. Civ. P. 19(a). Order No. 8, issued October 12, 1984, held that the absence of the individuals named did not deprive complainant of complete relief under § 337 and denied the motion.

On October 1, 1984, respondents Herbert Berger, G. Edward Wilka, Jay J. Ahn, Felix Markhovsky, Mikhail Anisimov, and Format Corporation filed a motion to dismiss the complaint or, alternatively, for an order to terminate this investigation. Motion No. 203-10. Respondents denied all the allegations of unfair trade practices set forth in the complaint. Respondent individuals asserted that they had not in their personal capacities participated in the importation of the subject article into the United States and respondent Format asserted that it ceased the importation and sale of the subject article over one month before the complaint was filed and had no intention to engage in future importation and sale of this merchandise. Messrs. Berger, Wilka, and Ahn also asserted that the cause of action for constructive fraud should be dismissed because they never entered into a confidential relationship with Tandon. Order No. 11, issued October 23, 1984, viewed most aspects of this motion as a request for summary determination and found that respondents had failed to show that there was no genuine issue as to any material fact that would entitle them to a determination as a matter of law. Order No. 11 also found that the subject matter jurisdiction of the Commission under § 337 is not limited to those acts which occur during the actual process of importation. The Commission's jurisdiction is established if there is some nexus between the unfair acts and importation. In re Certain Molded-In Sandwich Panel Inserts, 218 U.S.P.Q. 832, 835 (1982). Finally, the

administrative law judge held that he was unable to terminate an investigation under Rule 210.51(d) based upon one party's representation that it did not intend to engage in the future importation or sale of the subject merchandise and urged the parties to make a good faith effort to reach settlement.

A preliminary conference was held in this matter on October 4, 1984. Appearances were made on behalf of complainant Tandon, all respondents, and the Commission investigative attorney. Given the representation made by the parties at the October 4 conference and an October 5 letter filed by counsel for the respondent individuals, complainant's motion for temporary relief was withdrawn. Order No. 9 (Oct. 12, 1984). The parties agreed to proceed according to an expedited schedule on the issue of permanent relief.

On November 14, 1984, Messrs. Berger and Wilka and on December 6, 1984, Dr. Ahn, filed joint motions with complainant and the Commission investigative attorney to terminate this investigation based upon consent orders and settlement agreements. Motion Nos. 203-22, 203-31. Respondents consented to entry of an order by the Commission which would bar them from importation into and sale in the United States of the relevant disk drives. Respondents also agreed not to form any new business enterprise or otherwise own or participate in any new company which would import into or sell in the United States the subject articles and to respond voluntarily to all discovery requests. On December 28, 1984, the administrative law judge issued initial determinations terminating this investigation as to respondents Messrs. Berger, Wilka, and Ahn. Order Nos. 22, 23. The Commission decided on February 5, 1985, not to review these initial determinations. 50 Fed. Reg. 6,073 (Feb. 13, 1985).

On December 6, 1984, Tandon filed a motion to terminate this investigation without prejudice. Motion No. 203-30. Respondents filed responses to complainant's motion on December 12 and 13, 1984, and also urged the administrative law judge to terminate this investigation, but with prejudice. See Motion No. 203-32 (Gold Star Tele-Electric). The Commission investigative attorney filed a response in support of complainant's motion but argued that termination should be made on the basis of a determination that no violation had occurred and that certain conditions should be specified as to the circumstances under which complainant could modify the determination or file a new complaint based upon changed circumstances. Oral argument on complainant's motion was set for December 20, 1984. Order No. 20 (Dec. 14, 1984).

Complainant sought dismissal of this investigation because it believed respondents did not currently represent a competitive threat to it in the domestic floppy disk drive market: (1) there were no current shipments of the subject articles by respondents to the United States; (2) there had been no shipments by respondents to the United States for the past few months; and

C* (3)

C . Tandon, Response to Order No. 20 and Motion 203-32, at 4; id., Proposed FF, ¶¶ 10-20. While Tandon believed the evidence supported a finding of a § 337 violation and was prepared to proceed to trial, it asserted that the public interest would be better served by termination of this investigation without prejudice. Complainant also requested that the investigation be terminated provided it retained the right to reinstitute the

C = confidential.

investigation should respondents resume shipping the article at issue. If dismissal of the investigation did not contain this specification, complainant wished to proceed to hearing and prove its case.

On the basis of the references to discovery contained in complainant's motion, the administrative law judge was unable to conclude that injury could not be proved: "[A] cessation by respondents of shipments to the United States does not provide a basis to moot an investigation." Order No. 21, at 5 (Dec. 26, 1984). The Korean respondents claimed that complainant's motion represented a failure to prosecute because of complainant's inability to prove certain essential allegations of the complaint. Complainant denied that it would be unable to prove the allegations. Therefore, the administrative law judge at the close of oral argument denied the motions to terminate, reset the date for a hearing in this investigation, and established a procedure whereby all parties could file motions for summary determinations on any or all issues in the investigation. See id., at 9. Through utilization of the summary determination procedure, and the resulting initial determination or order establishing facts, "we may learn whether or not there is any basis to dismiss this investigation on the grounds that respondents are incapable of causing substantial injury to the relevant domestic industry." Id., at 5; see id., at 9.

Complainant on January 10, 1985, and the Commission investigative attorney on January 14, 1985, filed motions for reconsideration of Order No. 21 or, in the alternative, for certification of Order No. 21 to the Commission. Motion Nos. 203-40, 203-43. The administrative law judge considered that

clarification of Order No. 21 was appropriate as to the following issues. First, a plain-meaning interpretation of 19 C.F.R. §§ 210.51(a) and (b) indicates that any party may move at any time for an order to terminate an investigation, "[b]ut we decide cases and controversies and act in the context of established facts." Order No. 28, at 2 (Jan. 28, 1985). Given the variant positions of the parties, it would be impossible to dismiss the investigation unless there were an adjudicated decision by which to establish the pertinent facts. "Because it is desirable to terminate an investigation when all parties desire to do so but differ only upon the terms and conditions of the dismissal, the administrative law judge devised a means to develop a factual record [the filing of motions for summary determination] to determine whether this investigation could be terminated without the necessity of a full hearing." Id., at 3; see Order No. 29, at 2 (Jan. 31, 1985).

Second, termination of an investigation is appropriate where the potential remedy is not necessary. The public interest determination implicitly found in the Commission's decision to institute an investigation should not ordinarily be reviewed at each interim procedural step prior to a settlement or an adjudication on the record. Order No. 28, at 3-4; Order No. 29, at 2. "The filing of motions to terminate based upon a decision by respondents to halt shipments of the article at issue to the United States during the course of an investigation provide no basis to review whether the continuation of an investigation remains in the public interest when there appears, as here, to be sufficient evidence in the discovery record that a tendency to injure continues to exist." Order No. 28, at 4; Order No. 29, at 2.

Finally, an investigation can be decided on the basis of a single dispositive issue, though this is a matter of discretion. "Summary judgment motions filed as to all issues open the possibility of ruling on a single issue or a group of issues." Order No. 29, at 3; see Order No. 28, at 4.

On January 7, 1985, respondents Lucky-Goldstar International (Motion No. 203-33), Lucky-Goldstar International (America) (Motion No. 203-34), Gold Star (Motion No. 203-35), Lucky-Goldstar International (Pacific) (Motion No. 203-36), The Lucky-Goldstar Group (Motion No. 203-37), Gold Star Tele-Electric (Motion No. 203-39), and Format, Mikhail Anisimov, and Felix Markhovsky (Motion No. 203-38), filed motions for summary determination. These motions were filed after the end of discovery. Complainant Tandon did not file a motion for summary judgment, but on January 18, 1985, filed responses in opposition to respondents' motions.

The Commission investigative attorney filed a motion for leave to respond to complainant's opposition to Gold Star Tele-Electric's and Format's motions for summary determination. Motion No. 203-45. Motion No. 203-45 is hereby granted. The Commission investigative attorney also filed a response in partial support of and in partial opposition to these motions for summary determination and cross motion for termination. Motion No. 203-46.

Order No. 30, issued February 20, 1985, cancelled the hearing in this investigation. The administrative law judge determined that he was able to render a decision as to whether there has been a violation of § 337 on the basis of the motions for summary determination.

II. JURISDICTION

Pursuant to § 337 of the Tariff Act of 1930, as amended, the U.S. International Trade Commission has jurisdiction over unfair methods of competition and unfair acts in the importation into or sale in the United States of products the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. Therefore, the Commission has jurisdiction to investigate the unfair methods of competition and unfair acts alleged in the complaint and set forth in the Notice of Investigation to determine whether there exists a violation of § 337.

Service of the complaint and Notice of Investigation was perfected as to all respondents. Each respondent, individually or in conjunction with other respondents, has filed a response to the complaint pursuant to Rule 210.21.

The Lucky-Goldstar Group continues in its motion for summary determination to maintain that it is not a proper respondent to this investigation. Motion 203-37. For the reasons set forth in Order No. 4, issued September 26, 1984, LGG is appropriately named as a respondent in this investigation pursuant to Rules 210.2(i) and 210.4(f).

I find that the U.S. International Trade Commission has subject matter jurisdiction over the floppy disk drives and components thereof at issue in this investigation that have been imported into or sold in the United States.

III. SUMMARY DETERMINATION

A. Background: Motions for Termination.

On December 6, 1984, complainant Tandon Corporation filed a motion to terminate this investigation without prejudice. Motion No. 203-30. On December 14, 1984, respondent Gold Star Tele-Electric Co. (GST) filed both a response to complainant's motion and a motion to terminate this investigation with prejudice. Motion No. 203-32.

Complainant alleged in its motion for termination that newly discovered evidence indicated that

C

C and that Format had pulled the disk drive out of the United States' market. Tandon asserted that this new evidence was in sharp contrast to the facts known just prior to the filing of the complaint. Tandon believed that the evidence supported a finding of a § 337 violation by GST and was prepared to proceed to trial, but asserted that the public interest would be better served by terminating the investigation without prejudice so it may be reopened in the future upon a showing of altered circumstances. Motion 203-30.

Respondents Format Corporation, Felix Markhovsky, Mikhail Anisimov, Lucky-Goldstar International, Lucky-Goldstar International (Pacific), Lucky-Goldstar International (America), Gold Star Co., and The Lucky-Goldstar Group all filed responses to Tandon's motion in which they also urged the administrative law judge to terminate this investigation but with prejudice. GST filed a response and motion which urged termination with prejudice. GST asserted that the evidence indicated that as of August 1, 1984, Tandon never manufactured a disk drive which incorporated any trade secret or technology

allegedly incorporated in the GST-Format disk drives and never exploited the trade secrets and technology it claimed were misappropriated. GST then asserted that Tandon's recent admission in its motion to terminate that it had not been injured compelled dismissal of this investigation with prejudice and the imposition of safeguards to protect against similar abuses in the future. Memorandum, Motion No. 203-32.

The Commission investigative attorney filed a response in support of complainant's motion, but argued that termination should be made on the basis of a determination that no violation had occurred and that certain conditions be specified in the order of dismissal regarding the circumstance under which complainant could seek to reinstitute the complaint.

Because of the novelty of the questions involved and the diversity of views expressed by the various parties, the administrative law judge scheduled the motions for oral argument. Order No. 20 (Dec. 14, 1984). The administrative law judge requested the parties to focus their attention in part upon the following legal issues:

> 1. Complainant has alleged that certain Korean respondents have an inventory of the subject disk drives and a large capacity to produce them quickly. Why is there no ability to prove injury?
>
> 2. What are the equities of the parties in these circumstances, particularly since so much effort and money has been expended in preparing for trial?
>
> 3. What course will complainant pursue if its motion is denied? Does complainanat in such circumstances wish to proceed to trial? Does it wish to abandon the complaint?

Order No. 20, at 4.

Tandon filed a response to Order No. 20 and GST's motion. Complainant asserted that it could prove that there existed an effect and tendency to injure the domestic industry under the criteria traditionally utilized by the

Commission to reach such a determination. Tandon stated that it moved to terminate this investigation because it was not economically sensible to proceed to hearing "when the facts learned through discovery, i.e., that Respondents have stopped importing and , indicate that the tendency to injure is more theoretical than tangible at this time." Response to Motion No. 203-32, at 3-4. Complainant planned to continue to press for damages in the concurrent district court litigation and added that if the administrative law judge was inclined to grant respondent's motion, Tandon wished to proceed to trial on all issues in this proceeding.

Oral argument on the motions to terminate took place on December 20, 1984. Complainant's counsel at the conference stated, "We are firmly of the belief that there are genuine issues of fact remaining as to practically all of the issues in the investigation with the exception of injury, which is why we brought the motion to terminate." Sellers, Tr. 45. Complainant's counsel later added that if the investigation proceeded to a hearing, Tandon could demonstrate a tendency to injure based on respondents' capability, but there was probably not going to be any future importation and sale of this product into the United States. Lupo, Tr. 68-69.

The administrative law judge at the close of oral argument denied the motions to terminate, reset the date for a hearing in this investigation, and established a procedure whereby all parties could file motions for summary determinations on all issues in the investigation. Tr. 82-83; see Order No. 21, at 9 (Dec. 26, 1984). "[A]ll parties seem to want it [the investigation] to be terminated, but the conditions under which they wish it terminated vary quite radically, and . . . seem to amount to a total difference in view, which

does translate into whether they want to go to trial or whether they want a termination." Tr. 24. Order 21, which followed the conference and set forth in detail the administrative law judge's decision, stated that the summary determination procedures were designed to illuminate the questions raised by the motions to terminate. "Perhaps, through utilization of the summary determination procedure, and a resulting Initial Determination or Order of Facts, we may learn whether or not there is any basis to dismiss this investigation on the grounds that respondents are incapable of causing substantial injury to the relevant domestic industry." Order No. 21, at 5 (Dec. 26, 1984).

Complainant on January 10, 1985, and the Commission investigative attorney on January 14, 1985, filed motions for reconsideration of Order No. 21 or, in the alternative, for certification of Order No. 21 to the Commission. Motion Nos. 203-40, 203-43. Complainant once again stated that it had moved for

C termination based upon information obtained through discovery that

C were no longer importing the article in question and

C . Complainant, however, at this time also stated that "it is not in the economic interest of the public or the parties to continue this investigation because the remedy available through the Commission does not appear to be necessary at this time." (Emphasis added.) Motion No. 203-43.

Given the clarification of Order No. 21, the administrative law judge denied the Commission investigative attorney's and complainant's motions, in the alternative, to certify Order No. 21 to the Commission. Order No. 28 (Jan. 28, 1985); Order No. 29 (Jan. 31, 1985). See Discussion, Opn., at 9-11.

B. Motions for Summary Determination.

Respondents Lucky-Goldstar International (LGIC), Lucky-Goldstar International (America) (LGIA), Gold Star Co. (GSC), Lucky-Goldstar International (Pacific) (LGIP), and The Lucky-Goldstar Group (LGG) allege that they have not at any time been involved in the design, engineering, manufacture, or assembly of the GST-Format floppy disk drive or any other disk drive manufactured or assembled by Gold Star Tele-Electric (GST). Motion Nos. 203-33 through 203-37. LGIA, GSC, and LGG also allege that they have never been involved in the packaging, shipping, importation into, or distribution in the United States of the subject disk drive. Motion Nos. 203-34 through 203-37. The above respondents believe that a ruling on the merits should address all substantive issues in this proceeding.

LGIC admits that it assisted in the exportation of disk drives to the United States on behalf of GST, but asserts that it has never distributed the GST disk drives within the United States. Motion No. 203-33, at 1-2; Memorandum, id., at 1, 10. LGIP admits that it assisted in the exportation of disk drive components to GST and the importation of disk drives into the United States on behalf of GST. Motion No. 203-36, at 1. Both LGIC and LGIP assert that their activity with reference to the disk drives is unrelated to the unfair acts and practices alleged in the complaint and do not violate § 337.

Respondents Format, Mikhail Anisimov, and Felix Markhovsky allege that summary determination is appropriate because (1) a domestic industry for 5 1/4 inch half-height floppy disk drives does not exist, (2) respondents did not

prevent the establishment of such a domestic industry, and (3) there is no effect or tendency to destroy or substantially injure a 5 1/4 inch half-height floppy disk drive industry. Memorandum, Motion No. 203-38, at 1.

Respondent GST moves for an order granting summary determination in its favor on the following grounds:

> 1. GST has not engaged in any unfair methods of competition or unfair acts.
>
> 2. GST entered into its business relationship with the Format respondents without knowledge that Format was using information claimed by complainant to be its trade secrets.
>
> 3. No domestic industry exists because Tandon has not exploited the trade secrets and confidential information it claims to have been misappropriated.
>
> 4. No domestic industry exists because the domestic operations of Tandon are not devoted to the manufacture or production of the disk drives that are the subject of this investigation.
>
> 5. Tandon has not been prevented from establishing a domestic industry as a result of the actions of this or any other respondent.
>
> 6. The importation and sale of disk drives manufactured by GST does not have the effect or tendency to destroy or substantially injure a domestic industry.

Motion No. 203-39, at 1-2.

Respondents LGIC, LGIA, GSC, LGIP, LGG, and GST also request the administrative law judge to recommend that the Commission award reasonable attorneys' fees and costs to compensate respondents for expenses incurred defending against what they allege are complainant's discredited claims. Motion Nos. 203-33 through 203-37, 203-39.

The Commission investigative attorney filed a response in support of GSC's, LGIA's, and LGG's motions for summary determination, except with regard to the question of attorneys' fees and costs, and a response in opposition to LGIC's and LGIP's motions. The Commission investigative attorney also filed a response in partial support of and in partial opposition to GST's and Format

and Messrs. Anisimov and Markhovsky's motions for summary determination. Finally, the Commission investigative attorney filed a cross motion for termination. Motion No. 203-46.

The staff attorney submits that there exists no genuine issue of material fact with respect to the question of injury in this investigation and that as a matter of law the importation and sale of the accused disk drives by GST does not have the effect or tendency to destroy or substantially injure a domestic industry. "[F]inding a tendency to injure upon the record in this investigation would require speculation far beyond that ever permitted by the Commission in any investigation conducted to date, would not be supported by the requisite 'substantial evidence on the record,' and would fly in the face of applicable Commission precedent." Id., at 19.

Tandon filed responses in opposition to the motions for summary determination. Complainant asserts that there remain genuine issues of material fact as to all issues in this investigation. Specifically, Tandon states that respondents LGG, LGIC, and LGIP are owners, importers, consignees, or agents of either, relative to the sale of the subject goods in the United States and that GSC and LGIA are necessary respondents for effective relief. Complainant also asserts that Format unfairly competed with Tandon, GST had knowledge of the ongoing unfair competition and cover-up, and GST and Format's unfair methods of competition and unfair acts were designed to allow rapid importation of the accused product into the United States. Tandon asserts its domestic industry was injured by preventing the introduction of a new Tandon half-height disk drive product, by resulting delays which led to cancelled orders and missed business opportunities, and by GST's capacity to injure the domestic industry.

C. Law of Summary Determination.

Rule 210.50(a) states that any party may move for summary determination in his favor upon all or any part of the issues to be determined in a § 337 investigation. Such motion must be filed at least 30 days before the date fixed for hearing. "The determination sought by the moving party shall be rendered if the pleadings and any depositions, admissions on file, and affidavits 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. § 210.50(b).

Patterned after Rule 56 of the Federal Rules of Civil Procedure, the summary determination procedure prescribed by Rule 210.50 is designed to eliminate a hearing in which there is no genuine issue of material fact. The moving party has "the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to judgment as a matter of law." (Footnotes deleted.) 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.15[3] (2d ed. 1981). The administrative law judge, in ruling on a motion for summary determination, should not resolve any material factual issue. He is to determine "whether there is any genuine issue of material fact in dispute and render judgment only in the event there is none. If there is such an issue it should be resolved at a trial in the appropriate manner." (Footnotes deleted.) Id., ¶ 56.03; see id., ¶ 56.15[1.-0]; 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2712 (1983).

The decision whether to grant a motion for summary determination is to be rendered upon the pleadings and any depositions, admissions on file, and affidavits. Rule 210.50(a). Under Rule 56 of the Federal Rules of Civil

Procedure, courts may also properly consider answers of a party to interrogatories, oral testimony, and any other materials that would be admissible in evidence or otherwise usable at trial. See 6 Moore ¶ 56.11. "The court is authorized to examine proffered materials extraneous to the pleadings, not for the purpose of trying an issue, but to determine whether there is a genuine issue of material fact to be tried." (Footnote deleted.) Id., ¶ 56.04[1]; see 10 Wright § 2712. Since it is not the function of the administrative law judge on the motion for summary determination to adjudicate genuine factual issues, all inferences of facts from the evidence proffered must be viewed in a light most favorable to the party opposing the motion. 10 Wright § 2716; see 6 Moore ¶¶ 56.15[3], 56.16[8]. The movant, however, is entitled to whatever support the opposing papers may afford. The adverse party cannot rest upon the allegations in its pleadings, but must present sufficient evidence to raise a triable issue of material fact. 6 Moore ¶ 56.15[3].

Any reasonable doubt should be resolved against the movant. Still, the administrative law judge should not be unduly reluctant to grant summary determination when a hearing would serve no useful purpose and the movant is entitled to judgment as a matter of law. See id. ¶ 56.02[1]. A summary determination results from an application of substantive law to facts that are established beyond reasonable controversy.

The Commission can reach a "no violation" determination on a single dispositive issue. Beloit Corp. v. Valmet Oy, 742 F.2d 1421, 1423 (C.A.F.C. 1984). It is appropriate, for the reasons disclosed below, to do so in this investigation. The Commission also has the discretion to permit the reinstitution of the complaint under certain specified changed conditions, for example, if in the future a market for the subject disk drives reopens in the United States. See, e.g., 5 Moore § 41.05[1].

IV. SUMMARY OF FACTUAL BACKGROUND

All inferences of facts from the evidence proffered must be viewed in a light most favorable to the party opposing the motion. 10 Wright § 2716; see 6 Moore ¶¶ 56.15[3], 56.16[8]. Any reasonable doubt should be resolved against the movant. Accordingly, except where appropriately cited to findings of fact (FF), the following summary is not to be interpreted as an order establishing facts in this investigation since it incorporates inferences from the evidence proffered, viewed in a light most favorable to complainant.

Tandon introduced the first 5 1/4 inch half-height floppy disk drive into the United States in the spring of 1982. FF 39. The significance of 5 1/4 inch half-height technology was that two drives could be placed into the same space previously occupied by one full-height drive. FF 39. Tandon displayed the TM 50, a low cost 48 TPI half height, belt-driven floppy disk drive, during the summer of 1982 at the National Computer Conference Trade Show. Huenemeier Decl., Att. A, Response to Motions 203-38, 203-39, ¶ 32. Tandon attempted to modify the TM 50 for high performance use and introduced the TM 55, a 96 TPI half-height, belt-driven floppy disk drive, in the fall of 1982. Id.; see FF 40.

Tandon took orders for the TM 50 and TM 55 in the fall of 1982 and the spring of 1983,

C

C . FF 41. The TM 50/55 design did not lend itself to trouble free manufacture in large quantities. FF 41. The basic design

also was for low performance home use and did not easily convert to a high performance, direct or indirect drive. Huenemeier Decl., Att. A, Response to Motions 203-38, 203-39, ¶ 32.

It became apparent to Tandon in the fall of 1982 that many computer companies might prefer disk drives with direct drive motors rather than belt drive motors. Several major Japanese companies displayed high performance half-height disk drives with direct drive motors at the December 1982 Comdex Trade Show. Tandon needed to develop a reliable high performance, half-height floppy disk drive, preferably with a direct drive motor, to remain competitive. Abraham Decl., Att. D., Response to Motions 203-38, 203-39, ¶ 11.

In the fall of 1982, Tandon assigned Philip Tomasi to solve the problems associated with the TM 50 and TM 55. FF 42. Mr. Tomasi commenced work to modify or redesign the TM 55 to accommodate a direct drive motor. FF 42. Mr. Tomasi then suggested that he be allowed to develop his own concept of a direct drive disk drive. FF 43. This drive was not to be a redesign of the TM 55 or a direct drive TM 55. FF 43.

By the end of 1982, Mr. Tomasi had substantially completed a design for a half-height disk drive which incorporated a direct drive system. FF 44. He displayed the model to Tandon management on January 6, 1983, at a design review meeting. FF 45. He was told at this meeting to go ahead and develop his model into a working disk drive. Tomasi Decl., Att. B, Complaint, ¶ 19; Barmache Decl., Att. B, Response to Motions 203-38, 203-39, ¶¶ 28-41.

Mr. Tomasi terminated his employment with Tandon on January 21, 1983. FF 46. On January 31, 1983, Mr. Tomasi returned the disk drive model and some drawings relating to it. Some of the parts which had been on the model when

it was presented at the design review meeting had been removed or altered by Mr. Tomasi prior to the model being returned to Tandon. FF 47-48. The prototype was modified in a way which rendered it useless as a model from which to manufacture a product. Huenemeier Decl., Att. A, Response to Motions 203-38, 203-39, ¶¶ 39, 41-54, 57 ; Barmache Decl., Att. B, id., ¶¶ 60-65, 69-96, 101.

At the time Mr. Tomasi left his employment with Tandon, Tandon had not produced a half-height, direct drive floppy disk drive. FF 50. During the first four months of 1983, Tandon was able to substantially improve the belt driven TM 50 and TM 55 drives. FF 51. Tandon's first direct drive floppy disk drive, the TM 55D, was made available to some customers about September 1983. FF 52. First deliveries of the TM 65, a better performance half-height, direct drive floppy disk drive, took place during the summer or fall of 1984. FF 53-54.

After leaving his employment with Tandon, Mr. Tomasi entered into a business arrangement with Felix Markhovsky, Mikhail Anisimov, Herbert Berger, and Edward Wilka to design, develop, manufacture, and sell a 5 1/4 inch half-height direct drive floppy disk drive. FF 49; CDX 19, 151, 181, 225, Motion 203-30. The Tomasi designed disk drive was used as the company's first product. E.g. Tomasi Decl., Att. B, Complaint, ¶ 21. Messrs. Markhovsky and Anisimov were associates of Mr. Tomasi when he worked at Tandon, but unlike Mr. Tomasi, Messrs. Anisimov and Markhovsky remained in Tandon's employment until December 8, 1983, and January 13, 1984, respectively. Barmache Decl., Att. B, Response to Motions 203-38, 203-39, ¶¶ 104, 107; Tomasi Decl., Att. B, Complaint, ¶¶ 5, 23.

GST was interested in acquiring a 5 1/4 inch half-height direct drive floppy disk drive to produce in Korea. Memorandum, Motion 203-39, at 9; CDX 159, Motion 203-30. GST had hired Dr. Jay Ahn to evaluate the United States' floppy disk drive technology. CDX 159, Motion 203-30, at 4. In May 1983, Dr. Jay Ahn was approached by a friend of Mr. Tomasi who informed Dr. Ahn about a new disk drive company looking for investors and provided him with Mr. Wilka's name. Ahn Dep., Tr. 24, 32 (Sept. 26, 1984); Wilka, Response to Interrogatory No 3. Dr. Ahn met with individuals associated with Format and informed GST of the existence of the Format disk drive. Memorandum, Motion 203-39, at 9; see Ahn, Response to Interrogatory No. 3. Through Dr. Ahn, GST expressed interest in the disk drive and began exploring the possibility of investing in Format. Memorandum, Motion 203-39, at 9.

In May and June of 1983, Dr. Ahn alternately met with GST and Format. See Ahn, Response to Interrogatory No. 3. In June 1983, Messrs. Wilka and Berger traveled to Korea to meet with GST and discuss a possible business arrangement between GST and Format. Berger, Response to Interrogatory No. 3; Wilka, Response to Interrogatory No. 3; CDX 167, Motion 203-30. In July 1983, Mr. Tomasi visited GST in Korea with a working model of a Format disk drive. Tomasi Decl., Att. B, Complaint, ¶ 33. In August 1983, a GST negotiating team came to the United States to negotiate a contractual arrangement with Format. Memorandum, Motion 203-39, at 10-11. On August 26, 1983, Format and GST completed three agreements: (1) the $101,500 sale of drawings and technical documents; (2) a $400,000 manufacturing license agreement; and (3) a $500,000 stock purchase agreement. PE 39-41, Motion 203-30. GST would manufacture the drive in Korea and Format would have the exclusive right to market and sell the drives in the United States.

Format and GST developed for distribution in the United States brochures which advertised the GST-Format floppy disk drive. CDX 18-18A, Motion 203-30. GST eventually produced over 2000 of the subject disk drives by the end of the third quarter of 1984 (GST, Response to Interrogatory No. 11), of which some 700 were shipped to Format in the United States for resale (Format, Response to Interrogatory No. 11; see CX 288).

The relationship between GST and Format began to sour in the spring and summer of 1984. See, e.g., CDX 25, 28-29, 31, Motion 203-30. GST's last shipment to the United States of 400 disk drive units without heads took place on July 3, 1984. FF 5. The GST-Format disk drive is not currently imported into or available for sale in the United States. FF 5, 7-8, 11-13. However, as a result of its arrangements with Format, GST has established a floppy disk drive production line in Korea and has a large inventory of the subject floppy disk drives. See GST, Response to Interrogatory No. 11; CDX 294, Motion 203-30. GST remains in the business of manufacturing floppy disk drives in Korea, but claims to be selling them only in the Korean domestic market. FF 18-19. It no longer has marketing arrangements with Format and has made no further arrangements with any other company to market and sell such disk drives in the United States. FF 8-10.

C

C (FF 7-8), but has refused to give assurances that at some future time it will not resume shipments. (Conference, Tr. 57 (Dec. 28, 1984)).

V. TRADE SECRETS

Respondent Gold Star Tele-Electric (GST) alleges that it is entitled to summary determination as a matter of law because it has not engaged in any unfair methods of competition or unfair acts with regard to the subject matter of this investigation. Memorandum, Motion 203-39, at 27-28. Specifically, GST asserts that the facts establish that it acquired the GST-Format disk drive technology in good faith, without any knowledge of the manner in which Messrs. Tomasi, Markhovsky, and Anisimov developed that technology, or the fact that Tandon claimed that technology as a trade secret. Id., at 28-31. Respondent also asserts that the claimed technology does not constitute a trade secret for the following reasons:

> (1) To be a trade secret, the relevant information or technology must be used in one's business. Tandon admits that it does not use the information or technology at issue in its business.
>
> (2) To qualify as a trade secret, the claimed technology must not be generally known. The developer of the technology at issue, Mr. Tomasi, has acknowledged that the design concepts in his prototype were well-known in the industry.
>
> (3) Where a skilled employee develops a trade secret, rather than acquiring the knowledge from his employer, the trade secret lies within the employee's knowledge and he is privileged to disclose and use it in future employment. Mr. Tomasi designed the technology at issue, not Tandon.
>
> (4) Matters which are completely disclosed by goods when marketed cannot be trade secrets. The design of the technology at issue is completely disclosed when the article is marketed.

Id., at 31-32.

Misappropriation of trade secrets is an unfair method of competition or unfair act which falls within the purview of § 337. See In re Von Clemm, 108 U.S.P.Q. 371 (C.C.P.A. 1955); Certain Processes for the Manufacture of Skinless Sausage Casings, Inv. No. 337-TA-148/169, at 243-48 (Jul. 31, 1984); Certain Apparatus for the Continuous Production of Copper Rod, Inv. No. 337-TA-52, 206 U.S.P.Q. 138 (1979). The Commission in Copper Rod, modeling its criteria after § 757 of the Restatement of Torts, required complainant to establish four elements to prove misappropriation: (1) a trade secret exists which is not in the public domain; (2) complainant is the owner of the trade secret or possesses a proprietary interest in it; (3) complainant disclosed the trade secret to respondent while in a confidential relationship or respondent wrongfully took the trade secret by unfair means; and (4) respondent has used or disclosed the trade secret causing injury to complainant. 206 U.S.P.Q. at 156. The law of trade secrets originates from state common law. 2 R. Milgrim, Milgrim on Trade Secrets § 7.02[2] (1984).

A. Good Faith.

GST asserts that that it acquired the GST-Format disk drive technology in good faith, without knowledge as to how Messrs. Tomasi, Markhovsky, and Anisimov developed the technology and without knowledge as to Tandon's trade secret claim. Memorandum, Motion 203-39, at 11-14, 27-31. The material facts that GST relies upon to demonstrate the absence of any genuine issue and alleges entitle it to judgment as a matter of law are set forth in the next two paragraphs.

In the spring of 1983, GST was interested in acquiring for production purposes a 5 1/4 half-height direct drive floppy disk drive. Id., at 9. In May 1983, Dr. Ahn was approached by Jim Harvey, a friend of Mr. Tomasi. Through the information provided by Mr. Harvey, Dr. Ahn met with representatives of Format. Id. Dr. Ahn subsequently informed GST of the Format disk drive. GST expressed an interest in the Format disk drive. Id. In May and June 1983, Dr. Ahn met alternately with GST and Format. In June 1983, Messrs. Wilka and Berger traveled to Korea to discuss a possible business arrangement between Format and GST. In July 1983, Mr. Tomasi visited GST in Korea with a working model of a Format disk drive. In August 1983, representatives of GST came to the United States, retained the law firm of Macdonald, Halsted & Laybourne, and began contractual negotiations with Format. Id., at 9-10.

Prior to and during negotiations, Format and the respondent individuals represented to GST that the Format disk drive had been conceived, designed, and developed by Mr. Tomasi and Format and that the technology related to the drive was owned by Format. Id., at 11-12. GST was not informed by Mr. Tomasi, Format, or the respondent individuals that (1) Tomasi had constructed a model of a direct drive prototype while working at Tandon, (2) drawings and parts had been taken or stolen from Tandon, (3) the Format personnel had sabotaged or spied upon Tandon, (4) the Format disk drive contained any of Tandon's trade secrets or confidential information, (5) Tandon in any way had any claim to the Format disk drive, or (6) any other acts alleged in the complaint. Id., at 11-13. While GST knew Messrs. Markhovsky and Anisimov had employment experience with Tandon, GST was

not advised that they were employed by Tandon during GST's negotiations with Format and assumed they were employed by someone other than Format and Format intended to hire them should it receive funding from GST. At no time was GST or its counsel advised that Messrs. Markhovsky and Anisimov had participated in the design and development of the Format disk drive while employed by Tandon. Id., at 12-13. GST had been advised that Messrs. Markhovsky and Anisimov had not signed employment contracts while employed by Tandon. Id., at 12. Because Messrs. Markhovsky and Anisimov were not represented as having contributed to the development of the completed Format disk drive and were identified only as engineers which Format would hire to conduct future operations, the name of their present employer was unimportant to GST. Id.

The courts universally recognize that the law of trade secrets affords no protection against a person who discovers a particular trade secret by fair means such as experimentation or examination and analysis of a particular product. 1 Milgram § 5.04[1]. A first user of a trade secret also has no protection against a second user who in good faith acquires knowledge of the secret without breach of a contract or a confidential relationship. Id. § 5.04[2][a].

The fact that a second user of a trade secret employs a former employee of the first user does not create a presumption that the second user had notice of the first user's rights; there must be at least circumstantial evidence of fraud on the part of the second user. Id. § 5.04[2][c]. Notice may be imputed to a second user, however, when by exercise of fair business principles, it should have known that the first user's former employee was

disclosing information to which he was subject to a duty of secrecy. "[O]ne cannot insulate against liability by studiously achieved ignorance." Id.; see Carter Prods. Inc. v. Colgate Palmolive Co., 130 F. Supp. 557, 104 U.S.P.Q. 314, 326-27 (D. Md. 1955), aff'd, 230 F.2d 855, 108 U.S.P.Q. 383 (4th Cir.), cert. denied, 352 U.S. 843 (1956). Imputation of knowledge to a second user is generally recognized when it is a corporation organized by persons subject to a duty of secrecy with reference to the first user. The corporation is viewed as the alter ego of such individuals and charged with their knowledge. 1 Milgrim § 5.04[2][c]. Finally, if the second user knowingly received the first user's trade secret through a breach of duty owed to the first user, the second user can be enjoined, and the first user is entitled to appropriate additional relief. Id. § 5.04[3].

Knowledge or likelihood of knowledge must be proved by credible circumstantial evidence. Many cases deal with employee plans to appropriate the employer's trade secrets by the creation of a corporation in which the employee has an ownership interest.

> Surreptitious employees share certain habit patterns. They "plot" with other employees who appear to be discontent. They stay in the corporation, gather information that will be of value, all the while going through the formalities of creating a corporate vehicle, often in their wives' names. Then one or more of the plotters quits, often leaving other plotters behind to keep an eye open for new developments which might be of use to the newly formed competitor. The courts do not tolerate this kind of double-dealing by the employee; the guise of the independent corporation is penetrated in cases where it appears that the corporation is the alter ego of such employees. (Footnote deleted.)

Id.

Tandon in its opposition to GST's motion and the record as a whole demonstrate that there exists a genuine issue of material fact as to whether GST acquired the Format disk drive technology without knowledge as to how

Messrs. Tomasi, Markhovsky, and Anisimov developed the technology and without knowledge as to Tandon's trade secret claim. For example, there is a genuine issue of material fact as to whether or not GST knew or should have known that (1) Mr. Markhovsky worked at Tandon at the same time he was extensively involved with Format, (2) there existed a possible conflict of interest between Messrs. Markhovsky and Anisimov's association with Format and their employment by Tandon, and (3) Mr. Tomasi had developed a prototype of the Format disk drive while employed at Tandon. See Cites to Memorandum, Response to Motions 203-38, 203-39, at 25-47, 52-57; Tomasi Decl., Att. B, Complaint, ¶¶ 3-6, 29-45; Ahn, Response to Interrogatory No. 5.

The above three examples in and of themselves demonstrate that there exists complex issues of fact and unsettled questions of law as to whether GST acquired the alleged trade secrets of Tandon in good faith. Also, GST in its motion chose to highlight only those facts which supported its interpretation of the events at issue. Even if those facts were undisputed, it is questionable whether GST would be entitled to judgment as a matter of law on the issue of good faith.

The administrative law judge, in ruling on a motion for summary determination, should not resolve any material factual issues. A determination of this issue requires full development of the evidence. GST's motion for summary determination on this issue is denied.

B. Relevant Information Must be Used in Business.

GST asserts that the claimed technology does not constitute a trade secret because Tandon does not use it in its business. Memorandum, Motion 203-39, at 31. Specifically, Tandon admits that the trade secrets or technology

allegedly incorporated in the Tomasi prototype and identified in Attachment D to the complaint are not included in any disk drive produced by Tandon. FF 29-30. Tandon also admits that as of August 1, 1984, none of its facilities were devoted to the exploitation of the trade secrets or stolen technology allegedly contained in the Tomasi prototype. FF 31-32.

All inferences of facts from the evidence proffered must be viewed in a light most favorable to the party opposing the motion for summary determination. The record when viewed favorably as to Tandon allows for the following factual inferences: (1) the Tomasi prototype was at the moment of its conception a trade secret of Tandon; (2) Messrs. Tomasi, Markhovsky, and Anisimov were under a duty not to use or disclose this trade secret to Tandon's detriment; (3) the GST-Format disk drive because of a breach of Messrs. Tomasi, Markhovsky, and Anisimov's duty to Tandon incorporated Tandon's trade secrets; and (4) Tandon would have developed a 5 1/4 half-height direct drive floppy disk drive which utilized the trade secrets incorporated in the Tomasi prototype but for the unfair acts of these individuals. See Summary of Factual Background, Opn., at 22-26; Cites to Memorandum, Response to Motions 203-38, 203-39, at 20-21, 23, 58-67; Huenemeier Decl., Att. A, id., ¶¶ 36-40, 45-48, 57-58; Barmache Decl., Att. B, id., ¶¶ 12-54, 90-93, 101, 104-34, 142-52; Tomasi Decl., Att. B, Complaint, ¶¶ 3-5, 17, 21-28, 46-65.

The fact that Tandon does not currently use the claimed technology in its business has no bearing on whether or not this technology may be considered a trade secret of Tandon. Given the above factual inferences, the claimed

technology was at one time Tandon's trade secret and, but for the unfair acts of certain individuals, Tandon would have utilized the information in its business.

GST's motion for summary determination on this issue is denied.

C. The Claimed Technology Must Not be Generally Known.

GST asserts that the claimed technology does not qualify as a trade secret because Mr. Tomasi, the developer of the technology, has acknowledged that the design concepts in his prototype are well-known in the industry. Specifically, GST avers that none of the matters listed in Exhibit D to the complaint constitute trade secrets because they are not know-how; they are matters of design, all developed by Mr. Tomasi and all observable upon a cursory examination of the drive. Memorandum, Motion 203-39, at 32.

Comment b, section 757 of the Restatement of Torts, defines trade secrets as follows:

> A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods . . . . It may, however, relate to the sale of goods or to other operations in the business . . . .

California has for the most part adopted this definition. See Cal. Penal Code § 499c(a)(3) (West 1978).

Complainant must first demonstrate that the subject matter of the trade secret is secret and affords a demonstrable competitive advantage. 1 Milgrim § 2.03 (1984).

> Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts § 757 comment b (1939)(quoted in the administrative law judge's decision in Certain Processes for the Manufacture of Skinless Sausage Casings, Inv. No. 337-TA-148/169, at 245, and the California district court decision in Futurecraft Corp. v. Clary Corp., 205 Cal. App. 2d 279, 289, 23 Cal. Rptr. 198 (2d Dist. 1962)). A trade secret need not be a device or process which is patentable. "It may be a device or process which is clearly anticipated in the prior art or one which is merely a mechanical improvement that a good mechanic can make." Restatement of Torts § 757 comment b (1939); see 1 Milgrim § 2.08.

While certain aspects of the Tomasi prototype may have been well-known in the industry, it can be inferred from evidence in the record that it was a unique and creative solution to design problems then encountered with existing half-height disk drives. See Cites to Memorandum, Response to Motions 203-38, 203-39, at 23-24, 91; Barmache Decl., Att. B, id., ¶¶ 14-16, 51, 143. A genuine issue of material fact exists which requires resolution at a hearing in the appropriate manner. GST's motion for summary determination on this issue is denied.

D. The Trade Secret Lies Within the Employee's Knowledge.

GST asserts that since Mr. Tomasi had not signed Tandon's employment and nondisclosure agreement and he, not Tandon, had designed the technology at issue, Mr. Tomasi is privileged to disclose and use it in his future employment. Memorandum, Motion 203-39, at 32.

Where parties have not expressly contracted for protection of trade secrets, the courts may afford such protection by operation of law. California courts have utilized both the theory of an implied contract and the theory of a confidential relationship to protect trade secrets. See Plant Indus., Inc. v. Coleman, 287 F. Supp. 636, 159 U.S.P.Q. 651, 655-57 (C.D. Cal. 1968). Milgrim defined the circumstances under which courts by operation of law will grant a trade secret owner relief as follows: "(1) the existence of a trade secret; (2) a relationship between the parties pursuant to which the owner's trade secrets may become known to the other party; (3) knowledge of the trade secret by the other party; (4) knowledge or notice that such secret is regarded as valuable property which is not to be used outside of the relationship; and (5) use or disclosure (or, in some cases, threatened use or disclosure) by the party not the owner to the potential or actual detriment of the owner." 1 Milgrim § 4.01.

California courts consider the employer/employee relationship to be confidential. Olschewski v. Hudson, 87 Cal. App. 282, 285, 262 P. 43, 44 (1927). The existence of such a relationship imposes a duty upon the employee not to use or disclose the employer's confidential information to the employer's detriment. Fidelity Appraisal Co. v. Federal Appraisal Co., 217 Cal. 307, 18 P.2d 950, 954 (1933). However, to the extent that an employee

uses his knowledge, skill, and experience such that it does not use or threaten disclosure of a former employer's trade secrets, or breach a reasonable restrictive covenant, a former employee cannot be restricted from using his knowledge, skill, and experience in competition with his former employer. 1 Milgrim § 5.02[3]; see Futurecraft Corp. v. Clary Corp., 205 Cal. App. 2d 279, 287-88, 23 Cal. Rptr. 198 (2d Dist. 1962). "[P]rior employment does not impose upon the person who has been so employed a duty not to compete with his former employer. It means only that an ex-employee may not use his skills to violate the obligations arising from the relationship of trust of the former employment." 1 Milgrim § 5.02[3].

The rights of ownership to inventions or discoveries attributable in whole or in part to efforts of an employee are an important element in determining the extent to which trade secrets are protected. If an employee is hired to invent, discover, or perfect a specific item, the employee cannot claim title to the item after accomplishing the work for which he was hired. Solomons v. United States, 137 U.S. 342, 346 (1890); 1 Milgrim § 5.02[4][a]. If an employee is engaged entirely or partially in research and development and the employer does not specifically designate the item or field in which the employee is to work, "inventions made by an employee, although made during the hours of employment and with the use of his employer's materials, facilities and personnel, are the employee's property unless by the terms of his employment, or otherwise, he agreed to transfer the ownership . . . of such inventions." (Emphasis in original.) 1 Milgrim § 5.02[4][b]. That is, in the absence of an express agreement, the courts will look to the nature and scope of the employment relationship to determine if the employee assigned the

trade secret at issue to the employer on the basis of an implied agreement. Id. In California, the court found that an employee who turned over designs and improvements to an employer, even though some of the designs and improvements had been developed away from the employer's plant during nonworking hours, constituted proof that the employee considered himself bound to do so by the terms of his employment agreement. Daniel Orifice Fitting Co. v. Whalen, 198 Cal. App. 2d 791, 18 Cal. Rptr. 659, 665 (2d Dist. 1962).

Inventions developed by an individual after termination of employment in which trade secrets were imparted to him, belong to that individual absent an enforceable contract requiring disclosure and assignment to the employer. 1 Milgrim § 5.02[4][d]. The question as to the moment of invention immediately arises, however, when the invention is related to the activities of the employee's former employment. A reduction to practice of an invention which occurs shortly after termination may be considered evidence that the trade secret had been discovered prior to termination of employment. The respective rights of the employer and the former employee to inventions related to the former employment, but allegedly finalized after the employment, requires an acute factual and legal analysis. Id.

In 1981, Tandon decided to develop a half-height disk drive product. Mr. Tomasi was assigned to the half-height project in 1982. FF 39-40, 42. Mr. Tomasi, after requesting and receiving the permission of his immediate supervisor, developed a new half-height design. FF 43. Mr. Tomasi worked full time on this project, each day at Tandon and each night at home. "I worked with Tandon's model shop and drafting department to produce component parts and drawings. I drew off the experience and knowledge I had gained earlier at Tandon . . . ." Tomasi Decl., Att. B, Complaint, ¶ 13. At a

January 6, 1983, design review meeting, Tandon apparently decided to produce the Tomasi drive. Tomasi Decl., Att. B, Complaint, ¶ 19; Huenemeier Decl., Att. A, Response to Motions 203-38, 203-39, ¶¶ 36-37, 40; Barmache Decl., Att. B, id., ¶¶ 28-46. Mr. Tomasi resigned from his employment at Tandon on January 21, 1983. FF 46. Mr. Tomasi returned the prototype after altering its appearance to Tandon on January 31, 1983. FF 47-49. "I was aware that the design was proprietary to Tandon and confidential information which should not be revealed to persons outside Tandon." Tomasi Decl., Att. B, Complaint, ¶ 17.

There remains a genuine issue in this investigation as to ownership of the trade secret in question. GST's motion for summary determination on this issue is denied.

E. Matters Disclosed When Marketed Cannot be Trade Secret.

GST asserts that the design of the technology at issue is completely disclosed when the floppy disk drive is marketed. Memorandum, Motion 203-39, at 32. The law of trade secret affords no protection against a person who discovers a particular trade secret by fair means, such as examination and analysis of a particular product.

Secret use protects an existing trade secret, while the absence of sufficient precautions can forfeit secrecy. 1 Milgrim §§ 2.04, 2.05[1]. Trade secret protection may be lost by disclosure of the secret's subject matter through the sale, display, or circularization of products embodying the trade secret. Id. § 2.05[2]; see Restatement of Torts § 757 comment b (1939).

The fact that a company may in the future market a product which, upon examination, reveals a trade secret, has no bearing upon whether an item is currently a trade secret. Since the technology at issue was not marketed by Tandon at the time at which the alleged unfair act took place (see FF 31-32, 50), the technology may still qualify as a trade secret. GST's motion for summary determination on this issue is denied.

VI. IMPORTATION & SALE

To invoke the subject matter jurisdiction of the Commission and to support a finding that a violation of § 337 exists, a complainant must establish that the accused product has been imported and/or sold in the United States.

GST in its motion for summary determination admits to the importation and sale of the disk drives at issue in this investigation; "[t]he importation and sale of disk drives manufactured by the Respondent does not have the effect or tendency to destroy or substantially injure a domestic industry." Motion 203-39, at 2. The last importation of the GST-Format disk drive occurred on July 3, 1984, when 400 units without heads were shipped to the United States. FF 5. No orders for purchases of GST's disk drives have been placed with GST since July 1984. FF 12.

The GST-Format disk drives at issue have been imported into the United States through LGIC and LGIP. FF 1-3. LGIC in its motion for summary determination admits to its role in the importation of the relevant disk drive; "LGIC has done nothing more than facilitate a normal business transaction by assisting in the exportation of disk drives to the United States on behalf of GST for a standard commission." Motion 203-33, at 1-2. LGIP also in its motion admits to its role in the importation of the relevant disk drives; "LGIP did nothing more than facilitate a normal business transaction by assisting in the exportation of disk drive components to GST and the importation of disk drives into the United States on behalf of GST." Motion 203-36, at 1.

LGIP sold the disk drives at issue to Format. LGIP Answer to Interrogatory No. 9. Two units of the GST-Format disk drive at issue were purchased from respondent Format by Franklin Data Corporation in June of 1984. The box in which the GST-Format disk drive was packaged identified both GST and Format and was marked "Made in Korea." Rodgers Decl., Att. F, Complaint.

Tandon has elected not to file a motion for summary determination as to any issue. The administrative law judge, however, is not precluded from entering summary determination for a non-movant if no factual dispute exists and the non-movant is entitled to summary determination as a matter of law. See 6 J. Moore, W. Taggart, and J. Wicker, Moore's Federal Practice, ¶ 56.12 (1976).

The administrative law judge finds that there is no substantial controversy as to the importation and sale of the disk drives at issue. Respondents have had a full and fair opportunity to dispute this proposition. Therefore, it is the administrative law judge's ORDER OF FACTS that GST, LGIP, LGIC, and Format imported into and/or sold in the United States certain floppy disk drives and components therefor. 19 C.F.R. § 210.50(e).

VII. DOMESTIC INDUSTRY

Respondents GST, Format, Felix Markhovsky, and Mikhail Anisimov allege that they are entitled to summary determination as a matter of law because there does not exist in this case an efficiently and economically operated domestic industry. Respondents also assert that the alleged unfair methods of competition and unfair acts did not prevent the establishment of such an industry. Motions 203-38, 203-39.

GST asserts that undisputed facts establish that no domestic industry devoted to the exploitation of the confidential and proprietary technology at issue in this investigation existed on August 1, 1984, the date at which the complaint was filed. GST states that complainant must be producing on that date the articles alleged to have been affected by the unfair methods of competition and unfair acts of respondent. "Tandon admits that not a single trade secret or bit of Tandon technology embodied in the Tomasi prototype currently is being exploited in the production of disk drives at Tandon." Memorandum, Motion 203-39, at 36.

GST also asserts, as do respondents Format and Messrs. Markhovsky and Anisimov, that no domestic industry exists because all 5 1/4 inch half-height direct drive disk drives sold by Tandon in the United States are manufactured outside the United States. Specifically, respondents argue that complainant's recently filed 10-K states that its 5 1/4 inch drives are produced in India and that it anticipates that an affiliated company, Texas Peripherals, will commence production of such drives in January 1985. Only C percent of the entire value of the TM 65, the relevant 5 1/4 inch drive, is attributable to

activities in the United States, and of that percent, percent is for general and administrative expenses and percent for marketing expenses, items not relevant to value-added calculations.

Finally, GST asserts a domestic industry was not prevented from being established because Tandon is unable to show a readiness to commence production of a product utilizing the allegedly stolen trade secrets and technology. GST also argues that Tandon never made any effort to produce a disk drive incorporating the design features of the Tomasi prototype, even though a former employee of Tandon offered to prepare in one month all the necessary documents to reconstruct the prototype, and made the decision not to develop the prototype independent of any act of respondents. Format and Messrs. Markhovsky and Anisimov assert that Tandon's unimpeded plans to enter into an agreement with Tandy Corporation for the joint ownership and operation of Texas Peripherals demonstrates that respondents have not prevented the future establishment of a 5 1/4 half-height floppy disk drive industry in the United States.

The Commission customarily defines the domestic industry as the domestic operations of the intellectual property owner and its licensees devoted to the exploitation of the intellectual property. Certain Methods for Extruding Plastic Tubing, Inv. No. 337-TA-110, 218 U.S.P.Q. 348 (1982); Certain Slide Stringers and Machines and Components Thereof, Inv. No. 337-TA-85, 216 U.S.P.Q. 907 (1981); see H.R. Rep. No. 93-571, 93 Cong., 1st Sess. 78 (1973). The domestic industry is not limited to manufacturing per se but encompasses distribution, research and development, and sales. Certain Personal Computers, Inv. No. 337-TA-140, at 38 (1984); Plastic Tubing, supra. The

Commission does not adhere to any rigid formula in determining the scope of the domestic industry as it is not precisely defined in the statute, but will examine each case in light of the realities of the marketplace. Slide Fastener Stringers, supra; Certain Apparatus for the Continuous Production of Copper Rod, Inv. No. 337-TA-52, 206 U.S.P.Q. 138 (1979).

The essence of movants' claim is that because the alleged stolen technology is admittedly not being used by complainant, there is no domestic industry. This is an overly simplistic view.

Complainant has adduced substantial evidence in which to infer that when Mr. Tomasi presented to Tandon the newly designed, direct drive floppy disk drive, Tandon decided to manufacture a product incorporating the design. Tomasi Decl., Att. B, Complaint, ¶ 19; Huenemeier Decl., Att. A, Response to Motions 203-38, 203-39, ¶¶ 36-37, 40; Barmache Decl., Att. B, id., ¶¶ 28-46. Complainant's evidence further shows that because the majority of the drawings for the new drive were stolen or destroyed and the prototype deliberately modified to render it useless, Tandon chose not to utilize the design: Business exigencies indicated it would be more prudent to modify the TM 50/55 disk drive than to recreate the Tomasi design. Huenemeier Decl., Att. A, Response to Motions 203-38, 203-39, ¶¶ 39, 41-54, 57; Barmache Decl., Att. B, id., ¶¶ 60-65, 69-96, 101. Tandon's evidence indicates that it was unable to make available in commercial quantities a half-height, high performance direct drive floppy disk drive until the summer of 1984. FF 52-54.

It may be inferred from the above evaluation of complainant's evidence that Tandon was prevented from exploiting the Tomasi design because it was deprived of Mr. Tomasi's disk drives prototype and drawings. The inference

that Tandon was unable to exploit the Tomasi design does not in and of itself constitute an unfair act because there remains a genuine issue in this investigation as to ownership of the trade secret in question. See Opn., at 27-40. However, additional evidence submitted by complainant, for example, the statement by Mr. Tomasi that he "was aware that the design was proprietary to Tandon and confidential information which should not be revealed to persons outside Tandon" (Tomasi Decl., Att. B, Complaint, ¶ 17), allows the administrative law judge, for purposes of summary determination, to infer that the acts which prevented Tandon from exploiting the Tomasi design constituted an unfair method of competition.

Tandon designs, develops, manufactures, markets, and services 3 1/2, 5 1/4, and 8 inch floppy disk drives, 5 1/4 inch 'Winchester' technology rigid disk drives, and disk drive subsystems. Tandon currently manufactures the following floppy disk drives: (1) the TM 100, 5 1/4 inch flexible disk, full-height drive; (2) the TM 101, 5 1/4 inch flexible disk, full-height drive; (3) the TM 50, 5 1/4 inch flexible disk, half-height drive; (4) the TM 65, 5 1/4 flexible disk, half-height drive; and (5) the TM 848, 8 inch flexible disk, half-height drive.[1/] Huenemeier Decl., Att. A, Response to Motions 203-38, 203-39, ¶¶ 16-20; see Memorandum, id., at 79-84. Complainant asserts that the definition of domestic industry in this investigation

---

C 1/ percent of Tandon's net sales for fiscal years 1982, 1983, and 1984 are attributable to its sales of floppy disk drives. Serge Decl., Att. C, Response to Motions 203-38, 203-39, ¶ 6. Tandon states that of the $59,267,000 in property and equipment reported in its 1984 10-K, $43,307,000 represents capital in the United States, including manufacturing, testing,
C quality, engineering, and servicing facilities. Tandon employs individuals in the United States who are concerned with the design engineering, manufacturing, marketing, servicing, quality control, inventory control, and sustaining engineering of Tandon's floppy disk drives. See Cites to Memorandum, Response to Motions 203-38, 203-39, at 78-91.

includes all of Tandon's floppy disk drives for the following reasons: "1) the unfair acts were directed to the entire TANDON floppy disk drive line; 2) the half-height GST-FORMAT direct drive floppy disk drive competes directly against the entire TANDON floppy disk drive product line; and 3) many aspects of the particular stolen TANDON-Tomasi direct drive design are applicable to all TANDON disk drives, especially the half-height models, TM 50, TM 55, TM 65 and TM 848." Memorandum, Response to Motions 203-38, 203-39, at 143. There is evidence of record which indicates that at the time the complaint was filed, Tandon manufactured the TM 848 in the United States and manufactured the TM 100 and began production of the TM 65 both in the United States and offshore. Huenemeier Decl., Att. A, Response to Motions 203-38, 203-39, ¶¶ 17-22, 27, 30. There is also evidence which suggests that Tandon adds significant value in the United States to those floppy disk drives which it manufactures offshore. See Serge Decl., Att. C, Response to Motions 203-38, 203-39, ¶¶ 10-11.

Tandon's affidavits indicate that the TM 65 is functionally comparable to the disk drive that would have been produced if the Tomasi design had been manufactured by Tandon. Barmache Decl., Att. B, Response to Motions 203-38, 203-39, ¶¶ 98-103; Huenemeier Decl., Att. A, id., ¶¶ 50-54. The Commission's definition of a domestic industry is not rigid and bound to the exploitation of the intellectual property at issue but looks to the realities of the marketplace. The marketplace may demonstrate that the TM 65 either constitutes, or is part of, a domestic industry. The economic impact of

floppy disk drives which utilize the Tomasi design on other half-height disk drives may also lead the Commission to conclude that these models should constitute part of the domestic industry.

The evidence shows substantial factual issues and complicated legal questions that need fuller development to determine whether there exists a domestic industry for purposes of relief under § 337. For this reason, respondents' motion for summary determination as to this issue, and the issue whether the alleged domestic industry is efficiently and economically operated, is denied.

VIII. INJURY

Respondents assert that the alleged unfair acts do not have the effect or tendency to destroy or substantially injure a domestic industry or to prevent the establishment of such an industry. Injury requires proof separate and independent from evidence of an unfair act. Complainant must establish a causal relationship between respondents' unfair acts in the importation of an article and the injury suffered as a result of such acts. Certain Spring Assemblies and Components Thereof and Methods of Their Manufacture, Inv. No. 337-TA-88, 216 U.S.P.Q. 225, 243 (1981).

A. Substantial Injury.

Several factors are relevant to a determination of substantial injury to a domestic industry, including but not limited to: (1) declining sales; (2) lost customers; (3) decreased employment; and (4) decreased production and profitability. E.g., Certain Vertical Milling Machines, Inv. No. 337-TA-133 (1984); Certain Drill Point Screws for Drywall Construction, Inv. No. 337-TA-115 (1983); Spring Assemblies, 216 U.S.P.Q. at 242-45. Tandon, in response to the motions for summary determination, alleges that the "'peculiar facts' of this case require scrutinization because the injury to the domestic industry is not susceptible to easy labelling, due to the nature and timing of the unfair acts." Memorandum, Response to Motions 203-38, 203-39, at 151. Complainant relies on the Declaration of Robert Abraham, product marketing manager for Tandon, to demonstrate that the alleged unfair acts substantially injure the domestic industry. Id. at 152-53.

Mr. Abraham states that Tandon experienced production problems with the TM 50 and TM 55 during the fall of 1982. Abraham Decl., Att. D, Response to Motions 203-38, 203-39, ¶ 5. Mr. Abraham understood that Tandon was designing a direct drive half-height floppy disk drive which it expected to release to production in February or March 1983. Id. ¶ 6. "As a result of Tandon's inability to deliver the specified quantity of functioning half-height disk drives to many of its existing customers, Tandon suffered many order cancellations which would not have occurred if Tandon had been able to solve its production problems by introducing the new half-height disk drive design." Id. ¶ 8. Mr. Abraham concludes that Tandon suffered order cancellations in excess of million because of these problems, including:

(1) February 1983: canceled its July 29, 1983, order for TM 55s with still on order.

(2) May 1983: canceled its January 3, 13, and 25, 1983, orders for TM 50s with million still on order.

(3) October/November 1983: canceled its August 6, September 6, and November 1, 1983 orders for TM 55s with million still on order.

(4) Late 1983: canceled its September 30, 1983, order for TM 50s with million still on order.

(5) Early 1984: canceled its March 18, 1983, order for TM 50s with million still on order.

(6) April 1984: canceled its July 21, 1983, order for TM 65s with million still on order.

(7) May 1984: canceled its October 31, 1983, order for TM 55Ds with million still on order.

Id. ¶ 9.

Mr. Abraham also concludes that Tandon lost over million in business opportunities because of its inability to deliver to potential customers on a timely basis, including:

C (1) June 29, 1983: requested a quote for
C 200,000 TM 55s, delivery over a two-year period. Total Value:
C million. Business lost to .

C (2) Spring 1983: requested a quote for 80,000 TM 55-2s and
C 20,000 TM 55-4s, delivery over two years. Total Value: million.
C Business lost to .

C (3) Summer 1983: requested a quote for 60,000 TM 55s, one-year
C period. Total Value: million. Business lost to .

C (4) 1983: requested a quote for 72,000 TM 65s, delivery
C over two years. Total Value: million. Business lost to
C .

C (5) 1983: requested a quote for 36,000 TM 65s,
C delivery over two years. Total Value: million. Business lost to
C .

C (6) 1983: requested a quote for 30,000 TM 65s, delivery over one
C year. Total Value: million. Business lost to .

Id. ¶ 10; see Memorandum, Response to Motions 203-38, 203-39, at 152-53.

From the above facts, complainant concludes:

> These accounts were lost because of the inability to deliver a suitable half-height product on schedule (Abraham Decl., Att D, ¶¶10-16). In most instances, the customers were not willing to take the TANDON full-height TM 100 as a replacement (Id.). These were all TANDON prime OEM accounts which have now been lost to other floppy disk drive manufacturers (Id.). Had the TANDON-Tomasi prototype been available in May/June 1983, most of these sales would have been retained and TANDON would have maintained its OEM base for these customers. (Emphasis added.)

Memorandum, Response to Motions 203-38, 203-39, at 153.

Section 337(a) states in part that it is unlawful for an owner, importer, consignee, or agent of either, to participate in (1) unfair methods of competition and unfair acts, (2) in the importation of articles into the United States, or in their sale, (3) the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry. 19 U.S.C. 1337(a). All elements of § 337 must be established if

complainant hopes to prevail; however, the existence of each element is not sufficient evidence to find a violation of the statute where one element is not related to another. See generally Certain Centrifugal Trash Pumps, 337-TA-43, CD 9 (1979). The unfair methods of competition or unfair acts must be in the importation or sale of the subject articles such that the combination of these two elements destroys, substantially injures, or prevents the establishment of a domestic industry. The fact that a respondent imports the articles in question into the United States at a time far removed from the commission of the unfair act, does not result in a violation of § 337 if the importation of that article is concededly not the cause of the injury. A review of the legislative history of § 337 and the cases interpreting its provisions supports this conclusion.

Section 337 appeared as part of the Tariff Act of 1930, which is, as stated in its title, "[a]n Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, to protect American labor, and for other purposes." Section 337 is an example of the constitutional power of Congress derived from the commerce clause of Article I, section 8, clauses 1 and 3. In re Orion Co., 21 U.S.P.Q. 563, 568 (C.C.P.A. 1934); S.J. Charia & Co. v. United States, 103 U.S.P.Q. 252, 259-60 (Cust. Ct. 1954); see Frischer & Co., Inc. v. Bakelite Corp., 39 F.2d 247, 252-53 (C.C.P.A. 1930). The legislative history which accompanies § 316 of the Tariff Act of 1922, the prototype of § 337, states:

> The provision relating to unfair methods of competition in the importation of goods is broad enough to prevent every type and form of unfair practice and is, therefore, a more adequate protection to American industry than any antidumping statute the country has ever had.

S. REP. NO. 595, 67th Cong., 1st Sess. 3, reprinted in, Legislative History of the Tariff Act of 1930, Part 7, Sec. 337, at 1451.

Congress enacted § 337 for the express purpose of creating a unique forum for unfair acts in import trade. This purpose was recognized by the Tariff Commission in one of its first decisions and was quoted with approval by the Court of Customs and Patent Appeals in Frischer & Co., Inc. v. Bakelite Corp.:

> "The situation presented by the manufacture in the United States of articles infringing patents is quite different from that presented by the importation of such articles made abroad. In the case of the sale of articles manufactured in the United States the infringing manufacturer can be proceeded against and thus the unfair practice be reached at its source. Domestic patentees have no effective means through the courts of preventing the sale of imported merchandise in violation of their patent rights. . . . Unless . . . section 316 may be invoked to reach the foreign articles at the time and place of importation by forbidding entry into the United States of those articles which upon the facts in a particular case are found to violate rights of domestic manufacturers, such domestic manufacturers have no adequate remedy."

39 F.2d at 259-60 (quote from the Tariff Commission decision in the case) and In re Northern Pigment Co., 21 U.S.P.Q. 573, 580 (C.C.P.A. 1934)(quoting from Frischer).

Section 337(a) also states that when the Commission has found an unfair practice in import trade which violates this section, it "shall be dealt with, in addition to any other provisions of law." 19 U.S.C. 1337(a). Thomas O. Marvin, past Chairman of the United States Tariff Commission, in response to a request by the Honorable W.C. Hawley, then Chairman of the House Committee on Ways and Means, underscored the importance of the Commission's jurisdiction in addition to other legal remedies: "Existing law, apart from section 316, is wholly inadequate to protect domestic owners of their patent rights through the importation and sale of infringing articles. Stoppage of importation of infringing articles through an order of exclusion from entry is the only effectual remedy. . . . Section 316 . . . affords an exclusive remedy."

Letter and Report of the United States Tariff Commission, 17 Supp. to Tariff Readjustment Reports on the Tariff Bill of 1929, at 10664, 10667 (Mar. 30, 1929), reprinted in, Legislative History, supra, at 1531. Section 337 of the Tariff Act of 1930 as enacted is identical in substance to § 316 of the Tariff Act of 1922. Orion, 21 U.S.P.Q. at 567.

On March 27, 1984, GST for the first time exported to the United States 15 sets of the Model 48DS-S disk drive, which is alleged by complainant to incorporate Tandon's trade secrets. FF 5. The next shipment of 60 units took place on May 4, 1984. From June 5 through June 29, 1984, GST shipped 1333 units to the United States. FF 5. GST's last shipment to the United States of 400 non-functional disk drive units took place on July 3, 1984. FF 5.

The alleged unfair acts which complainant asserts caused substantial injury to a domestic industry took place more than one year before respondent first imported the Model 48DS-S disk drive to the United States. Complaint, 15-17. Tandon admits to the importance of the timing of the unfair act: "[H]ad the TANDON-Tomasi prototype been available in May/June 1983, most of these sales [as set forth in Mr. Abraham's Declaration] would have been retained and TANDON would have maintained its OEM base for these customers." Memorandum, Response to Motions 203-38, 203-39, at 153; see Response to Order 20/Motion 203-32, at 3. The alleged substantial injury would have taken place even if respondents had never imported the article at issue. Thus, § 337 is not violated when the unfair acts and injury are substantially separated in time from the imports so that there is no relationship between the economic injury and the importation of the articles in issue. Cf., Certain Spring Assemblies and Components Thereof, Inv. No. 337-TA-88, RD 5-6 (1981);

Certain Cattle Whips, Inv. No. 337-TA-57, RD 3 (1979); Certain Centrifugal Trash Pumps, Inv. No. 337-TA-43, CD 9 (1979); Certain Light Shields for Sonar Apparatus, Inv. No. 337-TA-33, RD 3 (1977); Certain Bismuth Molybdate Catalysts, Inv. No. 337-TA-20, RD 5 (1976).

There exists a genuine issue of material fact as to whether or not the unfair acts alleged by complainant caused substantial injury to the domestic industry. It is undisputed, however, that whatever injury resulted from the alleged unfair acts did not occur because of the importations of the article in issue. See, FF 25-28, 59-62. The importations of respondents are disconnected from the alleged injury. For this reason, I find that there is no genuine issue of material fact in this investigation as to the issue of substantial injury. Respondents are entitled to a summary determination with respect to this issue as a matter of law.

B. Tendency to Substantially Injure.

When an assessment of the market in the presence of the accused imported product demonstrates relevant conditions or circumstances from which probable future injury can be inferred, a tendency to substantially injure the domestic industry has been shown. Certain Combination Locks, Inv. No. 337-TA-47, RD 24 (1979). Relevant conditions or circumstances may include foreign cost advantage and production capacity, ability of the imported product to undersell complainant's product, or substantial manufacturing capacity combined with the intention to penetrate the United States' market. Certain Methods for Extruding Plastic Tubing, Inv. No. 337-TA-110, 218 U.S.P.Q. 348 (1982); Reclosable Plastic Bags, Inv. No. 337-TA-22 (1977); Panty Hose, Tariff

Comm'n Pub. No. 471 (1972). "Where unfair methods and acts have resulted in conceivable loss of sales, a tendency to substantially injure such industry has been established." H.R. REP. NO. 571, 93 Cong., 1st Sess. 78 (1973), citing, In re Von Clemm, 108 U.S.P.Q. 371 (C.C.P.A. 1955); see also Bally Midway Mfg. Co. v. Int'l Trade Comm'n, 219 U.S.P.Q. 97, 102 (Fed. Cir. 1983).

The Commission ordered the institution of this investigation on August 27, 1984. Notice of Investigation, 49 Fed. Reg. 35,257 (Sept. 6, 1984). Complainant alleged at that time that it appeared that GST and Format had the intention to penetrate the United States market. Certain post-institution activity may show, however, that the effect or tendency towards substantial injury which appeared to exist at time of the notice of investigation no longer exists, and that given this reason the complaint should be dismissed.

GST has not shipped any of the subject floppy disk drives to the United States since July 3, 1984. FF 5.

. FF 7.

. FF 8.

. FF 9.

. FF 13.

Since July 1, 1984, GST has not advertised for sale to the public in the

United States its disk drives. FF 14. Since July 1, 1984, GST has not placed any advertisements in trade publications circulated in the United States that advertise for sale GST's disk drives. FF 15. Since July 1, 1984, GST has not given or sold any disk drive technology to another person or business entity. FF 16. In opposition to GST's motion to terminate this investigation Tandon C stated that because respondents had stopped importing and C "the tendency to injure is more theoretical than tangible at this time." Response to Motion 203-32, at 3-4.

Notwithstanding the above facts, complainant now asserts that the evidence supports a finding that there exists a tendency to injure. GST plans to continue to manufacture floppy disk drives. FF 18. The GST specially designed facilities devoted to the production of the floppy disk drives cannot be utilized to produce or assemble articles other than disk drives. FF 19.

C

C

C

C . FF 18.

C

C . FF 19.

C . FF 19. GST has imported the 48DS-S disk drive to the United States (FF 5) and both Format and GST have developed brochures for distribution throughout the United States which advertise the GST-Format disk drives (CDX 18, 18A, Motion 203-30). Format's marketing strategy was to offer the subject disk drives to customers in 1,000 and 10,000 quantities at prices not normally available in the industry unless 100,000 units are purchased. CDX 27, Motion 203-30. Another respondent, GSC, exports computers to the

United States. Though GSC has never exported to the United States a computer containing a GST disk drive (FF 20) and

(FF 23), both GSC and GST are members of The Lucky-Goldstar Group (FF 24).

A cessation by respondents of shipments of the article in issue to the United States, and related activity, does not provide a basis to moot an investigation. See Order No. 21, at 5 (Dec. 26, 1984). GST has also refused to give assurances that at some future date it will not resume shipments of the subject articles to this country. Id., at 4, citing, Conference, Tr. 57 (Dec. 20, 1984). GST's refusal, together with those facts set forth by complainant above, demonstrate a genuine issue exists as to questions relevant to a determination of tendency to substantially injure. However, even if we assume that the evidence proffered demonstrates the existence of a foreign cost advantage and production capacity, an ability to undersell complainant's product, and manufacturing capacity combined with an intent to penetrate the United States' market, an assessment of the market in the presence of the accused imported product demonstrates relevant circumstances from which probable future injury cannot be inferred.

The subject disk drives are not to any appreciable extent sold over-the-counter. They are primarily sold to personal computer original equipment manufacturers (OEMs). The personal computer manufacturer contracts in advance for particular specifications and for delivery at certain time intervals in order to incorporate the disk drive into the computer. See, Memorandum, Response to Motions No. 203-38, 203-39, at 153-54; FF 61.

There is a period of time during which the marketing of a product is most opportune. This period of time is often referred to as the "marketing window." Abraham Decl., Att. D, Response to Motions 203-38, 203-39, ¶ 13. "This window of opportunity opens when a demand or need for a new product is identified. The window of opportunity substantially closes as the customers complete the selection of their vendors and enter into long-term contracts with them for the supply of the product in question." Id.

A demand for half-height 5 1/4 inch floppy disk drives was identified in the summer and fall of 1982. FF 57. The marketing window for this product opened. Computer manufacturers commenced their evaluation of this type of disk drive in the fall of 1982 and into 1983. FF 58. The manufacturers selected their vendors "based upon their assessment of the quality and performance of the disk drives in question and the perceived ability of the manufacturer . . . in question to produce and deliver and support the required quantity of disk drives on a reliable long-term basis." Abraham Decl., Att. D, Response to Motions No. 203-38, 203-39, ¶ 14.

The marketing window for this product to a large extent closed once the major customers entered the half-height disk drive market and selected their vendors.

> Once the relationship between a manufacturer and its vendor or vendors has been established, it is much more difficult for another vendor to successfully compete for future business from that manufacturer than it is before the initial vendor's selection is made. Manufacturers spend a substantial amount of time and effort in evaluating vendors' products from a technical standpoint before making their selection. In addition, they spend a substantial amount of time evaluating whether the vendors under consideration are able to supply their needs on a reliable basis. Accordingly, after vendors have been selected, manufacturers are reluctant to go through the evaluation and qualification process with any other vendor and ordinarily do not do so in the absence of a good reason, such as quality or delivery problems with an existing vendor or a substantially better price from another vendor.

Id. ¶ 15.

The marketing window for half-height floppy disk drives opened in the fall of 1982 and continued into 1983. Major OEMs qualified and selected their vendors for this product beginning in early 1983. FF 58. The marketing window began to close once the OEMs began to select their vendors and was substantially closed by the latter part of 1984, if not sooner. FF 59-62.

There is no genuine issue of material fact as to the relevant market conditions confronting the GST-Format disk drive: There is no remaining substantial marketing opportunity in the United States for this disk drive. Probable future injury to complainant cannot be inferred even if we assume that the evidence to be proffered would demonstrate the existence of a foreign cost advantage and production capacity, an ability to undersell complainant's product, and manufacturing capacity combined with an intent to penetrate the United States' market. Further, the summary determination motions were filed at the close of prehearing discovery, and there is no evidence indicating that marketing conditions will change in the future.

If for some reason future marketing conditions do change, complainant should be permitted to seek reinstitution of this complaint. Evidence of renewed shipments by respondents in substantial quantities would be evidence of changed marketing conditions.[2/] Summary determination may be rendered in favor of respondent and, at the same time, the Commission can provide that the complaint may be reinstituted under specified changed circumstances. See, e.g., 5 Moore § 41.05[1].

2/ In the months just prior to institution, importation was occurring and complainant had reason to believe such imports would increase in tempo even if by that time marketing opportunities were apparently substantially diminishing.

I find there is no genuine issue of material fact in this investigation as to the issue of tendency to substantially injure. Respondents are entitled to a summary determination with respect to this issue as a matter of law.

C. Prevent the Establishment.

Two types of domestic industries are sheltered by the § 337 provision designed to protect against the prevention of an industry's establishment: "(1) parties which have just begun manufacturing operations and for which § 337 violations would have the effect or tendency of frustrating efforts to stabilize such operations; and (2) parties which are about to commence production and for which §337 violations would have the effect or tendency of frustrating efforts to found a business." Certain Ultra-Microtome Freezing Attachments, 337-TA-10, 195 U.S.P.Q. 653, 656-57 (1976). The class of industries described in the second category are considered embryo industries, industries about to be born. Id. Complainant must demonstrate a readiness to commence production. Id.; Certain Caulking Guns, 337-TA-139, ID 56-57, 60-61 (1983).

Tandon in its response to the motions for summary determination asserts that as a domestic manufacturer of floppy disk drives it was completely frustrated by the unfair acts of its own former employees in its attempt to begin production in May or June 1983 of a direct drive half-height 5 1/4 inch floppy disk drive. Memorandum, Response to Motions 203-38, 203-39, at 147-48. Tandon also asserts that it had taken positive and overt steps to commence production of the Tomasi prototype. Id. Finally, Tandon states that

it cannot be faulted for failing to foresee the unfair acts or for trying to develop an alternative design in an effort to recover from the devastation caused by the unfair acts. Id. at 148.

As previously discussed in the section on substantial injury, all elements of § 337 must be established if complainant hopes to prevail. The existence of each element is not sufficient evidence to find a violation of the statute where one element is not related to another. See generally Certain Centrifugal Trash Pumps, 337-TA-43, CD 9 (1979). The unfair methods of competition or unfair acts must be in the importation of the subject articles into the United States, or in their sale, such that the combination of these two elements destroys, substantially injures, or prevents the establishment of a domestic industry. The fact that a respondent eventually imports the articles in question into the United States does not demonstrate that an unfair method of competition or unfair act which prevented the establishment of a domestic industry violates § 337 if the importation of that article did not have the effect or tendency of frustrating a company's efforts to stabilize a nascent manufacturing operation or to found a business. The discussion of the legislative history of § 337 on pages 52-54, and the previously described facts, support this conclusion.

The alleged unfair acts which complainant asserts prevented the establishment of a domestic industry took place more than one year before respondent imported the Model 48DS-S disk drive to the United States. FF 5. The alleged prevention of an industry's establishment would have taken place even if respondents had never imported the article at issue. The existence of

economic injury which may result from an unfair act, but is unrelated to import trade, does not violate § 337. Cf., Certain Spring Assemblies and Components Thereof, Inv. No. 337-TA-88, RD 5-6 (1981); Certain Cattle Whips, Inv. No. 337-TA-57, RD 3 (1979); Certain Centrifugal Trash Pumps, Inv. No. 337-TA-43, CD 9 (1979); Certain Light Shields for Sonar Apparatus, Inv. No. 337-TA-33, RD 3 (1977); Certain Bismuth Molybdate Catalysts, Inv. No. 337-TA-20, RD 5 (1976).

There exists a genuine issue of material fact as to whether or not the unfair acts alleged by complainant prevented the establishment of a domestic industry. There is no genuine issue as to the relationship of the alleged unfair methods of competition or unfair acts in the importation of the subject articles into the United States, or in their sale, to this alleged injury. The importation is not related to the alleged prevention. For this reason, I find that there is no genuine issue of material fact in this investigation as to the issue of prevention in the establishment of a domestic industry. Respondents are entitled to a summary determination with respect to this issue as a matter of law.

IX. FINDINGS OF FACT

1. LGIP on behalf of GST and Format has exported parts and components to GST, based on parts lists provided by GST or Format, and has imported disk drives into the United States. LGIP, Response to Complainant Interrogatory Nos. 1, 9 (Sept. 19, 1984).

C 2. LGIP

C

C . LGIP, Response to Complainant Interrogatory No. 11(d) (Sept. 19, 1984).

3. LGIC on behalf of GST and Format and with the assistance of LGIP has exported GST-manufactured disk drives to LGIP in the United States. LGIC, Response to Complainant Interrogatory Nos. 1, 9 (Sept. 26, 1984).

4. GST has developed four disk drives: (1) Model 48DS-S (5 1/4 inch half-height 48TPI double-sided standard disk drive; (2) Model GFD450A (5 1/4 inch half-height 48TPI single sided disk drive); (3) Model GFD451A (5 1/4 inch half-height 48TPI single-sided standard disk drive; and (4) Model GFD951A (5 1/4 inch 96TPI double-sided standard disk drive). The development of Models GFD450A, GFD451A, and GFD951A was completed prior to the receipt by GST of technical information from Format. GST, Response to Complainant Interrogatory No. 1 (Sept. 26, 1984).

5. GST has exported to the United States 1,408 sets of the Model 48DS-S disk drive:

Invoice Date	Quantity
3/27/84	15
5/04/84	60
6/05/84	33
6/07/84	200
6/09/84	200
6/20/84	300
6/26/84	400
6/29/84	200

GST, Response to Complainant Interrogatory No. 8 (Sept. 26, 1984). GST shipped to the United States 400 disk drive units without heads on July 3, 1984. GST, Response to Complainant 2nd Interrogatory No. 2 (Nov. 27, 1984).

6. On July 20, 1984, Format quoted the following prices for its 48DS floppy disk drive:

Quantity	Price
100	$110
500	105
1000	97

Prices were effective for 60 days and delivery took 18 months. Letter from George Evashko, Format, to Gary Rogers, Franklin Data, Att. J, Complaint (Jul. 20, 1984).

C 7.

C

C . GST, Response to Complainant 2nd Interrogatory No. 5 (Nov. 27, 1984).

C 8.

C . GST, Response to Complainant 2nd Interrogatory No. 6 (Nov. 27, 1984).

9.

. GST, Response to Complainant 2nd Interrogatory No. 7 (Nov. 27, 1984).

10.

. GST, Response to Complainant 2nd Interrogatory No. 5 (Nov. 27, 1984).

11. The GST-Format disk drive is not currently available for sale in the United States. Format, Answer to Complaint, ¶ 113.

12.

. GST, Response to Complainant 2nd Interrogatory No. 4 (Nov. 27, 1984).

13.

. GST, Response to Complainant 2nd Interrogatory No. 8 (Nov. 27, 1984).

14. Since July 1, 1984, GST has not advertised for sale to the public in the United States its disk drives. GST, Response to Complainant 2nd Interrogatory No. 9 (Nov. 27, 1984).

15. Since July 1, 1984, GST has not placed any advertisements in trade publications circulated in the United States that advertise for sale GST's disk drives. GST, Response to Complainant 2nd Interrogatory No. 9 (Nov. 27, 1984).

16. Since July 1, 1984, GST has not given or sold any disk drive technology to another person or business entity. GST, Response to Complainant 2nd Interrogatory No. 10 (Nov. 27, 1984).

17. Since July 1, 1984, GST has produced only one disk drive covered by this investigation. GST, Response to Complainant 2nd Interrogatory No. 1 (Nov. 27, 1984).

C 18.

C

C

C . GST, Response to Complainant 2nd Interrogatory No. 11 (Nov. 27, 1984).

C 19.

C

C

C

C

C

C

C . GST, Response to Complainant 2nd Interrogatory Nos. 12, 13, 15 (Nov. 27, 1984).

20. GSC exports computers to the United States. GSC has never exported to the United States a computer containing a GST disk drive. GSC, Response to Complainant Interrogatory Nos. 1, 7 (Oct. 5, 1984); GSC, Response to Complainant 2nd Interrogatory No. 2(b) (Dec. 12, 1984).

C 21.

. GSC, Response to Complainant 2nd Interrogatory Nos. 1, 3 (Dec. 12, 1984).

C 22.

C . GSC, Response to Complainant 2nd Interrogatory No. 4 (Dec. 12, 1984).

C 23.

C . GSC, Response to Complainant 2nd Interrogatory No. 7 (Dec. 12, 1984).

24. LGG filed an annual report in 1982. The following companies were listed under a section entitled "The Lucky-Goldstar Group at a Glance": (1) Gold Star Co., Ltd.; (2) Gold Star Tele-Electric; (3) Bando Sangsa Co., Ltd. LGG, Annual Report 1982, Att. 4, Response to Motion 203-37, at 6-7; see id., at 14, 15, 29.

25. Tandon does not contend that there has occurred a decline in the production of complainant's floppy disk drives as a result of sales of the GST-Format floppy disk drive. Tandon, Response to GST 2nd Interrogatory No. 21 (Nov. 14, 1984).

26. Tandon does not contend that the profit margin on its floppy disk drives had declined as a result of efforts to compete with sales of the GST-Format floppy disk drive. Tandon, Response to GST 2nd Interrogatory No. 23 (Nov. 14, 1984).

27. Tandon does not contend that it has been forced to lower the price of its floppy disk drive to compete with the GST-Format floppy disk drive. Tandon, Response to GST 2nd Interrogatory No. 24 (Nov. 14, 1984).

28. Tandon does not contend that it has suffered a loss of royalties or potential income from licensees as a result of sales of the GST-Format floppy disk drive. Tandon, Response to GST 2nd Interrogatory No. 26 (Nov. 14, 1984).

29. The alleged Tandon trade secrets identified in Attachment D to the Complaint, and which are included in the GST-Format disk drive, are not included in any Tandon disk drive. Tandon, Response to GST 2nd Interrogatory Nos. 43, 44, 45 (Nov. 14, 1984).

30. The alleged Tandon technology identified in Attachment D to the Complaint, and which are included in the GST-Format disk drive, are not included in any Tandon disk drive. Tandon, Response to GST 2nd Interrogatory Nos. 46, 47 (Nov. 14, 1984).

31. As of August 1, 1984, no facilities of Tandon were devoted to the exploitation of the trade secrets allegedly contained in the Tomasi prototype. Tandon, Response to GST Interrogatory No. 60 (1984).

32. As of August 1, 1984, no facilities of Tandon were devoted to the exploitation of the allegedly stolen Tandon technology contained in the Tomasi prototype. Tandon, Response to GST Interrogatory No. 61 (1984).

33. As of August 1, 1984, Tandon was the largest producer of floppy disk drives in the world. Complaint ¶ 81, at 41.

34. Tandon's net sales for fiscal years 1981, 1982, 1983, and 1984 have increased each year: $54,152,000 (FY 81); $150,490,000 (FY 82); $303,369,000 (FY 83); and $400,792,000 (FY 84). Tandon 1983 Annual Report, Att. A, Complaint, at 25; Serge Decl., Att. C, Response to Motions 203-38, 203-39, ¶ 6 (Jan. 1985).

C 35. Approximately of Tandon's net sales are attributable to Tandon's floppy disk drive sales. Serge Decl., Att. C, Response to Motions 203-38, 203-39, ¶ 6 (Jan. 1985).

36. Tandon's net income for fiscal years 1981, 1982, 1983, and 1984 has increased each year: $4,505,000 (FY 81); $15,735,000 (FY 82); $23,658,000 (FY 83); $29,436,000 (FY 84). Tandon 1983 Annual Report, Att. A, Complaint, at 25; Serge Decl., Att. C, Response to Motions 203-38, 203-39, ¶ 6 (Jan. 1985).

C 37. Tandon's net income for fiscal year 1984 is estimated at million. RDX 600, Complaint, Certain Double-Sided Floppy Disk Drives, Inv. No. 337-TA-215, ¶ 28, at 26 (Dec. 6, 1984); see Att. A (Revised Version), Complaint (Aug. 21, 1984).

38. Tandon manufactures the following disk drives: (1) TM 100, a 5 1/4 inch, full-height floppy disk drive; (2) TM 55, a half-height, direct drive floppy disk drive; (3) TM 848, an 8 inch, half-height, direct drive floppy disk drive; (4) TM 50, a half-height, belt-driven floppy disk drive; and (5) TM 101, a modification of the TM 100. Huenemeier Decl., Att. A, Response to Motions 203-38, 203-39, ¶ 16 (Jan. 15, 1985); Serge Decl., Att. C, Response to Motions 203-38, 203-39, ¶¶ 7-9 (Jan. 1985).

39. Tandon introduced the first 5 1/4 inch half-height floppy disk drive into the United States in the spring of 1982. The significance of 5 1/4 inch half-height technology was that two drives could be placed into the same space previously occupied by one full-height drive. Huenemeier Decl., Att. A, Response to Motions 203-38, 203-39, ¶ 32 (Jan. 15, 1985).

40. By 1982 Tandon had introduced to the market two half-height drives. One it designated as the TM 50 (a low cost 48 TPI half-height), the other as the TM 55 (a 96 TPI half-height which used essentially the same mechanics as the TM 50). Both drives are belt-driven or indirect drives. Barmache Decl., Att. B, Response to Motions 203-38, 203-39, ¶ 6 (Jan. 16, 1985); Huenemeier Decl., Att. A, Response to Motions 203-38, 203-39, ¶ 32 (Jan. 15, 1985); Abraham Decl., Att. D, Response to Motions 203-38, 203-39, ¶¶ 3-4 (Jan. 16, 1985).

41. In the latter part of 1982 and the first part of 1983, Tandon was receiving substantial orders from its customers for its half-height belt-driven drives. Substantial difficulty was experienced by Tandon in getting the TM 50 to be manufacturable. Greater difficulty was being experienced with respect to the TM 55. Huenemeier Decl., Att. A, Response to Motions 203-38, 203-39, ¶ 34 (Jan. 15, 1985); see Abraham Decl., Att. D, Response to Motions 203-38, 203-39, ¶¶ 5-7 (Jan. 16, 1985).

42. In the fall of 1982, Mr. Tomasi was assigned to solve problems Tandon was having with the TM 50 and TM 55. Tomasi Decl., Att. B, Complaint, ¶ 8 (Jul. 27, 1984); CX 582. Mr. Tomasi commenced work to modify or redesign the TM 55 to accommodate a direct drive motor. Huenemeier Decl., Att. A, Response to Motions 203-38, 203-39, ¶ 32 (Jan. 15, 1985); Barmache Decl., Att. B, Response to Motions 203-38, 203-39, ¶¶ 18-19 (Jan. 16, 1985).

43. Mr. Tomasi suggested that he be allowed to develop his own concept of a direct drive disk drive. Tomasi Decl., Att. B, Complaint, ¶ 9 (Jul. 27, 1984); Barmache Decl., Att. B, Response to Motions 203-38, 203-39, ¶¶ 12-13 (Jan. 16, 1985). This drive was not to be a redesign of the TM 55 or

a direct drive TM 55. Huenemeier Decl., Att. A, Response to Motions 203-38, 203-39, ¶ 36 (Jan. 15, 1985); Barmache Decl., Att. B, Response to Motions 203-38, 203-39, ¶¶ 14, 20 (Jan. 16, 1985).

44. By the end of 1982, Mr. Tomasi had substantially completed a design for a half-height disk drive which incorporated a direct drive system. Tomasi Decl., Att. B, Complaint, ¶ 14 (Jul. 27, 1984).

45. Mr. Tomasi displayed the model to Tandon management at a design review meeting on January 6, 1983. Tomasi Decl., Att. B, Complaint, ¶ 14 (Jul. 27, 1984); Barmache Decl., Att. B, Response to Motions 203-38, 203-39, ¶ 22 (Jan. 16, 1985).

46. Mr. Tomasi terminated his employment with Tandon on January 21, 1983. Tomasi Decl., Att. B, Complaint, ¶ 20 (Jul. 27, 1984).

47. Mr. Tomasi on January 31, 1983, returned a model and some related drawings. Tomasi Decl., Att. B, Complaint, ¶ 24 (Jul. 27, 1984); Barmache Decl., Att. B, Response to Motions 203-38, 203-39, ¶¶ 69-73, 76-77 (Jan. 16, 1985).

48. Some of the parts which had been on the model when it was presented at the design review meeting had been removed or altered by Mr. Tomasi prior to the model being returned to Tandon on January 31, 1983. Tomasi Decl., Att. B, Complaint, ¶¶ 25-26 (Jul. 27, 1984); Barmache Decl., Att. B, Response to Motions 203-38, 203-39, ¶¶ 70, 75-80 (Jan. 16, 1985).

49. After leaving his employment with Tandon, Tomasi entered into a business arrangement with Felix Markhovsky, Mikhail Anisimov, Herbert Berger, and Edward Wilka to design, develop, manufacture, and sell a 5 1/4 inch half-height direct drive floppy disk drive. Tomasi Decl., Att. B, Complaint, ¶¶ 3, 21-22 (Jul. 27, 1984).

50. At the time Mr. Tomasi left his employment with Tandon, Tandon did not produce a half-height, direct drive floppy disk drive. Elsner Dep., at 24-25, 30 (Dec. 6, 1984); Abraham Dep., Ex. 3, Staff Response to Motion 203-39, at 113 (Dec. 10, 1984).

51. By the spring of 1983 Tandon was able to substantially improve the TM 55 disk drive design relative to the one that existed in the fall of 1982. Huenemeier Decl., Att. A, Response to Motions 203-38, 203-39, ¶ 49 (Jan. 15, 1985).

52. Tandon's first direct drive floppy disk drive, the TM 55D, was made available to some customers about September 1983. Abraham Dep., Ex. 3, Staff Response to Motion 203-39, at 124 (Dec. 10, 1984); Huenemeier Decl., Att. A, Response to Motions 203-38, 203-39, ¶¶ 49-50 (Jan. 15, 1985).

53. Production of the TM 65, a better performance 5 1/4 inch half-height, direct drive floppy disk drive, took place in mid to late 1984. Barmache Decl., Att. B, Response to Motions 203-38, 203-39, ¶ 103 (Jan. 16, 1985); Huenemeier Decl., Att. A, Response to Motions 203-38, 203-39, ¶ 20 (Jan. 15, 1985).

54. First deliveries of the TM 65 took place during the summer of 1984. Huenemeier Decl., Att. A, Response to Motions 203-38, 203-39, ¶ 53 (Jan. 15, 1985).

55. There is a period of time during which the marketing of a new product is most opportune. The opportunity is sometimes referred to as a marketing window and is characterized by customers who are shopping for the first time who are open-minded and select a vendor in an impartial way. Abraham Decl., Att. D, Response to Motions 203-38, 203-39, ¶ 13 (Jan. 16, 1985); Abraham Dep., Ex. 3, Staff Response to Motion 203-39, at 103-06 (Dec. 10, 1984).

56. The marketing window of opportunity for half-height 5 1/4 inch floppy disk drives opened in the summer and fall of 1982. Abraham Decl., Att. D, Response to Motions 203-38, 203-39, ¶ 14 (Jan. 16, 1985).

57. The marketing window for half-height floppy disk drives was wide open in the fall of 1982 and continued into 1983. Abraham Decl., Att. D, Response to Motions 203-38, 203-39, ¶ 16 (Jan. 16, 1985); Abraham Dep., Ex. 3, Staff Response to Motion 203-39, at 109-13, 114-17 (Dec. 10, 1984); see Discussion, Response to Motions 203-38, 203-39, at 20-22.

58. During the fall of 1982 and continuing into 1983, computer manufacturers evaluated half-height 5 1/4 inch floppy disk drives and selected their vendors based upon their assessment of the quality and performance of the disk drives and the perceived ability of the manufacturer to produce, deliver, and support the disk drives on a reliable long-term basis. Abraham Decl., Att. D, Response to Motions 203-38, 203-39, ¶ 14 (Jan. 16, 1985); Abraham Dep., Ex. 3, Staff Response to Motion 203-39, at 72 (Dec. 10, 1984).

59. Very little of the customer base for half-height, direct drive floppy disk drives was eliminated due to the efforts of competitors in September-October-November 1982. Approximately 20 percent of the market for this product disappeared during the spring of 1983, March-April-May. During June-July-August 1983, another 10 to 20 percent of the market disappeared, and during September-October-November 1983, another 10 to 20 percent disappeared. Abraham Dep., Ex. 3, Staff Response to Motion 203-39, at 118, 120-22, 126-28 (Dec. 10, 1984).

60. After the major customers chose the half-height disk drive for their new computers and selected their vendors, the marketing window for this product to a substantial degree closed. Abraham Decl., Att. D, Response to Motions 203-38, 203-39, ¶ 15 (Jan. 16, 1985); Abraham Dep., Ex. 3, Staff Response to Motion 203-39, at 72 (Dec. 10, 1984).

61. A marketing window never closes because inevitably there are new opportunities. However, most of the prospective customers have already signed with a vendor and it is extremely difficult to take business away from a competitor. Original equipment manufacturers spend a substantial amount of time and effort in evaluating vendors' products from a technical standpoint and from a standpoint of whether a vendor will be able the supply the OEMs' needs on a reliable basis. Once a vendor has been selected, manufacturers are reluctant to go through this process with any other vendor and ordinarily do not do so absent a good reason, such as quality or delivery problems or a substantially better price. Abraham Decl., Att. D, Response to Motions 203-38, 203-39, ¶ 15 (Jan. 16, 1985); Abraham Dep., Ex. 3, Staff Response to Motion 203-39, at 104, 130 (Dec. 10, 1984).

62. As major companies qualified and selected their vendors for half-height floppy disk drives, the marketing window began to close in early 1983 and was substantially closed by mid-1984. Of the customer base for this product perceived by Tandon in September 1982, only 10 or 20 percent of this base was available by August 1984. Abraham Decl., Att. D, Response to Motions 203-38, 203-39, ¶ 16 (Jan. 16, 1985); Abraham Dep., Ex. 3, Staff Response to Motion 203-39, at 129-31 (Dec. 10, 1984).

X. CONCLUSIONS OF LAW

1. The U.S. International Trade Commission has jurisdiction over unfair methods of competition and unfair acts in the importation into or sale in the United States of products the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. 19 U.S.C. § 1337.

2. The Commission has subject matter jurisdiction over the floppy disk drives and components thereof at issue in this investigation that have been imported into or sold in the United States. Opn., at 12.

3. Any party may move for a summary determination in his favor upon all or any part of the issues to be determined in a § 337 investigation. The determination sought by the moving party shall be rendered if the pleadings and any depositions, admissions on file, and affidavits 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. § 210.50.

4. The administrative law judge, in ruling on a motion for summary determination, should not resolve any material factual issue. If there is such an issue it should be resolved at a hearing in the appropriate manner. Opn., at 20-21.

5. All inference of facts from the evidence proffered must be viewed in a light most favorable to the party opposing the motion. Any reasonable doubt should be resolved against the movant. Opn., at 20-21, 22-26.

6. Misappropriation of trade secrets is an unfair method of competition or unfair act which falls within the purview of § 337. Opn., at 27-28.

7. There are genuine issues of material fact as to the existence of the alleged unfair methods of competition and unfair acts. Opn., at 27-40.

8. To invoke the subject matter jurisdiction of the Commission and to support a finding that a violation of § 337 exists, a complainant must establish that the accused product has been imported and/or sold in the United States. Opn., at 41.

9. There is no substantial controversy as to the importation into and sale in the United States by certain respondents of the subject floppy disk drives and components therefor. Opn., at 41-42.

10. Domestic industry is customarily defined as the domestic operations of the intellectual property owner and its licensees devoted to the exploitation of the intellectual property. The domestic industry is not limited to manufacturing per se but encompasses distribution, research and development, and sales. The Commission does not adhere to any rigid formula in determining the scope of the domestic industry but will examine each case in light of the realities of the marketplace. Opn., at 43-45.

11. The evidence shows substantial factual issues and complicated legal questions that need fuller development to determine whether there exists an industry, efficiently and economically operated, in the United States for purposes of relief under § 337. Opn., at 43-48.

12. Injury requires proof separate and independent from evidence of an unfair act. Complainant must establish a causal relationship between respondents' unfair acts in the importation of an article and the injury suffered as a result of such acts. Opn., at 49, 51-54.

13. There is no genuine issue of material fact as to the relationship of the alleged unfair methods of competition or unfair acts in the importation of the subject articles to the United States, or in their sale, to the alleged substantial injury to the domestic industry or the alleged prevention of the establishment of such an industry. Opn., at 49-55, 61-63.

14. There is no genuine issue of material fact as to the alleged tendency to injure the domestic industry. However, if for some reason marketing conditions in the future change, complainant should be permitted to seek reinstitution of the complaint. Evidence of renewed shipments by respondents in significant quantities would be evidence of changed marketing conditions. Opn., at 55-61.

XI. INITIAL DETERMINATION AND ORDER

The administrative law judge hereby denies in part respondents Lucky-Goldstar International, Lucky-Goldstar International (America), Lucky-Goldstar International (Pacific), The Lucky-Goldstar Group, Gold Star, and Gold Star Tele-Electric's motions for summary determination as to the alleged unfair methods of competition or unfair acts. The administrative law judge also denies in part those same respondents and respondents Format and Messrs. Anisimov and Markhovsky's motions for summary determination as to the alleged existence of an industry, efficiently and economically operated, in the United States. Finally, the request of certain respondents that the administrative law judge recommend to the Commission that it award reasonable attorney's fees and costs is denied.

The administrative law judge finds that there is no substantial controversy as to the importation and sale of the disk drives at issue by respondents Gold Star Tele-Electric, Lucky-Goldstar International, Lucky-Goldstar International (Pacific), and Format. The administrative law judge is not precluded from finding facts for a non-movant if no factual dispute exists. Therefore, it is the administrative law judge's finding of fact that GST, LGIP, LGIC, and Format imported into and/or sold in the United States certain floppy disk drives and components therefor. 19 C.F.R. § 210.50(e).

The administrative law judge hereby grants in part respondents Lucky-Goldstar International, Lucky-Goldstar International (America), Lucky-Goldstar International (Pacific), The Lucky-Goldstar Group, Gold Star, Gold Star Tele-Electric, Format, and Messrs. Anisimov and Markhovsky's motions for summary determination:

(1) It is the administrative law judge's ORDER OF SUMMARY DETERMINATION that there is no genuine issue of material fact as to the relationship of the alleged unfair methods of competition or unfair acts in the importation of the subject articles to the United States, or in their sale, to the alleged substantial injury to the domestic industry or the alleged prevention of the establishment of such an industry.

(2) It is also the administrative law judge's ORDER OF SUMMARY DETERMINATION that there is no genuine issue of material fact as to the alleged tendency to substantially injure the domestic industry. However, if for some reason marketing conditions as defined in this opinion at pages 55-60 in the future change, complainant should be permitted to seek reinstitution of the complaint. Evidence of renewed shipments by respondents in substantial quantities would be evidence of changed marketing conditions.

Based on the foregoing opinion, findings of fact, conclusions of law, and the record as a whole, and having considered all pleadings and arguments, it is the administrative law judge's INITIAL DETERMINATION that there is no violation of § 337 of the Tariff Act of 1930, as amended, in the importation into or sale in the United States of certain floppy disk drives and components therefor. The administrative law judge hereby CERTIFIES to the Commission this Initial Determination together with the relevant motions, pleadings, depositions, affidavits, interrogatories, and other materials that would be admissible in evidence or otherwise usable at trial.

In accordance with Rule 210.44(b), all material found to be confidential by the administrative law judge under Rule 210.6(a) is to be given in camera treatment for five years from the termination date of this investigation.

The Secretary is instructed to serve a public version of this Initial Determination upon all parties of record and the confidential version upon all counsel of record who are signatories to the protective order issued by the administrative law judge on September 6, 1984. To expedite service of the

public version, counsel is hereby ordered to serve on the administrative law judge by no later than April 30, 1985, a copy of this Initial Determination with those sections considered by the party to be confidential bracketed in red ink.

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 Initial Determination, or certain issues herein, pursuant to Rules 210.54(b) or 210.55. 19 C.F.R § 210.53(h).

Any party to this investigation may request a review by the Commission of this Initial Determination by filing with the Secretary a petition for review, except that a party who has defaulted may not petition for review of any issue regarding which the party is in default. A petition of review shall be filed within five (5) days after the service of this Initial Determination. 19 C.F.R. § 210.54(a).

So ordered.

Sidney Harris
Administrative Law Judge

Issued: April 26, 1985

CERTIFICATE OF SERVICE

I, Kenneth R. Mason, hereby certify that the attached Initial Determination (Public Inspection) was served upon Victoria Partner, Esq., and upon the following parties via first class mail, and air mail where necessary, on May 9, 1985.

Kenneth R. Mason, Secretary
U.S. International Trade Commission
701 E Street, N. W.
Washington, D.C. 20436

FOR COMPLAINANT TANDON CORPORATION:

R. V. Lupo, Esq.; Jack Q. Lever, Jr., Esq.;
Steven E. Lipman, Esq.
LEVINE, LUPO, LIPMAN & LEVER
1025 Connecticut Avenue, N.W., Suite 712
Washington, D.C. 20036

James A. Hamilton, Esq.; Thomas K. Bourke, Esq.;
Steven C. Kenninger, Esq.
RIORDAN, CAPS, CARBONE & MCKINZIE
523 West Sixth Street, Suite 1234
Los Angeles, California 90014

Raymond A. Bogucki, Esq.; Louis A. Mok, Esq.
FRASER & BOGUCKI
3345 Wilshire Boulevard, Suite 704
Los Angeles, California 90010-1868

RESPONDENTS

FOR GOLD STAR TELE-ELECTRIC CO., LTD.; LUCKY-GOLDSTAR INTERNATIONAL CORP.; LUCKY-GOLDSTAR INTERNATIONAL (PACIFIC), INC.; LUCKY-GOLDSTAR GROUP; GOLD STAR CO., LTD.; LUCKY-GOLDSTAR INTERNATIONAL (AMERICA, INC.:

Andrew S. Newman, Esq.;
Jeff Turner, Esq.; Frank R. Samolis, Esq.
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037

Charles Owen Verrill, Jr. Esq.
WILEY & REIN
1776 K Street, N.W.
Washington, D.C. 20006

(Cont'd)

CERTIFICATE OF SERVICE - Page 2

FOR GOLD STAR TELE-ELECTRIC CO., LTD.:

Orville A. Armstrong, Esq.
MACDONALD, HALSTED & LAYBOURNE
1200 Wilshire Boulevard
Los Angeles, California 90017

FOR FORMAT CORPORATION; FELIX MARKHOVSKY; MIKHAIL ANISIMOV; HERBERT BERGER; JAY J. AHN; AND G. EDWARD WILKA

Larry E. Klayman, Esq.; Michael R. Levy, Esq.
LAW OFFICE OF LARRY E. KLAYMAN
Washington Square, Suite 300
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Howard B. Brown, Esq.
BROWN & BROWN, P.C.
10100 Santa Monica Boulevard
Suite 2080
Los Angeles, California 90067

FOR HERBERT BERGER; G. EDWARD WILKA:

Peter A. Menjou, Esq.; Joel D. Covelman, Esq.
MESERVE, MUMPER & HUGHES
333 South Hope Street, 35th Floor
Los Angeles, California 90071

FOR JAY J. AHN:

William K. Swank, Esq.; Maren Nelson, Esq.
OVERTON, LYMAN AND PRINCE
550 South Flower Street, 6th Floor
Los Angeles, California 90071

GOVERNMENT AGENCIES:

Mr. Charles S. Stark
Antitrust Div./U.S. Dept of Justice
Room 7115, Main Justice
Pennsylvania Avenue & Tenth Street, N.W.
Washington, D.C. 20530

Edward F. Glynn, Jr., Esq.
Asst Dir for Intl Antitrust
Federal Trade Commission
Room 502-4, Logan Building
Washington, D.C. 20580

Darrel J. Grinstead, Esq.
Dept of Health and Human Svcs.
Room 5362, North Building
330 Independence Avenue, S.W.
Washington, D.C. 20201

Richard Abbey, Esq.
Chief Counsel
U.S. Customs Service
1301 Constitution Avenue, N.W.
Washington, D.C. 20229