

In the Matter of

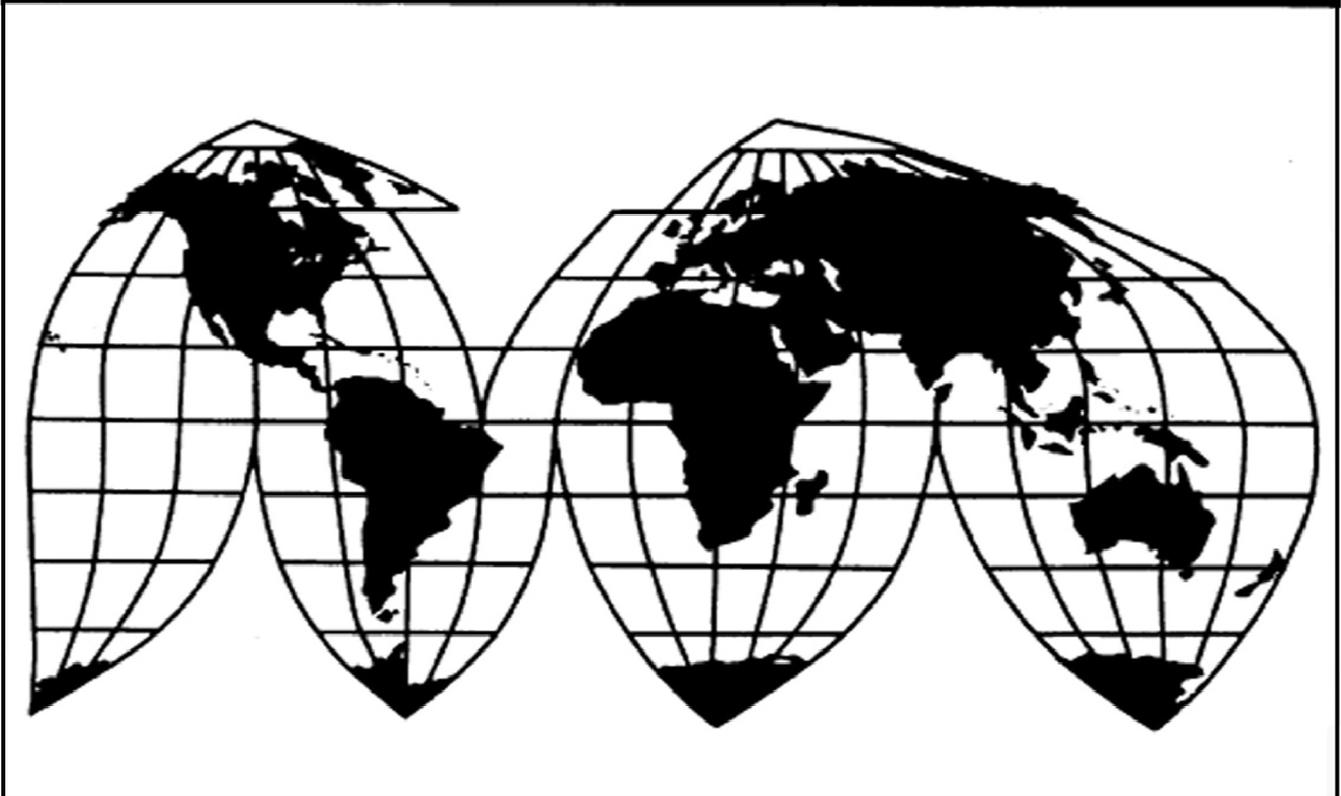
**Certain Ink Markers and
Packaging Thereof**

Investigation No. 337-TA-522

Publication 3971

December 2007

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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Dean A. Pinkert*

*Commissioner Irving A. Williamson was sworn in on February 7, 2007, and Commissioner Dean A. Pinkert was sworn in on February 26, 2007; they did not participate in this investigation. Commissioner Marcia E. Miller, whose term ended on September 6, 2005 recused herself from the violation determination in this investigation, Commissioner Shara L. Aranoff was sworn in on September 6, 2005, and participated in the remedy phase of this investigation. Commissioner Stephen Koplun, whose term ended on February 6, 2007, and Commissioner Jennifer A. Hillman, whose term ended on February 23, 2007, did participate in this investigation.

**Address all communications to
Secretary to the Commission
United States International Trade Commission
Washington, DC 20436**

U.S. International Trade Commission

Washington, DC 20436
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In the Matter of

Certain Ink Markers and Packaging Thereof

Investigation No. 337-TA-522



UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN INK MARKERS AND
PACKAGING THEREOF**

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) **Inv. No. 337-TA-522**
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**ISSUANCE OF A GENERAL EXCLUSION ORDER
AND A CEASE AND DESIST ORDER; TERMINATION OF INVESTIGATION**

AGENCY: U.S. International Trade Commission

ACTION: Notice

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has issued a general exclusion order and a cease and desist order in the above-captioned investigation and has terminated the investigation.

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

SUPPLEMENTARY INFORMATION: This trademark-based section 337 investigation was instituted by the Commission based on a complaint filed by Sanford, L.P. of Freeport, Illinois ("Sanford" or "complainant"). 69 *Fed. Reg.* 52029 (August 24, 2004). The complaint, as supplemented, alleged violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 ("Section 337") in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain ink markers and packaging thereof by reason of infringement of U.S. Trademark Registration Nos. 807,818 and 2,721,523 and also by reason of infringement of trade dress. The notice of investigation identified 12 respondents. On November 10, 2004, the presiding administrative law judge ("ALJ") granted a motion to add

three respondents to the investigation. The Commission determined not to review this initial determination (“ID”). 69 *Fed. Reg.* 75342 (December 16, 2004). Each respondent was accused of violating Section 337 by infringing Sanford’s trade dress. Certain respondents were also accused of infringing one or more of complainant’s registered trademarks.

Between November 15, 2004, and June 1, 2005, the ALJ issued several IDs terminating various respondents on the basis of settlement agreements or consent orders. During that time period other IDs were issued finding several other respondents in default. No petitions for review of any of these IDs were filed, and the Commission determined not to review any of them, thereby allowing them to become the Commission’s determinations.

On April 19, 2005, Sanford filed a motion seeking a summary determination of violation and issuance of a general exclusion order and a cease and desist order. On July 25, 2005, the ALJ issued Order No. 30, an ID finding violations of Section 337 and recommending the issuance of a general exclusion order and a cease and desist order to respondent Mon Ami Co. Ltd. (“Mon Ami”). He further recommended that the bond permitting temporary importation during the Presidential review period be set at 100 percent of the value of the infringing imported product.

On August 5, 2005, Sanford filed a petition for review of one aspect of Order No. 30. Specifically, Sanford sought review of the ID’s finding that complainant had failed to show importation with respect to defaulted respondent LiShui Laike Pen Co., Ltd. The Commission investigative attorney (“IA”) opposed Sanford’s petition for review. On August 25, 2005, complainant filed a motion for leave to file a reply to the IA’s petition for review.

The Commission determined, on September 8, 2005, not to review the July 25, 2005 ID (Order No. 30) finding a violation of Section 337, and established a schedule for filing submissions on the issues of remedy, the public interest and bonding. 70 *Fed. Reg.* 54079 (Sept. 13, 2005). The Commission also denied complainant’s motion for leave to file a reply. *Id.* Sanford and the IA filed timely written submissions regarding the issues of remedy, the public interest, and bonding. Sanford filed a reply submission.

Having reviewed the record in this investigation, including the parties’ written submissions and responses thereto, the Commission determined that the appropriate form of relief in this investigation is a general exclusion order and a cease and desist order to one respondent, Mon Ami. The general exclusion order prohibits the entry for consumption of certain ink markers and packaging thereof that bear SHARPIE Trademarks or Sanford’s protected trade dress, as well as any marks or trade dress confusingly similar thereto or that are otherwise misleading as to source, origin or sponsorship. The cease and desist order prohibits respondent Mon Ami from importing, selling, marketing, advertising, distributing, offering for sale, transferring (except by exportation), and soliciting U.S. agents or distributors for imported ink markers and packaging thereof that bear Sanford’s protected trade dress, are confusingly similar thereto, or that are otherwise misleading as to source, origin or sponsorship.

The Commission determined that the statutory public interest factors enumerated in subsections (d)(1) and (f)(1) of section 337 of the Tariff Act of 1930 (19 U.S.C. §§ 1337(d)(1) and (f)(1)) do not preclude the issuance of these remedial orders. The Commission also determined that the excluded ink markers may be imported and sold in the United States during the Presidential review period under bond in the amount of 100 percent of the entered value of such items. The Commission's orders and opinion in support thereof were delivered to the President and the United States Trade Representative on the day of their issuance.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and section 210.50 of the Commission's Interim Rules of Practice

By order of the Commission.

A handwritten signature in cursive script, appearing to read "Marilyn R. Abbott".

Marilyn R. Abbott
Secretary to the Commission

Issued: October 25, 2005

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

In the Matter of

**CERTAIN INK MARKERS AND
PACKAGING THEREOF**

Inv. No. 337-TA-522

GENERAL EXCLUSION ORDER

The Commission has previously determined that there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the unlawful importation, sale, and/or sale after importation of certain ink markers and packaging thereof that infringe: (1) U.S. Registered Trademark Nos. 807,818 and 2,721,523 and (2) the trade dress of certain of Complainant's ink markers ("protected trade dress"). 70 *Fed. Reg.* 54079 (Sept. 13, 2005). The protected trade dress is as follows:

A distinctive gray, tapered, cigar-shaped barrel; a tapered, fully-colored cap that contrasts with the gray color of the barrel; and a cap-to-barrel ratio of approximately 1/3 to 2/3 (a 1:2 ratio) of the total size of the marker.

Unreviewed Initial Determination (Order No. 30, July 25, 2005) at 15.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined that a general exclusion from entry for consumption is necessary to prevent circumvention of an exclusion order limited to products of named persons

because there is a pattern of violation of section 337 and it is difficult to identify the source of infringing products. Accordingly, the Commission has determined to issue a general exclusion order prohibiting the unlicensed importation of infringing ink markers and packaging thereof.

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

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

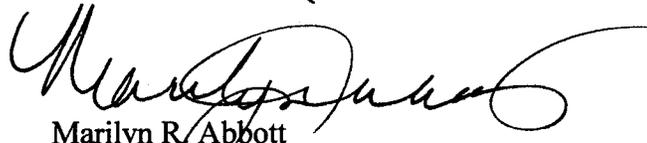
1. Ink markers and packaging thereof that (i) infringe U.S. Registered Trademark Nos. 807,818 or 2,721,523¹ or any marks confusingly similar thereto or that are otherwise misleading as to source, origin, or sponsorship, or (ii) bear Sanford's protected trade dress or any trade dress confusingly similar thereto or that are otherwise misleading as to source, origin or sponsorship are excluded from entry into the United States for consumption, entry for consumption from a foreign-trade zone, and withdrawal from a warehouse for consumption until such date as the trademarks or trade dress are abandoned, canceled, or rendered invalid or unenforceable, except under license from, or with the permission of, the trademark or trade dress owner or as provided by law.
2. For the purpose of assisting U.S. Customs and Border Protection in the enforcement of this Order, and without in any way limiting the scope of the Order, the Commission has attached to this Order as Exhibit 3 a copy of a series of full-color photographs provided by Sanford, L.P. of exemplary Sanford ink markers containing the protected trade dress and a photograph of the trade dress broken down by its component parts. The Commission has also attached the relevant trademark registrations to this Order as Exhibits 1 & 2.

¹ Copies of these registrations are attached as Exhibits 1 and 2.

3. Notwithstanding paragraph 1 of this Order, the aforesaid ink markers and packaging thereof are entitled to entry into the United States for consumption, entry for consumption from a foreign-trade zone, and withdrawal from a warehouse for consumption, under bond in the amount of 100 percent of the entered value of such articles pursuant to subsection (j) of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337(j), from the day after this Order is received by the United States Trade Representative as delegated by the President, 70 *Fed. Reg.* 43251 (July 21, 2005), and until such time as the United States Trade Representative notifies the Commission that this action is approved or disapproved but, in any event, not longer than sixty (60) days after the date of receipt of this action.
4. Any party that believes itself to be excluded from this Order by the terms of a Commission consent order shall present evidence to that effect to U.S. Customs and Border Protection.
5. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to ink markers and packaging thereof imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.
6. Complainant Sanford, L.P. shall file a written statement with the Commission, made under oath, each year on the anniversary of the issuance of this Order stating whether Sanford, L.P. continues to use each of the aforesaid trademarks and trade dress in commerce in the United States in connection with ink markers and packaging thereof and whether any of the aforesaid trademarks and trade dress has been abandoned, canceled, or rendered invalid or unenforceable.
7. The Commission may modify this Order in accordance with the procedure described in section 210.76 of the Commission's rules of Practice and Procedure (19 C.F.R. § 210.76).
8. The Commission Secretary shall serve copies of this Order upon each party of record in this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and U.S. Customs and Border Protection.

9. Notice of this Order shall be published in the *Federal Register* pursuant to section 337(j)(1)(A) of the Tariff Act of 1930 as amended (19 U.S.C. § 1337(j)(1)(A)) and section 210.49(b) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.49(b)).

By order of the Commission



Marilyn R. Abbott
Secretary to the Commission

Issued: October 25, 2005

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

In the Matter of

**CERTAIN INK MARKERS AND
PACKAGING THEREOF**

Investigation No. 337-TA-522

ORDER TO CEASE AND DESIST

IT IS HEREBY ORDERED THAT Mon Ami Co., Ltd., 125-20 Jungdam 1-Dong, Gangnam-Gu, Seoul, 135-957, South Korea (hereinafter "Mon Ami" or "Respondent") cease and desist from conducting any of the following activities in the United States: importing, selling, offering for sale, marketing, advertising, distributing, transferring (except for exportation), and soliciting U.S. agents, dealers, distributors or the like for imported ink markers and packaging thereof that bear Sanford's protected trade dress or any trade dress confusingly similar thereto or that are otherwise misleading as to source, origin or sponsorship the protected trade dress in violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337.

I.

Definitions

As used in this Order:

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

(B) "Mon Ami Co., Ltd.," "Mon Ami" and "Respondent" shall mean Mon Ami Co., Ltd., 125-20 Jungdam 1-Dong, Gangnam-Gu, Seoul, 135-957, South

Korea and its affiliates, subsidiaries, assigns, and any other related business entities

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

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

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

(F) The term "covered products" shall mean ink markers and packaging thereof that are manufactured abroad by or on behalf of, or are imported by or on behalf of, Respondent, that bear Sanford's protected trade dress or any trade dress confusingly similar thereto or that are otherwise misleading as to source, origin or sponsorship and thereby infringe the protected trade dress as described by the Commission and shown in the photograph attached hereto, and that are not imported by, under license from, or with the permission of the trade dress owner, or as provided by law. The Commission has described the protected trade dress as follows:

A distinctive gray, tapered, cigar-shaped barrel; a

tapered, fully-colored cap that contrasts with the gray color of the barrel; and a cap-to-barrel ratio of approximately 1/3 to 2/3 (a 1 :2 ratio) of the total size of the marker.

Unreviewed Initial Determination at 15 (Order No. 30, July 25, 2005).

II.

Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, *infra*, for, with, or otherwise on behalf of, Respondent.

III.

Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by the Order. Until the asserted trade dress is abandoned or rendered invalid or unenforceable, Respondent shall not:

- (A) import into the United States covered products;
- (B) market, distribute, offer for sale, sell, or otherwise transfer (except for exportation), in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents, dealers, distributors, or the like for imported

covered products; or

(E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

IV.

Conduct Permitted

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

V.

Reporting

For purposes of this reporting requirement, the reporting periods shall commence on July 1 of each year and shall end on the subsequent June 30. However, the first report required under this section shall cover the period from the date of issuance of this Order through June 30, 2006. This reporting requirement shall continue in force until such time as Respondent will have truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission the quantity in units and the value in dollars of covered products that Respondent has imported or sold in the United States after

importation during the reporting period and the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

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

VI.

Record-keeping and Inspection

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

(B) For the purpose of determining or securing compliance with this Order and for no other purpose, and subject to any privilege recognized by the federal courts of the United States, duly authorized representatives of the Commission, upon reasonable written notice by the Commission or its staff, shall be permitted access and the right to inspect and copy in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, both in detail and in summary

form, as are required to be retained by subparagraph VI(A) of this Order.

VII.

Service of Cease and Desist Order

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States as well as upon those persons with these responsibilities at the licensees, distributors, contractors, and controlled (whether by stock ownership or otherwise) and/or majority owned business entities described in paragraph I;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII (A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the protected trade dress is abandoned or rendered invalid or unenforceable.

VIII.

Confidentiality

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

IX.

Enforcement

Violation of this Order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.75, including an action for civil penalties in accordance with section 337(f) of the Tariff Act of 1930, 19 U.S.C. § 1337(f), and any other action as the Commission may deem appropriate. In determining whether Respondent is in violation of this Order, the Commission may infer facts adverse to Respondent if Respondent fails to provide adequate or timely information.

X.

Modification

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.76.

XI.

Bonding

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

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* Commission Rule 210.68, 19 C.F.R. § 210.68. The bond and any accompanying documentation is to be provided to and approved by the Commission prior to the commencement of conduct which is otherwise prohibited by Section III of this Order.

The bond is to be forfeited in the event that the United States Trade Representative approves, or does not disapprove within the Presidential review period, this Order, unless the U.S. Court of Appeals for the Federal Circuit, in a

final judgment, reverses any Commission final determination and order as to Respondent on appeal, or unless Respondent exports the products subject to this bond or destroys them and provides certification to that effect satisfactory to the Commission.

The bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved, or not disapproved, by the United States Trade Representative, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By Order of the Commission.

A handwritten signature in black ink, appearing to read 'Marilyn R. Abbott', with a large, stylized flourish at the end.

Marilyn R. Abbott
Secretary to the Commission

Issued: October 25, 2005

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF ISSUANCE OF A GENERAL EXCLUSION ORDER AND A CEASE AND DESIST ORDER; TERMINATION OF INVESTIGATION**, was served upon the Commission Investigative Attorney, and all parties via first class mail on October 26, 2005.



Marilyn R. Abbott, Secretary
U.S. International Trade Commission
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PUBLIC VERSION

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

In the Matter of

**CERTAIN INK MARKERS AND
PACKAGING THEREOF**

Inv. No. 337-TA-522

**COMMISSION OPINION ON VIOLATION OF SECTION 337
AND ON REMEDY, THE PUBLIC INTEREST, AND BONDING**

BACKGROUND

This trademark-based section 337 investigation was instituted by the Commission based on a complaint filed by Sanford, L.P. of Freeport, Illinois (“Sanford” or “complainant”). 69 *Fed. Reg.* 52029 (August 24, 2004). The complaint, as supplemented, alleged violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain ink markers and packaging thereof by reason of infringement of U.S. Trademark Registration Nos. 807,818 and 2,721,523 and also by reason of infringement of Sanford’s trade dress. The notice of investigation identified 12 respondents.¹ *Id.* On November 10, 2004, the ALJ granted a motion to add three respondents to the investigation.² The Commission determined not to review the ID. 69 *Fed. Reg.* 75342 (December 16, 2004).

Each respondent was accused of violating Section 337 by infringing Sanford’s trade dress.

¹ The respondents named in the original complaint are as follows: Asia Global (HK) Ltd.; Bangkit USA, Inc.; Cixi City Heng Bao Pen Manufacturer; Cixi Guancheng Yangtse River Pen Company; Lineplus Corp.; LiShui Laike Pen Co., Ltd.; Luxor International Pvt. Ltd.; Midwestern Home Products, Inc.; Mon Ami Co. Ltd.; Ningbo Biefa Group Co. Ltd.; Southern States Marketing, Inc.; and Uchida of America Corp.

² The additional respondents are Big Lots Stores, Inc., Big Lots Inc., and Two Powers Enterprise Co. Ltd.

PUBLIC VERSION

Some respondents were also accused of infringing one or more of complainant's registered trademarks. Between November 2004 and June 2005, all respondents, except for Lineplus Corp. ("Lineplus"), had either been terminated from the investigation on the basis of settlement agreements or consent orders, or had been found in default. The defaulted respondents included Cixi City Heng Bao Pen Manufacturer ("Heng Bao"); Cixi Guancheng Yangtse River Pen Company ("Yangtse River"); LiShui Laike Pen Co., Ltd., ("LiShui"); and Mon Ami Co. Ltd. ("Mon Ami").

On April 19, 2005, complainant Sanford filed a motion seeking a summary determination of violation and issuance of a General Exclusion Order and a Cease and Desist Order against respondent Mon Ami.

On July 25, 2005, the Administrative Law Judge ("ALJ") issued Order No. 30, an initial determination ("ID") finding violations of section 337 and recommending issuance of a General Exclusion Order and a Cease and Desist Order against Mon Ami. In his ID, the ALJ stated that he considered Lineplus and defaulted respondents Heng Bao, Yangtse River, and Mon Ami to be the respondents to the motion for summary determination. ID at 7. He stated that he did not include LiShui as a motion respondent because he found that complainant had not established the importation requirement as to LiShui. ID at 7 n.3 and ID at 24. Consequently the ID found a violation of section 337 based on importations by Lineplus, Heng Bo, Yangtse River, and Mon Ami.

On August 5, 2005, Sanford filed a petition for review of the ID's finding that complainant had failed to show importation with respect to defaulted respondent LiShui. On August 12, 2005, the Commission Investigative Attorney ("IA") (Ms. Goalwin) filed an opposition to Sanford's petition for review. The Commission determined on September 8, 2005, not to review the ID, and established a schedule for filing submissions on the issues of remedy, the public interest and bonding.

PUBLIC VERSION

The complainant and the IA filed timely written submissions regarding those issues on September 16, 2005. On September 23, 2005, the Commission received a reply submission from Sanford; no reply submission was received from the IA. The ALJ, complainant and the IA agree that a General Exclusion Order and a Cease and Desist Order as to Mon Ami are appropriate under the circumstances in this case. There are differences between the complainant and the IA, however, as to the scope and terms of the General Exclusion Order.

DISCUSSION

I. REMEDY

A. Statutory Background and Criteria for Issuance of a General Exclusion Order

Where a violation of section 337 has been found, the Commission must consider the issues of remedy, the public interest, and bonding. With respect to remedy, the Commission may issue a remedial order excluding the goods of the person(s) found in violation (a limited exclusion order) or, if certain criteria are met, against all infringing goods regardless of the source (a general exclusion order).³

Depending on the circumstances, the Commission's authority to issue a general exclusion order may be found in section 337(d)(2) or 337(g)(2).

Section 337(d)(2) provides that:

The authority of the Commission to issue an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that--

- (A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or
- (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

³ The Commission also has authority to issue cease and desist orders and to sanction parties for certain conduct. *See* 19 U.S.C. § 1337(f) & (h).

PUBLIC VERSION

19 U.S.C. § 1337(d)(2).

Section 337(g)(2) provides that:

In addition to the authority of the Commission to issue a general exclusion from entry of articles when a respondent appears to contest an investigation concerning a violation of the provisions of this section, a general exclusion from entry of articles, regardless of the source or importer of the articles, may be issued if--

- (A) no person appears to contest an investigation concerning a violation of the provisions of this section,
- (B) such a violation is established by substantial, reliable, and probative evidence, and
- (C) the requirements of subsection (d)(2) of this section are met.

19 U.S.C. § 1337(g)(2).

Read together, section 337(g)(2) supplements the authority granted to the Commission under section 337(d)(2), empowering it to issue a general exclusion order when “no person appears to contest an investigation concerning violation of this section,” if certain conditions are met. Given that several respondents have appeared to contest the current investigation, and have settled with complainant or entered into Consent Orders, the Commission’s authority to issue a general exclusion order in this investigation arises under section 337(d)(2).

The Commission has noted that the criteria of section 337(d)(2) “do not differ significantly” from the factors in *Certain Airless Paint Spray Pumps and Components Thereof*, Inv. 337-TA-90, USITC Pub. 1199, 216 U.S.P.Q. 465 (USITC 1981) (“*Spray Pumps*”). *Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing Same*, Inv. No. 337-TA-372, USITC Pub. 2694 (May 1996), Comm’n Op. at 5 (“*Neodymium Magnets*”). In *Spray Pumps*, the Commission held that a complainant seeking a general exclusion order must show both (1) a widespread pattern of unauthorized use of its patented invention and (2) certain business conditions from which one might reasonably infer

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that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles. *Spray Pumps*, 216 U.S.P.Q. 465, 473. The Commission stated that the evidence which might be presented to prove a “widespread pattern of unauthorized use of the patented invention” included:

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

Spray Pumps, 216 U.S.P.Q. 465, 473.

The Commission determined that evidence which might be presented to prove the “business conditions” criterion included:

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

Spray Pumps, 216 U.S.P.Q. 465, 473.

Although *Spray Pumps* involved claims of patent infringement, the Commission applies the same test with respect to trademark infringement. *Certain Agricultural Tractors and Components Thereof*,

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Inv. No. 337-TA-487, Commission Opinion at 7-8 (“The criteria and factors set forth in *Spray Pumps* apply *mutatis mutandis* to trademark cases.”); *Certain Cigarettes and Packaging Therefor*, Inv. No. 337-TA-424, USITC Pub. No. 3366 (Nov. 2000), Commission Opinion at 6-7.

B. The ALJ’s Recommended Determination

The ALJ’s Recommended Determination is included within the subject ID (Order No. 30). In it, the ALJ addressed the requirements for the issuance of a general exclusion order that appear in section 337(d)(2), and made findings that bear directly on the additional requirements.

With respect to subsection (d)(2) and the “widespread pattern of unauthorized use” criterion, the ALJ found that Sanford had demonstrated the existence of a widespread pattern of violation with respect to the registered trademarks at issue. ID at 66. The ALJ noted evidence of violations by the defaulted Respondents and a Respondent terminated pursuant to a Consent Order, as well as evidence of fifteen additional manufacturer/suppliers that were not named in the complaint that are exporting, or are suspected of exporting, ink markers into the United States that infringe Sanford’s trademarks and/or protected trade dress. ID at 67. The ALJ also found considerable evidence that numerous domestic entities are importing infringing ink markers for sale and distribution. ID at 69.

With respect to the business conditions criterion of subsection (d)(2), the ALJ noted that there is an established U.S. market for the ink markers at issue, with low barriers to entry and a well-developed and diverse distribution network that ranges from large retailers to flea markets. ID at 63-4. The ALJ noted evidence that manufacturing facilities to produce infringing markers can be established relatively easily and inexpensively and that barriers to entry for marker manufacturers are low. ID at 64-5. There is also evidence, the ALJ found, that marker manufacturing facilities can “easily be taken apart in as little as a day or two” such that “it is difficult to identify the source of infringing products.” ID at 66. Based

PUBLIC VERSION

on these representations, the ALJ found the “widespread pattern” and “business conditions” criteria to be satisfied, and he recommended that the Commission issue a general exclusion order if its finds a violation of section 337. ID at 70. The ALJ also recommended the issuance of a cease and desist order against respondent Mon Ami, because he found that Mon Ami maintains a significant inventory of infringing markers in the United States. ID at 70-1.

C. Analysis and Determination

1. Requirements for Issuance of a General Exclusion Order

We determine that the requirements of section 337(d)(2) for the issuance of a general exclusion order have been met here. As to the widespread pattern of unauthorized use criterion, the record indicates that unauthorized uses occurred in the importation and sale of infringing products manufactured by Mon Ami and numerous other ink marker producers. As to the certain business conditions criteria, the record shows an established U.S. market for goods practicing the trademarks at issue, and the availability of U.S. marketing and distribution networks for such goods. ID at 25-26. Moreover, the ALJ found it is difficult to determine the source of infringing goods, and there is evidence that foreign manufacturers of ink markers can produce infringing products at relatively little expense. We determine that the uncontroverted records facts relied on by the ALJ are sufficient to satisfy the requirement that a violation be shown by evidence that is “substantial, reliable, and probative.” 19 U.S.C. § 1337(g)(2). Accordingly, we find that all the elements of section 337(d)(2) are satisfied, and determine to issue a general exclusion order.

2. The General Exclusion Order

We agree with Sanford that the General Exclusion Order in this case should exclude any ink markers or packaging that “bear” the SHARPIE Trademarks or Sanford’s protected trade dress as well as

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any marks or trade dress “confusingly similar thereto or that are otherwise misleading as to source, origin, or sponsorship.”⁴ The language proposed by Sanford closely tracks the statutory definition of trademark “infringement” under the Lanham Act, which bars the reproduction, copying or imitation of a registered mark in a manner that is “likely to cause confusion, or to cause mistake, or to deceive” and prohibits false designations of origin; descriptions or representations “likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.” 19 U.S.C. § 1114(1)(a)(2005); 19 U.S.C. § 1125(a)(1)(A)(2005). We note that the IA did not file any comments objecting to this language.

Second, we also agree with Sanford that, in the section of the General Exclusion Order that deals with trade dress, photographic representations of the protected trade dress should be presented without the SHARPIE trademarks so as to make clear that the trade dress is protected whether or not it is presented along with the Sharpie trademarks, and that the Order should include separate images of the protected trade dress that reflect the differences between the various applications of Sanford’s trade dress. We believe, however, that attachment of the photographic representations as exhibits to the General Exclusion Order is sufficient to assist the Bureau of Customs and Border Protection (BCBP), and that the attachment of actual physical samples to the Order would be impracticable.

Third, we agree with Sanford that it is not necessary or advisable that the General Exclusion Order expressly exclude by name those Respondents that reached settlements with Sanford and are subject to Commission Consent Orders specifying that these Respondents are to be exempted from any General Exclusion Order. Sanford’s concern about the potential for administrative confusion on the part

⁴ Sanford Proposed General Exclusion Order at 2; Sanford Reply at 2.

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of BCBP, and the danger that certain infringing ink marker producers will falsely identify their products using the names of the Respondents subject to the Commission's Consent Orders, finds support in the record of this investigation. In particular, the ALJ found record evidence of a "widespread pattern of unauthorized use" and that "it is difficult to identify the source of infringing products." ID at 66. Under these circumstances, the General Exclusion Order will be substantially diminished if the names of those Respondents subject to Commission Consent Orders are expressly excluded in the Order itself. Consequently, the General Exclusion Order provides, in general terms, that any importers believing themselves to be excluded from the General Exclusion Order by the terms of a Commission Consent Order may present evidence to that effect to BCBP.

3. The Cease and Desist Order

Our Cease and Desist Order as to Mon Ami emulates the language in the General Exclusion Order with respect to the scope of infringement, and the description of the trade dress. The Order requires Mon Ami to serve, within 15 days, a copy of the Order on certain licensees, distributors, contractors, and controlled and/or majority owned business entities of Mon Ami. We note that such a provision is standard in Commission cease and desist orders.

II. THE PUBLIC INTEREST

A. Statutory and Regulatory Standards

In addition to the factors discussed above, the Commission's authority to issue any exclusion order is conditioned on consideration of the public interest.⁵ Specifically, in an investigation where parties have contested the investigation, the Commission may issue a general exclusion order only if it determines that "a general exclusion from entry of articles is necessary to prevent circumvention of an

⁵ 19 U.S.C. § 1337(d).

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exclusion order limited to products of named persons” and

after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.⁶

Similarly, the Commission may elect not to issue a cease and desist order if it finds that such an order would be contrary to the public interest.⁷ The public interest analysis does not concern whether there is a public interest in issuing a remedial order, but whether issuance of such an order will adversely affect the public interest.⁸

We are not aware of any evidence on the record indicating that the issuance of a General Exclusion Order in this investigation would be contrary to the public interest. The proposed Order bars entry of infringing ink markers only, and does not extend to non-infringing ink markers. Moreover, the record indicates that U.S. demand for ink markers can be met by Sanford and U.S. manufacturers of non-infringing ink markers. Finally, ink markers are not the sort of product that raises public interest concerns.⁹ Accordingly, we determine that the issuance of a general exclusion order will not adversely affect the public interest.

⁶ *Id.*

⁷ 19 U.S.C. § 1337(f).

⁸ *Certain Agricultural Vehicles*, Inv. No. 337-TA-487, Comm’n Op. at 17.

⁹ The Commission has found that the public interest factors precluded a remedy under Section 337 in only three previous investigations *viz.* *Certain Automatic Crankspin Grinders*, Inv. No. 337-TA-60 (parts for fuel efficient engines); *Certain Inclined Field Acceleration Tubes*, Inv. No. 337-TA-67 (instruments for atomic research); and *Certain Fluidized Beds*, Inv. No. 337-TA-182/188 (hospital beds for burn patients).

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III. BOND DURING PRESIDENTIAL REVIEW PERIOD

A. The Statute on Bonding During the Presidential Review Period

During the Presidential review period, imported articles otherwise subject to a remedial order are entitled to conditional entry under bond, pursuant to section 337(j)(3).¹⁰ The amount of the bond is specified by the Commission and must be an amount sufficient to protect the complainant from any injury.¹¹

B. The ALJ's Recommended Determination

The ALJ explained that, in setting the amount of the bond during the Presidential review period in cases where no reliable comparative pricing information has been available, the Commission has set a 100 percent bond.¹² In the present investigation, the ALJ noted that none of the Respondents provided any discovery and therefore recommended a bond of 100 percent of the entered value of the infringing goods.¹³

C. Analysis and Recommendation

As noted by the ALJ, the record lacks sufficient information to calculate the difference in price between the asserted ink markers and the infringing products. When the pricing information is

¹⁰ 19 U.S.C. § 1337(j)(3).

¹¹ *Id.*, 19 C.F.R. § 210.50(a)(3).

¹² ID at 71 (citing *Certain Multipurpose Tools*, Inv. No. 337-TA-416, USITC Pub. 3498, Unreviewed Final Initial and Recommended Determination at 29 (May 27, 1999)).

¹³ ID at 71, citing to *Certain Oscillating Sprinklers, Sprinkler Components, and Nozzles*, Inv. No. 337-TA-448, USITC Pub. 3498, Limited Exclusion Order at 4-5 (Mar. 2002)(noting that traditionally, 100% bond is appropriate when a respondent fails to provide discovery regarding pricing of its products).

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insufficient, the Commission has set the amount of the bond at 100 percent of entered value.¹⁴ In accordance with the recommendation of the ALJ and Commission precedent, we determine to set the bond at 100 percent of the entered value of infringing ink markers to prevent any harm to Sanford during the Presidential review period.

By order of the Commission.



Marilyn R. Abbott
Secretary to the Commission

Issued: December 3, 2007

¹⁴ See *Neodymium Magnets*, Inv. No. 337-TA-372, USITC Pub. 2694 (May 1996), Comm'n Op. at 15.

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached COMMISSION OPINION has been served by hand upon the Commission Investigative Attorney, Anne Goalwin, Esq., and the following parties as indicated, on December 3, 2007.

Marilyn R. Abbott

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Other: _____

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

_____)
In the Matter of)

CERTAIN INK MARKERS AND)
PACKAGING THEREOF)
_____)

Inv. No. 337-TA-522

**NOTICE OF COMMISSION DECISION NOT TO REVIEW AN INITIAL
DETERMINATION FINDING A VIOLATION OF SECTION 337; SCHEDULE FOR
WRITTEN SUBMISSIONS ON REMEDY, BONDING, AND THE PUBLIC INTEREST**

AGENCY: U.S. International Trade Commission

ACTION: Notice

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination ("ID") (Order No. 30) issued by the presiding administrative law judge ("ALJ") finding a violation of section 337 in the above-captioned investigation. The Commission has set forth a schedule for submitting written submissions on the issues of remedy, bonding, and the public interest.

FOR FURTHER INFORMATION CONTACT: Jean H. Jackson, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 205-3095. Copies of all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. General information concerning the Commission may be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: This trademark-based section 337 investigation was instituted by the Commission based on a complaint filed by Sanford, L.P. of Freeport, Illinois ("Sanford" or "complainant"). 69 *Fed. Reg.* 52029 (August 24, 2004). The complaint, as supplemented, alleged violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain ink markers and packaging thereof by reason of infringement of U.S. Trademark Registration Nos. 807,818 and 2,721,523 and also by reason of infringement of trade dress. The notice of investigation

identified 12 respondents. On November 10, 2004, the ALJ granted a motion to add three respondents to the investigation. The Commission determined not to review the ID. 69 *Fed. Reg.* 75342 (December 16, 2004). Each respondent was accused of violating Section 337 by infringing Sanford's trade dress. Certain respondents were also accused of infringing one or more of complainant's registered trademarks.

Between November 15, 2004, and June 1, 2005, the ALJ issued several IDs terminating various respondents on the basis of settlement agreements or consent orders. During that time period other IDs were issued finding several other respondents in default. No petitions for review of any of these IDs were filed, and the Commission determined not to review any of them, thereby allowing them to become the Commission's determinations.

On April 19, 2005, Sanford filed a motion seeking a summary determination of violation and issuance of a general exclusion order and a cease and desist order. On July 25, 2005, the ALJ issued Order No. 30, an initial determination (ID) finding violations of Section 337 and recommending a general exclusion order and a cease and desist order. The ALJ also recommended the issuance of a general exclusion order. He further recommended that the bond permitting temporary importation during the Presidential review period be set at 100 percent of the value of the infringing imported product.

On August 5, 2005, Sanford filed a petition for review of one aspect of Order No. 30. Specifically, Sanford sought review of the ID's finding that complainant had failed to show importation with respect to defaulted respondent LiShui Laike Pen Co., Ltd. ("LiShui Laike"). The Commission investigative attorney (IA) opposed Sanford's petition for review. On August 25, 2005, complainant filed a motion for leave to file a reply to the IA's petition for review. The Commission has determined to deny that motion.

The Commission has determined not to review Order No. 30, thereby allowing it to become the Commission's final determination.

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

When the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider in this investigation include the effect that an exclusion order would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are

like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the President has 60 days to approve or disapprove the Commission's action. During this period, the subject articles would be entitled to enter the United States under a bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed.

WRITTEN SUBMISSIONS: The parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on remedy, the public interest, and bonding. Such submissions should address the ALJ's July 25, 2005, recommended determinations on the issues of remedy and bonding. Complainant and the Commission's investigative attorney are also requested to submit proposed orders for the Commission's consideration. Complainant is further requested to state the HTSUS numbers under which the infringing goods are imported. Main written submissions and proposed orders must be filed no later than close of business on September 16, 2005. Reply submissions, if any, must be filed no later than the close of business on September 23, 2005. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file with the Office of the Secretary the original document and 14 true copies thereof on or before the deadlines stated above. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons that the Commission should grant such treatment. *See* section 201.6 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 201.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, and sections 210.42 and 210.50 of the Commission's Rules of Practice and Procedure, 19 C.F.R. §§ 210.42 and 210.50.

By order of the Commission.

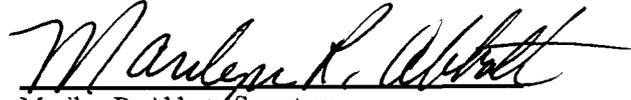


Marilyn R. Abbott
Secretary to the Commission

Issued: September 8, 2005

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF COMMISSION DECISION NOT TO REVIEW AN INITIAL DETERMINATION FINDING A VIOLATION OF SECTION 337; SCHEDULE FOR WRITTEN SUBMISSIONS ON REMEDY, BONDING, AND THE PUBLIC INTEREST**, was served upon the Commission Investigative Attorney, and all parties via first class mail on September 8, 2005.



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PUBLIC VERSION

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

In the Matter of)

CERTAIN INK MARKERS AND)
PACKAGING THEREOF)

Investigation No. 337-TA-522

This is the administrative law judge's Order No. 30 relating to complainant's Motion No. 522-38 for summary determination and for additional adverse inferences and terminating the investigation in toto. Order No. 30 finds violations of section 337 and recommends a general exclusion order as well as a cease and desist order.

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of)	
)	
CERTAIN INK MARKERS AND)	Investigation No. 337-TA-522
PACKAGING THEREOF)	

Order No. 30: Relating to Sanford's Motion No. 522-38 For Summary Determination And For Additional Adverse Inferences And Initial Determination Terminating The Investigation In Toto

On April 19, 2005, complainant Sanford, L.P. (Sanford) filed a motion for summary determination and for additional adverse inferences.¹ (Motion Docket No. 522-38.)

The staff, on May 6, 2005, filed its response to Motion No. 522-38.

On May 23, 2005, complainant moved for leave to file a reply to the staff's response on the grounds that the staff's response highlights some potential gaps in Sanford's evidence and raises objections to Sanford's requested findings. (Motion Docket No. 522-40.) Motion No. 522-40 is granted.

The staff, pursuant to the administrative law judge's Order No. 27, which issued on May 24, 2005, filed a response to complainant's reply on May 31.

No other party responded to Motion No. 522-38.

¹ On May 2, 2005 complainant filed a "substituted version of the Memorandum (along with the original version of the motion [Motion No. 522-38]) merely to correct certain errata." (May 2, 2005 Letter to the Secretary.) Said filing should have included a motion for leave to file a substituted memorandum. In view of the substance of the filing, the administrative law judge however is treating said filing as including a motion for leave (Motion Docket No. 522-39.) Motion No. 522-39 is granted.

I. Procedural History

The notice of this investigation was published in the Federal Register on August 24, 2004. (69 Fed. Reg. No. 163 at 52,029.) By this notice, the Commission instituted an investigation, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, to determine (a) whether there is a violation of subsection (a)(1)(C) of section 337 in the importation into the United States, the sale for importation into the United States, or the sale within the United States after importation of certain ink markers and packaging thereof by reason of infringement of U.S. Trademark Registration Nos. 807,818 and 2,721,523, and whether an industry in the United States exists as required by subsection (a)(2) of section 337, or (b) whether there is a violation of subsection (a)(1)(A) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain ink markers and packaging thereof by reason of infringement of trade dress, the threat or effect of which is to destroy or substantially injure an industry in the United States.

The complaint was filed with the Commission on July 20, 2004, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, on behalf of Sanford, L.P. (Sanford) of Freeport, Illinois. A supplement to the complaint was filed on August 10, 2004. The complaint, as supplemented, alleged violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain ink markers and packaging thereof by reason of infringement of the trademarks identified supra and also by reason of infringement of trade dress, the threat or effect of which is to destroy or substantially injure an industry in the United States. The complaint also alleged that there exists an industry in the United States with respect to the asserted intellectual property rights. The complainant

requested that the Commission institute an investigation and, after a hearing, issue a permanent general exclusion order and permanent cease and desist orders.

The following were named in the notice of investigation as respondents and were served with the complaint:

Asia Global (HK) Ltd. (Asia Global)
Room M 3FI Phase 3 Kaiser Est Hok Yuen St.
HungHom
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Bangkit USA, Inc. (Bangkit)
4280 South Maywood Avenue
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Dongqiao
Lijia Village
Zhengqi Town
China

Cixi Guancheng Yangtse River Pen Company (Yangtse River)
Guancheng Town
Cixi City
Zhejiang, China

Lineplus Corporation (Lineplus)
Koyang-City
Rm. 524
Samsun Midas O/T 775-1
Janghang-Dong
Ilsan-Ku
South Korea

LiShui Laike Pen Co., Ltd. (LiShui Lake)
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17, Okhla Industrial Estate,
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300 Phillipi Road
Columbus, OH 43228

Mon Ami Co., Ltd. (Mon Ami)
125-20 Jungdam 1-Dong
Gangnam-Gu
Seoul, 135-957
South Korea

Ningbo Beifa Group Co., Ltd. (Ningbo Beifa)
Xiaogang Road
Ningbo
Zhejiang, China 315801

Southern States Marketing, Inc. (Southern States)
2066 Airport Industrial Park Drive
Marietta, GA 30062

Uchida of America Corporation (Uchida)
3535 Del Amo Boulevard
Torrance, CA 90503

On September 17, 2004 the administrative law judge issued Order No. 3 which set a 13-month target date for this investigation, viz. Monday, September 26, 2005.

Order No. 5, which issued on November 10, 2004, granted complainant's motion to amend the complaint and notice of investigation to add allegations against three proposed respondents, viz. Big Lots Stores, Inc., Big Lots, Inc. (Big Lots) and Two Powers Enterprise Co., Ltd. (Two Powers), with respect to the importation and sale of ink markers that infringe Sanford's trade dress. On December 13, 2004 the Commission determined not to review Order

No. 5.

Order No. 7, which issued on November 15, 2004, terminated the investigation as to Luxor on the basis of a settlement agreement. The Commission determined not to review Order No. 7 on December 16, 2004.

On December 21, 2004 the administrative law judge issued Order No. 12 which granted complainant's Motion No. 522-21 to extend the target date by one month to October 24, 2005 (which meant that any final initial determination on violation had to be filed by Monday July 25, 2005) and make certain changes to a procedural schedule set in Order No. 4, which had issued on October 21, 2004. Order No. 12 set a February 11, 2005 deadline for filing any motions for summary determination on any domestic industry or importation issues.

On January 7, 2005 the administrative law judge issued Order No. 13 finding each of respondents Heng Bao, Yangtse River and LiShui Laike in default. The Commission determined not to review Order No. 13 on January 25, 2005.

On February 7, 2005 complainant moved for an extension of time to file a motion for summary determination on "all issues" in the investigation and argued that "a hearing will be unnecessary." (See Motion Docket No. 522-28.) The administrative law judge in his Order No. 15 issued on February 8 granted Motion No. 522-28, set a deadline of April 12, 2005 for complainant to file its motion for summary determination on all issues in this investigation, and indicated that there would be no evidentiary hearing.²

² In an email sent from the attorney advisory to counsel for complainant and the staff on April 7, 2005, the administrative law judge granted the joint motion of complainant and the staff to extend the deadline for complainant to file any motion for summary determination to April 19 and for the staff to file a response to May 3. In an email sent on April 29, the administrative law judge granted the staff's request to extend the deadline to file its response to May 6.

Order Nos. 16-18, which issued on February 11, 2005, terminated the investigation as to each of respondents Asia Global, Uchida, and Bangkit, respectively, on the basis of settlement agreements and consent orders. On March 8 the Commission determined not to review Order Nos. 16-18.

On February 17, 2005 the administrative law judge in his Order No. 19 granted in part complainant's Motion No. 522-13 for adverse inferences to the extent that the administrative law judge entered certain adverse inferences against Lineplus.

On March 15, 2005 the administrative law judge issued Order No. 21 terminating the investigation as to respondent Ningbo Beifa on the basis of a settlement agreement and consent order and further issued Order No. 22 terminating the investigation as to respondent Two Powers on the basis of a settlement agreement and consent order. The Commission determined not to review Order Nos. 21 and 22 on April 6.

Order No. 24, which issued on May 12, 2005, terminated the investigation as to respondent Southern States on the basis of a settlement agreement and consent order. Also on May 12, the administrative law judge issued Order No. 25 terminating the investigation as to the Big Lots respondents and respondent Midwestern based on a settlement agreement. On May 27 the Commission determined not to review Order Nos. 24 and 25.

On June 1, 2005 the administrative law judge issued Order No. 28 finding respondent Mon Ami in default. In addition, the administrative law judge, pursuant to Commission rule 210.33(b), made certain adverse inferences against Mon Ami. The Commission determined not to review Order No. 28 on June 17, 2005.

Lineplus is the only respondent remaining in the investigation. Lineplus, as well as the

defaulted respondents, viz. Heng Bao, Yangtse River, and Mon Ami, are referred to herein as the Motion Respondents.³ Sanford's complaint alleges that each of the Motion Respondents have violated section 337 by infringing Sanford's trade dress. (CX-1 at 13-16, 18; see 19 U.S.C. § 1337(a)(1)(A).) In addition, the complaint alleges that each of respondents Heng Bao, Yangtse River and LiShui Laike (excluding respondents Mon Ami and Lineplus) infringe Sanford's U.S. Trademark Registration Nos. 807,818 and 2,721,523. (CX-1 at 13-16; see 19 U.S.C. § 1337(a)(1)(C).)

Pursuant to Order No. 29, which issued on June 21, 2005, the administrative law judge held closing arguments on Motion No. 522-38 on July 14 at which only counsel for complainant and the staff appeared.

The staff, in its filings relating to Motion No. 522-38 and at closing argument on July 14, while it takes issue with complainant regarding certain points complainant has argued in support of its Motion No. 522-38, argued that there have been violations of section 337; and that a general exclusion order, as well as a cease and desist order, should issue.

II. Adverse Inferences

Complainant has moved for additional adverse inferences in addition to the adverse inferences found in Order Nos. 19 and 28. In closing arguments on July 14, 2005, complainant confirmed which outstanding adverse inferences it is still pursuing. (See Tr. at 19.) The administrative law judge will treat those outstanding adverse inferences in the order presented during closing arguments.

³ LiShui Laike is not included as a Motion Respondent because the administrative law judge has found that complainant has not established the importation requirement as to LiShui Laike. See infra.

Complainant argued that it should be entitled to an inference that discovery from each of the respondents that has ever been involved in the investigation would have yielded data indicating that the “protected trade dress” was intentionally copied. (Tr. at 10-11.) The staff argued that its position on adverse inferences in general is that when there is other evidence such that complainant is not prejudiced if it does not get said adverse inferences, the request for adverse inferences should be denied; that the requested adverse inference is a second backup way of proving secondary meaning that has already been shown completely through direct evidence and supported by circumstantial evidence; and that thus there is no need for the requested adverse inference. The staff further argued that all of the respondents that were ever in this investigation cannot be found in violation, but that “circumstantial evidence,” including evidence from the respondents who have settled, is usable to show secondary meaning, although the staff feels that such circumstantial evidence is unnecessary. (Tr. at 12-13.) The administrative law judge, infra, has found that complainant has established a secondary meaning for the trade dress in issue, irrespective of the requested adverse inference in issue. Hence, complainant’s request for said adverse inference is denied.

Complainant argued that it should be entitled to the adverse inference that the “absent” respondents’ data would indicate that said respondents intended to cause confusion with the protected trade dress. The staff’s position is as argued supra. Thus, the staff argued that confusion with respect to the Motion Respondents is already adequately shown and that intent is a “completely unnecessary element which would also show confusion with respect to the motion respondents.” (Tr. at 13-15.) Complainant’s request for the adverse inference in issue is denied.

Complainant argued that it should be entitled to an adverse inference that the defaulting

respondents have significant excess capacity to produce infringing markers. The staff argued that the requested adverse inference has already been entered with respect to respondents Mon Ami and Lineplus (Order Nos. 19 and 28) and hence it would take a similar position with respect to the remaining defaulting respondents that it took with Mon Ami and Lineplus. (Tr. at 15-16.) Complainant's request for said adverse inference is granted as to the defaulting respondents where said adverse inference has not already been made.

Complainant argued that it should be entitled to an adverse inference that the "respondents" have large inventories of infringing markers. Complainant argued that there has been a finding by the administrative law judge with respect to Mon Ami and "I believe Lineplus" with regard to their inventories and complainant thinks that the same finding should be made with respect to "all of the other Respondents." (Tr. at 17.) The staff argued that with respect to the settled respondents it does not believe that there is any reason for the requested adverse inference because the settling respondents cannot be found in violation; that with respect to respondents Mon Ami and Lineplus, the adverse inferences the administrative law judge entered were actually that they have substantial overseas inventories; and that with respect to the defaulting respondents Heng Bao, LiShui Laike, and Yangtse River, the staff has no problem with the entry of an adverse inference that they have substantial overseas inventories. (Tr. at 16-18.) The administrative law judge makes the adverse inference that defaulting respondents Heng Bao and Yangtse River have substantial overseas inventories of the accused markers.

III. Settled Respondents

The staff in its response pursuant to Order No. 27 at 4 argued that Sanford asks for a "finding of infringement" against all respondents and that it is not clear what Sanford means by a

“finding of infringement.” In closing arguments on July 14, 2005, the administrative law judge asked complainant’s counsel what complainant meant by a “finding of infringement.”

Complainant’s counsel responded:

MR. SCHILL: I believe what we would be looking for from Your Honor is a finding the products imported and sold that we have included in our brief for each of the settled respondents, as well as the nonsettling respondents, be found to be infringing, the trade dress of Sanford, the gray, cigar-shaped barrel, et cetera.

JUDGE LUCKERN: All right. And would that mean any Respondent that has ever been named in this investigation? We have some defaulted. We have some consenting. I mean, I have to go through them all. But every Respondent that was ever named in this investigation you want a “finding of infringement” as you have just defined it?

MR. SCHILL: Yes, Your Honor.

(Tr. at 38.) The staff argued that complainant has shown either an actual injury or a threat of injury by each of the Motion Respondents and that evidence is sufficient to prove a violation; that other evidence of infringement by the settling respondents is relevant to remedy but is totally unnecessary to prove the prerequisite violation; and that if that were not so and there was no evidence of injury by the Motion Respondents, the evidence of injury by the settling respondents alone would be insufficient to find a violation because that would be the same thing as finding a violation by the settling respondents. (Tr. at 41-42.)

At closing arguments (Tr. at 27-38), complainant cited the final initial determination of this administrative law judge in Certain Feathered Fur Coats And Pelts, And Process For The Manufacture Thereof, Inv. No. 337-TA-260 (May 1988) where it was found that complainants had established prima facie that certain settled respondents infringed certain claims of the patent in issue. Thereafter the Commission, while it nonreviewed the final initial determination, in its

“Commission Action And Order” commented that the administrative law judge found that complainants have established prima facie that settled respondents, defaulting respondents, and a nonparty had infringed the patent in issue. However, this administrative law judge in his later non-reviewed initial determination in Certain Plastic Grocery and Retail Bags, Inv. No. 337-TA-492 (Mar. 2003) specifically found at pages 25 and 26 that because certain respondents had settled with complainant, they were not found in violation of section 337, although the conclusion that the products of settled respondents had infringed the patent in issue was relevant to the issue of remedy because it indicated a widespread pattern of infringement justifying a general exclusion order. My finding in Bags presumed that complainant had showed a violation of section 337 as to the respondents in Bags that had not settled. In view of the disclaimer in Bags that the settling respondents were not found in violation of section 337, the administrative law judge is rejecting complainant’s argument for a “finding of infringement” against all respondents.

IV. Legal Standard

Complainant argued that Commission rule 210.18 governs motions for summary determination and that complainant “bears the initial burden of demonstrating the absence of any genuine issue of material fact and its entitlement to judgement as a matter of law”; that after complainant satisfies this initial threshold, “the burden then shifts to the nonmovant who must demonstrate that a genuine factual issue exists”; and that “[i]f the nonmovant fails to respond to a complainant’s summary determination motion, it shall be granted, where appropriate.” (Motion at 6-7 (citations omitted).) The staff argued that while complainant cited Commission rule 210.18 and contended that “the usual summary determination standard applies,”

[a]s the Commission made clear in Sildenafil, any determination of violation of Section 337 where there are contesting parties, including one made on a summary determination record, must be supported by ‘reliable, probative, and substantial evidence.’

(Response at 7, citing Certain Sildenafil or any Pharmaceutically Acceptable Salt Thereof, Such as Sildenafil Citrate, and Products Containing Same, Inv. No. 337-TA-489, Commission Opinion on Remedy, the Public Interest, and Bonding at 4-5 (July 2004).)

In Sildenafil, the administrative law judge, in ruling on a motion for summary determination on domestic industry and violation of section 337, found that complainant had “amply established” a violation by “substantial, reliable, and probative evidence” per section 337(g)(2)(B) and the requisite conditions for issuance of a general exclusion order per section 337(g)(2)(C). Sildenafil, Order No. 19 at 9-10 (October 28, 2003) (Unreviewed Initial Determination). Aside from the staff’s response to complainant’s motion for summary determination, the named respondents in Sildenafil did not contest said motion as all respondents either defaulted or were terminated from the investigation on the basis of a settlement agreement or consent order.⁴ Id. at 2. The Commission affirmed the administrative law judge’s application of the reliable, substantial and probative standard for a violation of section 337 to support a

⁴ The Sildenafil investigation was instituted with fifteen respondents, eleven of which were found to be in default prior to the administrative law judge’s issuance of Order No. 19. See Sildenafil, Comm’n Op. at 1-2. Two more respondents were found to have not been served with the complainant and notice of investigation and neither appeared or otherwise participated in the Sildenafil investigation. Id. at 1 n.1. At the time the administrative law judge issued Order No. 19, the Ezee respondent had been terminated from the investigation on the basis of a settlement agreement, which termination was not reviewed by the Commission (Sildenafil, Order No. 19 at 2 n.3) and the Commission had remanded part of an initial determination terminating the investigation as to the fifteenth respondent Biovea on the basis of a consent order. (Commission Notice (Sept. 30, 2003); see Order No. 22 (Jan. 6, 2004) (unreviewed initial determination terminating the investigation as to Biovea on the basis of a settlement agreement).)

general exclusion order. Sildenafil, Comm'n Op. at 4-5. Moreover, the Commission considered whether the general exclusion order was governed by section 337(g)(2) or 337(d)(2) based on the fact that no respondents had opposed complainant's motion for summary determination on violation. Id. Thus the Commission stated:

We find that the issuance of a general exclusion order in the circumstances of this case is not governed by section 337(g)(2), since that provision expressly requires that no respondent appear to contest the investigation and it is clear that respondents Ezee and Biovea did. That no discovery may have been taken from those two respondents prior to action on their termination from the investigation does not change the fact of their appearance to contest this investigation. Section 337(g)(2) therefore cannot apply, and the proper legal framework is section 337(d)(2). However, the non-applicability of 337(g)(2) does not affect the standard for finding a violation of section 337. This is because the adjudicative provisions of the Administrative Procedure Act, which apply to section 337 investigations, provide that a sanction or order may not be issued unless supported by 'reliable, probative, and substantial evidence.' We see no difference between this standard and the 'substantial, reliable, and probative evidence' standard of section 337(g)(2).[.] The additional criteria of section 337(d)(2) for issuance of a general exclusion order apply in both instances. The Commission's rules have long provided for summary determination, including summary determination of violation of section 337. In this case, the ALJ found that the summary determination record supported a finding that the eleven defaulting respondents had violation section 337 and that a domestic industry existed. The Commission determined not to review the ALJ's ID and it became the Commission's determination.

Sildenafil, Comm'n Op. at 4-5 (footnote omitted) (emphasis added); see Certain Purple Protective Gloves, Inv. No. 337-TA-500, Commission Opinion on Remedy, the Public Interest and Bonding at 5-6 (Dec. 2004) (concluding general exclusion order governed by 337(d)(2) and not 337(g)(2) where six respondents that appeared to contest the investigation were terminated via settlement agreements and/or consent orders and a seventh respondent defaulted).

Based on the Commission opinion in Sildenafil, the administrative law judge finds that complainant must establish a violation of section 337 and the requisite conditions for issuance of

a general exclusion order by substantial, reliable and probative evidence. Moreover, as with any motion for summary determination:

The determination sought by the moving party shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as matter of law.

Commission rule 210.18(b).

In addition, when deciding a motion for summary determination, the administrative law judge must accept all evidence presented by the non-movant as true, must view all of the evidence in the light most favorable to the non-movant and must draw all justifiable inferences in favor of the non-movant. Certain Lens-Fitted Film Packages, Inv. No. 337-TA-406, Order No. 7 at 3 (July 10, 1998) (denying summary determination that patent in suit was unenforceable due to alleged inequitable conduct before the PTO). Any doubt as to the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. See id.; Certain Coated Optical Waveguide Fibers and Products Containing Same, Inv. No. 337-TA-401, Order No. 6 at 3 (July 28, 1998) (denying a motion for summary determination of non-infringement).

Summary determination is improper where the record contains facts which, if explored and developed, might lead the Commission to accept the position of the non-moving party. Id. Moreover, if an administrative law judge uses faulty legal analysis when applying law to the facts in a motion for summary determination, a reversal is required. See Film Packages, Order No. 7, at 4, citing Howes v. Medical Components, Inc., 814 F.2d 638 (Fed. Cir. 1987); Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles, Inv. No. 337-TA-334, Views of the Commission at 3, 4 (Nov. 25, 1992); Coated

Optical Waveguide Fibers, Order No. 6 at 3, see also Certain Set-Top Boxes and Components Thereof, Inv. No. 337-TA-454, Order No. 8 at 7-8 (May 31, 2001); see also, e.g., Certain Tool Handles, Tool Holders, Tool Sets, and Components Therefor, Inv. No. 337-TA-483, Order No. 14 at 2 (June 20, 2003).

V. Trademarks And Trade Dress In Issue

Complainant has submitted evidence showing that it is the owner of the two U.S. Registered Trademarks at issue, viz. U.S. Registered Trademark Nos. 807,818 (SHARPIE® stylized trademark) for “Marking And Writing Pens,” and 2,721,523 (SHARPIE® word trademark) for writing instruments, namely pens and markers “in class 16.” (See CX-1, Exh. 1-1G, Exh. 2.) The SHARPIE® stylized trademark was registered on May 3, 1966 and is on the principal register. (CX-1, Exh. 1.) Similarly, the SHARPIE® word trademark was registered on June 3, 2003 and is also on the principal register. (CX-1, Exh. 2.)

Both complainant and the staff agree, and the administrative law judge so finds, that the trade dress at issue is described as follows:

A distinctive gray, tapered, cigar-shaped barrel; a tapered, fully-colored cap that contrasts with the gray color of the barrel; and a cap-to-barrel ratio of approximately 1/3 to 2/3 (a 1:2 ratio) of the total size of the marker.

(Response at 12; see Reply at 5 n.5 (noting that complainant “appreciates the Staff’s vigilance” and “accepts the Staff’s clarified definition of the Protected Trade Dress”).)⁵

VI. Importation

As for the defaulted Motion Respondents, complainant argued that its allegation that each

⁵ Complainant originally defined the trade dress at issue as “consisting of a gray, cigar - shaped barrel; a plastic tapered cap that is colored differently than the barrel; and an approximate 1-2 ratio between the cap and the barrel.” (Motion at 2-3.)

of said respondents manufactures, markets or sells the accused ink markers that are imported from China or Korea and sold in the United States are presumed to be true on account of each respondent's default; and that "[e]ven without such a finding, however, it is evident that the activities of each of the defaulting Respondents gives rise to a Section 337 violation." (Motion at 23-24.) With respect to respondent Lineplus, complainant argued that Lineplus has admitted that it imported the accused markers "about two years ago" and that more recently, Sanford representatives have made purchases in the United States of the accused Lineplus products. (Id. at 24-25.)

The staff argued that complainant has shown that each of the five Motion Respondents has imported or sold the accused markers as required by section 337(a)(1)(A) and(C). (Response at 8-9.)

With respect to respondent Heng Bao, U.S. Customs and Border Protection has seized counterfeit versions of SHARPIE® markers that Heng Bao ("sometimes read as Heng Bad") attempted to export to the United States. (CX-77 at SAN 12485, SAN 12495-504; see CX-76 at 12405-06; CX-78.) Sanford representatives have purchased Heng Bao accused markers in the United States bearing the label "Made in China" on the barrel of the marker. (CX-1, Exh. 26 at ¶¶ 6-7, Exh. 26-C, 26- D; see Physical Exh. 9-12.⁶) Complainant has provided evidence of { } purchased in Dollar Stores and flea markets in the United States. (See CX-81 at SAN 14639-42, 44, 46, 48; CX-83 at SAN12482;

⁶ "Physical exhibits" cited to herein are physical exhibits complainant filed in support of its complaint at the outset of this investigation. In contrast, the record also contains exhibits with the prefix "CPX," which exhibits complainant filed in connection with Motion No. 522-38.

see also CPX-8 at SANP0238.) In addition, in July 2004, Stewart Graff, Vice President and General Counsel of Sanford, received an{

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(CX-79 at SAN 016116.)

As for the respondent Yangtse River's accused markers, Sanford representatives have purchased said markers in the United States. (CX-1, Exh. 11, Exh. 28 at ¶¶ 3-5, Exh. 28-A.) The packaging for the accused Yangtse River markers purchased in the United States contains a "YU PAI®" and "Sharpie" name, a "Made in China" label, and further identification consisting of "Chang jiang pen Making Factory" and a web address <http://www.cnchangjiang.com>⁷ (CX-1, Exh. 28-A.) The cnchangjiang.com web site indicates that Yangtse River manufactures said accused markers purchased in the United States. (See CX-1, Exh. 12.)

In a letter to the Secretary dated October 1, 2004, the President of Lineplus, J.W. Sog, admitted that the "'LINEPLUS POWER-LINE 200' was exported to U.S. through Korean trading company about 2 years ago and the amount is only USD18,921.47." (CX-12.) In addition, Sanford representatives have purchased said Lineplus Power-Line 200 markers in the United States, which are labeled "Made in Korea" on the marker barrels and packaging. (CX-1, Exh. 26 at ¶ 8, Exh. 26-E; see Physical Exh. 14.)

⁷ The label on the accused respondent Yangtse River markers appears to contain the word "Shanpie." (See CX-1, Exh. 11, Exh. 28-A.)

Mon Ami, in the Statement of Information pursuant to Commission rule 210.13(b) included in its response to the complaint, indicated that “[i]n 2003, Mon Ami exported { } Acculiner markers with a total value of{ } to the United States”; that “[t]he United States market composes a{ } of Mon Ami’s business in its Acculiner markers”; and that “[i]n 2003, Mon Ami’s exports of Acculiner markers to the United States comprised { }% of Mon Ami’s worldwide exports of Acculiner markers.” (CX-88 at 20.) In addition, Sanford representatives have purchased the accused Acculiner markers in the United States, which bear the “Made in Korea” label on the marker barrels and packaging. (CX-1, Exh. 26 at ¶ 12, Exh. 26-I; see Physical Exh. 19.)

Based on the foregoing, the administrative law judge finds that complainant has satisfied the importation requirement of section 337(a)(1)(A) as to each of respondents Heng Bao, Yangtse River, Lineplus, and Mon Ami by substantial, reliable, and probative evidence. The administrative law judge further finds that complainant has satisfied the importation requirement of section 337(a)(1)(C) as to each of Heng Bao and Yangtse River.

As to LiShui Laike, complainant argued that LiShui Laike “manufactures, markets or sells writing instruments under the names Lanke and Hai Xin that are imported from China and sold in the United States”; that “Sanford representatives have made U.S. purchases of [LiShui] Laike’s accused markers, which are labeled as being ‘Made in China’ directly on the marker barrels,” citing CX-1, Exh. 14, Exh. 26 at ¶ 9, Exh. 26-F, Physical Exh. 15; and that additionally, LiShui Laike, a Chinese company, offers for sale to U.S. customers ink markers labeled “Sharpie” on its website, citing CX-1, Exh. 15. (CX-1 at 20; Motion at 24.) The staff argued that the evidence shows that LiShui Laike has imported or sold the accused products as required per

section 337(a)(1)(A) and (C), citing CX-1, Exh. 26 at ¶ 9; and that complainant has provided “information regarding customer returns in the United States of LiShui Laike markers,” which returns relate to markers labeled as ‘HAIXIN’ and as ‘Lanke,’” citing CX-81 at SAN 14649 and CX-83 at 7697-98. (Response at 8-9.)

Both complainant and the staff cite to CX-1, Exh. 26 at ¶ 9 in support of complainant’s claim that{

} Said exhibit is a declaration from Sanford representative Mark A. York (York declaration), which states:

{

}

(CX-1, Exh. 26 at ¶ 9.) The Exhibit F referred to in the York declaration corresponds to CX-1, Exh. 26-F, which is a black-and-white photograph of four markers. (CX-1, Exh. 26-F.) {

} (Id.)

Complainant further cites to CX-1, Exh. 14 and Physical Exh. 15 to support its allegation that{

} and that therefore, it has established importation as to LiShui Laike. (Motion at 24.) CX-1, Exh.

14 consists of{

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}

Sanford, at ¶ 13 of its complaint, alleged that LiShui Laike “manufactures, markets or sells writing instruments under the names Lanke and Hai Xin that are imported from China and sold in the United States.” (CX-1 at 20.) {

}

The staff argued that complainant has provided evidence of{

}(CX-81 at SAN 14649.)

⁸ {

}a mere offer for sale, without more, is not sufficient to establish importation.

That reported{

} (See CX-81.) As

for the customer return of markers in CX-83, the packaging of the markers bears the LANKE and Sharpie names, yet the name “HENGBAO” is printed on one of the marker barrels, which suggests perhaps that LANKE and Heng Bao are affiliated in some way.⁹ (CX-83 at SAN 7698.)

At closing arguments, complainant’s counsel, relying on CX-1, Exh. 14 and CX-1, Exh 15 discussed supra, argued that “[i]t is based on this information that the connection between LiShui Laike, who is a named respondent in this case, LANKE, and HAIXIN are all connected.” (Tr. at 69.) The staff, also at closing arguments and agreeing with complainant’s position on importation as it relates to LiShui Laike, argued that “[i]t appears to us that the linking of the web site [likemarkpen.com] and the purchase in the United States establishes importation by the company whose name is on the web site in [CX-1,] Exhibit 15, which is LiShui Laike.” (Tr. at

⁹ Addressing the apparent “link” between the LANKE and Heng Bao names in CX-83, complainant’s counsel at closing arguments on July 14, 2005 commented that:

CX-83 that you [the administrative law judge] brought to our attention. And that is that this was a package of markers that came in from a customer along with a letter complaining about the markers. The package itself was opened prior to the time it was sent to Sanford, and so we have no idea about the integrity of the package, whether the markers that were actually in it were sold in that packaging or not. In other words the LANKE name on the top of that package may well not be related to the pens that are in the package, if you know what I mean, because while there are Heng Bao pens that are in there, that is different than the rest of the packaging we just looked at in our samples that we have back here in the courtroom. So, in other words, the inference you are making may be an inference that isn’t warranted, but we don’t have any evidence one way or the other to say whether it is, whether that word LANKE is actually associated with Heng Bao or not.

(Tr. at 79 (emphasis added).)

76.) The staff further argued that it “stands by the statement that the affidavit in the complaint detailing the purchase in the United States [York Decl., CX-1, Exh. 26] of a package labeled with a web site which would enable one to reach the LiShui Laike web site, and see on that web site a picture of markers that look like the Sharpie markers is evidence of importation by the company, LiShui Laike.” (Tr. at 81.)

It is a fact that{ } of the LiShui Laike web site in evidence. (See CX-1, Exh. 15.) Thus, there is no evidence submitted in connection with Motion No. 522-38 that links the LiShui Laike, LANKE, and HAIXIN names for importation purposes. (See CX-1, Exh. 15.) As to the accused markers{ } which the staff contends establishes importation as to LiShui Laike, the packaging for that five-pack of markers bears the Sanford corporate address and the Sanford web site. There is no mention of the likemarkpen.com web site or any LiShui Laike or LANKE entity. (See CX-1, Exh. 14 at 3, Exh. 26 at ¶ 9., Exh. 26F.)

Counsel for complainant, at closing arguments on July 14, 2005 and in response to questions from the administrative law judge on the alleged importation of LiShui Laike, argued that in Certain Compound Action Metal Cutting Snips and Components Thereof, Inv. No. 337-TA-197, U.S.I.T.C. Pub. 1831 (Mar. 1986) (Metal Snips), “the Commission inferred that a Respondent sold metal clips [sic - snips] in the United States based on the packaging for the product that was submitted into evidence. And so the packaging itself was used to infer the importation.” (Tr. at 82-83.) In Metal Snips, the administrative law judge did find that certain domestic respondents sold accused imported snips in the United States where the product packaging indicated that the accused snips were made in Taiwan. See Metal Snips, Initial

Determination at 46-49 (referring to respondents Homier, Azco, and Coast Freight). As to each of three foreign respondents in Metal Snips, viz. Fedco, Home Chain, and Harko, the judge found that they had “offered metal cutting snips for sale in the United States in an advertisement displaying the snips in packaging bearing the” registered and common law trademarks in issue. Metal Snips, Initial Determination at 48-50. However, he ultimately concluded that complainant did not establish “that any of the accused imported snips originated with Fedco, Harko or Home Chain ... I cannot find that respondents Fedco, Harco and Home Chain have exported to, imported into or sold in the United States, the accused aviation snips.” Id. at 97-98. Thus, importation was not inferred from the packaging of the foreign respondents’ accused products in Metal Snips. More importantly, the identity of the foreign respondents Fedco, Harko, and Home Chain was not at issue in Metal Snips as it is with respect to the LiShui Laike, LANKE, and HAIXIN entities in this investigation.

Drawing all justifiable inferences in favor of the non-movant, viz. LiShui Laike, the administrative law judge finds that complainant has not established that it is entitled to a summary determination that, as a matter of law, LiShui Laike has imported the accused markers, and hence is not a respondent in this investigation.

VII. Validity Of Trademarks In Issue

The listing of a trademark on the principal register is “prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant’s ownership of the mark, and of the registrant’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the registration.” 15 U.S.C. § 1115(a). Additionally, by virtue of the length of its continued use in commerce, the SHARPIE® stylized

trademark is incontestable. 15 U.S.C. § 1065; SX-1 (evidencing filing of Section 8 and Section 15 affidavits and renewal). An incontestable registration of a trademark is “conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant’s ownership of the mark, and of the registrant’s exclusive right to use the registered mark in commerce.” 15 U.S.C. § 1115(b).

Based on the foregoing, the administrative law judge finds that complainant has established the validity of the trademarks in issue.¹⁰

VIII. Validity Of Trade Dress In Issue

Complainant has alleged that it has created a distinctive, identifiable trade dress that is subject to protection under Section 43 of the Lanham Act.¹¹ (Motion at 26; CX-1 at ¶ 27.)

¹⁰ At closing arguments on July 14, 2005, the staff, responding to a question from the bench, argued that Lannon Manufacturing Co. v. U.S. Int’l Trade Comm’n, 799 F.2d 1572 (Fed. Cir. 1986) would prevent a finding that the trademark in issue is not valid, but would not prevent a finding that “Complainant has not met their decision[sic][burden].” (Tr. at 64.)

¹¹ Section 43 of the Lanham Act provides in pertinent part:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any . . . symbol, or device, or any combination thereof, . . . which –

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . .

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act. . . .

(3) In a civil action for trade dress infringement under this Act for trade dress not registered on the principal register, the person who asserts trade dress protection has

Section 43 of the Lanham Act embraces not only word marks, such as “Nike,” and symbol marks, such as Nike’s swoosh symbol, but also “trade dress.” Wal-Mart Stores, Inc. v. Samara Brothers, Inc., 529 U.S. 205, 209 (2000). Trade dress “originally included only the packaging or ‘dressing,’ of a product, but in recent years has been expanded by many courts of appeal to encompass the design of the product.” Id.

The party asserting the trade dress bears the burden to establish that the trade dress is: (1) nonfunctional; and (2) distinctive. 15 U.S.C. § 1125(a)(3); see Wal-Mart Stores, Inc. v. Samara Brothers, Inc., 529 U.S. 205, 210-11 (2000). A feature of an alleged trade dress is functional and therefore not entitled to protection where “the exclusive use of [the feature] would put competitors at a significant non-reputation-related disadvantage.” Traffix Devices, Inc. v. Marketing Displays, Inc., 523 U.S. 23, 32 (2001), citing Qualitex Co. v. Jacobson Products Co., 514 U.S. 159, 165 (1995). An alleged trade dress is also deemed functional where “it is essential to the use or purpose of the device or when it affects the cost or quality of the device.” Traffix, 523 U.S. at 33, citing Qualitex, 514 U.S. 159 and Inwood Laboratories v. Ives Laboratories, Inc., 856 U.S. 844, 850, n.10 (1982). The Commission has adopted the test set forth in In re Morton-Norwich Products, Inc., 671 F.2d 1332 (C.C.P.A. 1982) to determine functionality:

Morton-Norwich listed the following factors as relevant consideration in determining functionality: (1) whether the utilitarian advantages of the design are touted in advertising; (2) whether the particular design results from a comparatively simple or cheap method of manufacture; (3) whether there exists a utility patent which discloses the utilitarian advantage of the design for which

the burden of proving that the matter sought to be protected is not functional.

15 U.S.C. § 1125(a).

production is sought; and (4) whether commercial alternatives are available. The foregoing factors are aids in determining functionality; no single factor is dispositive.

Certain Woodworking Machines, Inv. No. 337-TA-174, U.S.I.T.C. Pub. 1979, 1985 WL 303562, at *9-10 (Opinion of Commissioners Liebeler, Eckes, Lodwick and Rohr) (May 1987); see also Certain Bar Clamps, Bar Clamp Pads, and Related Packaging, Display, and Other Materials, Inv. No. 337-TA-429, 2001 WL 474337, at *6 (Mar. 13, 2001) (vacated on basis of settlement agreement) (recognizing Commission's adoption of test employed in In re Morton-Norwich).

To establish that the trade dress is distinctive, a complainant must demonstrate that the trade dress has acquired a secondary meaning. Wal-Mart Stores, Inc. v. Samara Brothers, Inc., 529 U.S. 205, 216 (2000). Trade dress is distinctive "if it has developed a secondary meaning which occurs, when 'in the minds of the public, the primary significance of a [mark] is to identify the source of the product rather than the product itself.'" Wal-Mart, 529 U.S. at 211 quoting Inwood Laboratories, 856 U.S. at 851, n.11. The Commission has recognized that "[c]ourts have held that the strongest and most relevant evidence regarding whether a mark has acquired secondary meaning and, therefore, is entitled to trademark protection, is evidence by a public opinion survey or poll." Certain Luggage Products, Inv. No. 337-TA-243, U.S.I.T.C. Pub. 1969, 1987 WL 450863, at *10 (Mar. 27, 1987) (Views of Commissioners Brunsdale, Eckes, Lodwick and Rohr). To evaluate the credibility and reliability of consumer survey evidence, the Commission has relied upon the following eight factors set forth in the Judicial Conference of the United States Handbook of Recommended Procedures for the Trial of Protracted Cases (West Ed. 1970), hereafter referred to as the Survey Factors:

- (1) Examination of the proper universe;

- (2) A representative sample drawn from the proper universe;
- (3) A correct mode of questioning interviewees;
- (4) Recognized experts conducting the survey;
- (5) Accurate reporting of data gathered;
- (6) Sample design, questionnaire, and interviewing in accordance with generally accepted standards of objective procedure and statistics in the field of surveys;
- (7) Sample design and interviews conducted independently of the attorneys; and
- (8) The interviewers, trained in this field, have no knowledge of the litigation or the purpose for which the survey is to be used.

Certain Two-Handle Centerset Faucets and Escutcheons, and Components Thereof, Inv. No. 337-TA-422, U.S.I.T.C. Pub. 3332, Initial Determination at 23 (July 2000). Moreover, as required to obtain a general exclusion order barring nationwide importation of infringing products, Sanford must prove secondary meaning throughout the United States. Certain Sneakers with Fabric Uppers and Rubber Soles, Inv. No. 337-TA-118, U.S.I.T.C. Pub. 1366, Views of the Commission at 26-28 (Mar. 9, 1983).

Complainant argued that its trade dress at issue is both nonfunctional and distinctive and therefore, is valid and subject to protection (Motion at 30); that complainant has established that the trade dress is nonfunctional under each of the factors enumerated in In re Morton-Norwich (Motion at 32-34); that it has demonstrated through both direct and circumstantial evidence that the trade dress “is uniquely associated with complainant as the specific, single source of its products and therefore has acquired secondary meaning” (Motion at 34); that complainant’s direct evidence of secondary meaning includes evidence of actual consumer confusion between genuine SHARPIE® markers and the Motion Respondents (Heng Bao, Yangtse River, and Mon Ami) imitation SHARPIE® markers, as well as a secondary meaning survey that was professionally designed and conducted by Dr. Michael Rappeport (Rappeport survey) (Motion at

35); that “[f]ully{ } of survey participants identified Sanford’s SHARPIE® products for reasons specifically relating to the trade dress...” (Motion at 36); and that said Rappeport survey “must be given considerable weight ... because the survey was designed and conducted ... in strict accordance with the Judicial Conference of the United States, Handbook of Recommended Procedures For The Trial of Protracted Cases (West ed. 1960),” which the Commission recognized “as setting forth the factors for evaluating the credibility and reliability of a survey.”¹² (Motion at 40; see id. at 40-46.)

The staff argued that complainant has established that the trade dress in issue is nonfunctional and distinctive. Regarding nonfunctionality it was argued that the color scheme consisting of a gray marker barrel and contrasting colored cap is not essential to the use or purpose of the marker (Response at 14); that given the variety of color schemes that are commercially available, complainant has established that there is no manufacturing price advantage or quality advantage gained by using Sanford’s color scheme (Response at 14); that the commercial availability of markers using other color schemes demonstrates that the color scheme employed in complainant’s trade dress does not put competitors at a significant non-reputation-related disadvantage (Response at 15); and that the claimed shape is not essential to the use or purpose of the marker and does not affect the cost or quality of the marker. (Response at 15.)

The staff argued that complainant has presented direct evidence to demonstrate that the trade dress at issue acquired secondary meaning before the Motion Respondents’ accused

¹² In addition to the Rappeport survey, complainant argued that circumstantial evidence “strongly supports” a finding that the trade dress at issue has acquired secondary meaning. (See Motion at 46-54.)

products entered the market (Response at 16-17); that the Rapoport survey indicates that{

} (Response at 17 (emphasis in original), citing CX-91 at 8; CX-92 at 44-49); that said Rapoport survey was properly conducted and has significant probative value (Response at 17-18); and that thus, the trade dress at issue is protected from infringement because complainant has established that the trade dress is both nonfunctional and distinctive.¹³

1. The Trade Dress In Issue Is Nonfunctional

With reference to the Morton-Norwich factors for assessing functionality, supra, the record contains evidence that Sanford's advertising does not tout any utilitarian advantages of the trade dress in issue. (See CX-18; CX-54; CX-55; CX-57; CX-69.) In fact, the SHARPIE® marketing materials of record make no reference to the trade dress at issue. (Id.) Complainant has also represented that{

}(CX-80 at ¶ 16.) As to whether the trade dress in issue is the result of a cheaper or simpler method of manufacture,{

} (CX-36 at ¶ 24.) "Producing the SHARPIE® marker with a gray barrel requires the use of tints and dyes and actually costs more money than using a natural

¹³ The staff argued that complainant has not established, via circumstantial evidence by itself, that the trade dress at issue has acquired a secondary meaning. (Response at 18-19.)

white colored barrel.” (Id.) The record further indicates that commercial alternatives to the trade dress in issue are readily available and in existence among Sanford’s competitors. (See Motion at 27-29.) Complainant’s motion contains photographs of several competing marker designs including white, black, gold, red and other brightly colored barrels.¹⁴ (Id.) Said marker designs also include non-tapered caps and barrels, uncapped markers, and other design variations that appear to have a cap-to-barrel ratio that is not “approximately 1/3 to 2/3 (a 1:2 ratio) of the total size of the marker.” (Id.) Moreover, Sanford uses shapes other than the tapered, cigar-shaped barrel and tapered cap in its SHARPIE® Ultra Fine Point and SHARPIE® Retractable markers. (SX-2 at 4, 13.) Considering the variety of commercial alternatives to the trade dress at issue, the administrative law judge finds that said trade dress is “not essential to the use or purpose” of the marker and further, that granting Sanford exclusive use of the chosen combination of color scheme and shape would not “put competitors at a significant non-reputation-related disadvantage.” Accordingly, the administrative law judge finds that complainant has established that the trade dress in issue is nonfunctional.

2. The Trade Dress In Issue Has Acquired Secondary Meaning

With respect to secondary meaning, complainant and the staff agree that the Rapoport survey establishes that the trade dress at issue has acquired secondary meaning by identifying the source of the product rather than the product itself and is therefore distinctive. The Rapoport Survey was designed and implemented to determine whether, based on the trade dress at issue and without the appearance of printed trademarks or logos, consumers have come to identify a

¹⁴ Respondent Ningbo Beifa, as part of its settlement of this investigation with Sanford, agreed to make its markers with a blue barrel. (CX-6 at 5.)

SHARPIE® fine-point permanent marker as a “SHARPIE.” (CX-91 at RAP0003.) {

}

(CX-92 at 49.)

As for the protocol of the Rappeport survey, the record indicates that said survey closely adhered to the eight Survey Factors enumerated by the Judicial Conference of the United States in its Handbook of Recommended Procedures for the Trial of Protracted Cases, *supra*. Thus, Rappeport¹⁵ indicated that a proper universe of survey respondents was examined, *viz.*{

¹⁵ Rappeport submitted his resume indicating that he has more than 30 years of experience in market and survey research and has made more than 100 appearances as an expert witness at trial and/or by deposition. (CX-91 at RAP0047.) The administrative law judge finds such experience relevant in light of the Survey Factors’ consideration of whether the survey in issue has been conducted by a recognized expert. See Certain Two-Handle Centerset Faucets and Escutcheons, and Components Thereof, Inv. No. 337-TA-422, U.S.I.T.C. Pub. 3332, Initial Determination at 23 (July 2000).

} (See CX-92 at 27-30; CX-91 at RAP0005.) The survey, which employed a {
} methodology, was conducted in{

}¹⁶ (CX-91 at RAP0005; see Certain Sneakers with Fabric
Uppers and Rubber Soles, Inv. No. 337-TA-118, U.S.I.T.C. Pub. 1366 at 26-28 (Mar. 9, 1983)
(Views of the Commission).)

As to the mode of questioning, Rappeport testified that the survey method employed
{ (CX-92 at 20; see
CX-91 at RAP0003 n.2.) Thus, survey participants{

} (CX-91 at
RAP0006.) Rappeport referred to this methodology as an{
} (CX-91 at RAP0003 n.2.) The
format of the questions where,{

}has been consistently recognized as proper in a secondary meaning
survey. See Certain Air Impact Wrenches, Inv. No. 337-TA-311, 1991 WL 788551, at *38-39

¹⁶{
} (CX-91 at
RAP0005.)

(May 6, 1991) (Initial Determination). Moreover, with respect to the accuracy of the data reported in the Rapoport survey, Rapoport indicated that{

} (See CX-91 at RAP0008-10; CX-92 at 42-

43.)

Describing the design and implementation of the Rapoport survey, Rapoport testified that{

} (CX-92 at 34-35; see CX-91, Appendix C.) In addition,

{

}¹⁷ (CX-91 at RAP0007.)

In view of the foregoing, the administrative law judge finds that the Rapoport survey is entitled to substantial weight in determining whether the asserted trade dress has acquired secondary meaning. The administrative law judge further finds that the Rapoport survey, in which{

} establishes that complainant's trade dress at issue has

¹⁷ Complainant represented that{

} (Motion at 45.)

acquired secondary meaning.¹⁸

Based on the foregoing, the administrative law judge finds that complainant has established the validity of the trade dress in issue.

IX. Trademark Infringement

Complainant contends that the Heng Bao and Yangtse River respondents each infringe Sanford's SHARPIE® stylized trademark and the SHARPIE® word mark. (See Motion at 83-85.)

The staff argued that complainant has established that each of Heng Bao and Yangtse River infringe the trademarks in issue. (See Response at 22-25.)

The Commission has stated that “[t]he touchstone of direct trademark infringement is the notion of ‘likelihood of confusion’” and that “the test for trademark infringement is whether the alleged infringer’s use of the mark is so similar to complainant’s mark as to create the likelihood

¹⁸ In addition to the direct evidence of secondary meaning offered by complainant, viz. the Rappeport survey, complainant also offered circumstantial evidence to prove that its protected trade dress has acquired secondary meaning. (See Motion at 46-52.) The staff argued that “Sanford has already shown by direct evidence that the trade dress at issue has acquired secondary meaning” and that the circumstantial evidence “is insufficient, by itself, to establish secondary meaning.” (Response at 18. n.22, 19 ; see also July 14 Closing Arguments Tr. at 12 (arguing that “any circumstantial evidence ... is unnecessary.”).) In its reply, complainant argued that “the ALJ should also accept that the uncontroverted circumstantial evidence offered by Sanford further proves the secondary meaning of the Protected Trade Dress,” but that “because the Staff accepts that the secondary meaning of the trade dress has been proven by direct survey evidence, it is unnecessary for Sanford further to prove that element of the infringement case.” (Reply at 2 n.1.) Indeed, at closing arguments, complainant’s counsel acknowledged that the circumstantial evidence of secondary meaning coupled with the direct survey evidence of secondary meaning “is a belts and suspenders thing.” (Tr. at 13.) As the administrative law judge has found that complainant has established, through direct evidence, that the trade dress has acquired secondary meaning, he finds that it is unnecessary to make any determination as to whether the circumstantial evidence offered by complainant “further proves the secondary meaning” of the trade dress in issue.

of confusion among an appreciable number of members of the public as to the source or sponsorship of the product.” Certain Chemiluminescent Compositions and Components Thereof and Methods of Using, and Products Incorporating the Same, Inv. No. 337-TA-285, Commission Opinion, (U.S.I.T.C. Pub. 2370), 1991 WL 790083, at *7 (Mar. 1991). For purposes of determining whether there is a likelihood of confusion, the Commission has adopted the following factors set forth in the Restatement of Torts § 729 (Restatement Factors):

- (a) the degree of similarity between the designation and the trademark or trade name in
 - (i) appearance;
 - (ii) pronunciation of the words used;
 - (iii) verbal translation of the pictures or designs involved;
 - (iv) suggestion;
- (b) the intent of the actor in adopting the designation;
- (c) the relation in use and manner of marketing between the goods and services marketed by the actor and those marketed by the other;
- (d) the degree of care likely to be exercised by purchasers.

Certain Strip Lights, Inv. No. 337-TA-287, Initial Determination, 1989 WL 608725, at *11 (June 27, 1989); see Chemiluminescent Compositions, Comm’n Op., 1991 WL 790083, at *7. This sort of comparison of the impression created by competing marks is commonly used to determine if there is a likelihood of confusion. 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, §§ 23.19, 23.21 (4th ed. 2005).

There are three different types of evidentiary support for a finding of likelihood of confusion including survey evidence, evidence of actual confusion, and/or argument based on an

inference arising from a judicial comparison of the conflicting marks themselves and the context of their use in the marketplace. Strip Lights, Initial Determination, 1989 WL 608725, at *11; see 3 McCarthy on Trademarks and Unfair Competition § 23:2.1. The Commission has undertaken its own analysis of the words used on the domestic and accused products to determine likelihood of confusion. Chemiluminescent Compositions, Comm'n Op., 1991 WL 790083, at *7-8; see also Strip Lights, ID, 1989 WL at 17-28. Indeed, the administrative law judge can decide the issue himself based on the Restatement Factors. See Strip Lights, Initial Determination, 1989 WL 608725, at *11. In making such a determination, however, the administrative law judge must not consider whether he is likely to be confused, but rather, whether the reasonable purchaser in the marketplace is likely to be confused. Strip Lights, Initial Determination, 1989 WL 608725, at *11. Certain courts have cautioned, however, that while a fact-finder can conduct its own visual examination this should not constitute the sole basis for the conclusions made. Tools USA and Equipment Co. v. Champ Frame Straightening Equipment, Inc., 87 F.3d 654, 660 (4th Cir. 1996); Woodsmith Publishing Co. v. Meredith Corp., 904 F.2d 1244, 1249-50 (8th Cir. 1990).

Evaluating the accused Heng Bao markers in light of the first two of the four Restatement Factors, viz., degree of similarity and intent of the actor, the record indicates that Heng Bao has used the identical word "SHARPIE" printed in an identical font on the accused markers and marker packaging as compared to the trademarks in issue. (CX-1, Exh. 10 at 1-5, Physical Exh. 9-12.) In addition, certain Heng Bao packaging bears the names "Shanpie" and "Shonpie" in a similar script as compared to the SHARPIE® stylized trademark. (CX-1, Exh. 10 at 6-7.) The administrative law judge finds that Heng Bao's changing of only one or two letters of the SHARPIE® word trademark results in marks, viz. Shanpie and Shonpie, that appear and sound

very similar to the SHARPIE® word mark in issue. Accordingly, the administrative law judge finds that there is a high degree of similarity between the designation of the accused Heng Bao markers as “Sharpie,” “Shanpie,” or “Shonpie” and the SHARPIE® stylized and word trademarks at issue in appearance and pronunciation of the words used. Moreover, Heng Bao has included the Sanford corporate address, the Sanford web address, a Sanford guarantee that uses the actual Sanford customer service return address, and a suggestion for the purchaser to try other SHARPIE® products on the packaging of its accused markers. (Compare CX-1, Exh. 10 at 3, 5 with CX-1, Physical Exh. 1.) Thus, the administrative law judge further finds that Heng Bao intended to cause confusion through its use of the SHARPIE® stylized and word trademarks juxtaposed with the Sanford guarantee, customer service return address, and Sanford corporate address on the packaging of its accused markers. (Id.) In further support of the finding that Heng Bao intended to cause confusion, Customs and Border Protection has seized Heng Bao “Sharpie” markers, considering the marking on the Heng Bao markers to be a “counterfeit version” of Sanford’s registered trademarks. (See CX-76.)

With respect to the accused Yangtse River markers, there is evidence that the packaging of said accused markers uses the Sharpie name, the exact name set forth in the SHARPIE® word trademark in issue, in a font that is nearly identical to that of the SHARPIE® stylized trademark in issue. (See CX-1, Exh. 11 at 2.) As with certain of the accused Heng Bao markers, the accused Yangtse River markers use a confusingly similar name “Shanpie” on the marker barrel in a font nearly identical to that of the SHARPIE® stylized trademark. (See CX-1 at 1, Physical Exh. 13.) Hence, the administrative law judge finds that there is a high degree of similarity between the designation of the accused Yangtse River markers as “Sharpie” or “Shanpie” and the

SHARPIE® stylized and word trademarks at issue in appearance and pronunciation of the words used.

As required by the third Restatement factor for determining whether there is a likelihood of confusion, the record contains evidence that demonstrates a similar relation in the use and manner of marketing between the accused markers and those marketed by complainant Sanford. Sanford's genuine SHARPIE® markers and the accused Heng Bao and Yangtse River markers are designed for the same use. (Compare CX-1, Exh. 3 at 1, 3 (describing Sanford's SHARPIE® products as permanent markers) with CX-1, Exh. 11 at 5 (describing accused Heng Bao product as a permanent marker) and CX-1, Physical Exh. 13 (describing accused Yangtse River product as a permanent marker).) Moreover, the genuine SHARPIE® markers and the accused markers are typically sold in packages containing several markers of different colors. (See, e.g., CX-1, Exh. 3 at 3-5 (SHARPIE® markers), Exh. 10 at 2-7 (Heng Bao markers), Exh. 11 at 2 (Yangtse River markers).) In addition, Sanford's genuine SHARPIE® markers and the accused Heng Bao markers are offered for sale in some of the same retail outlets including Dollar stores and eBay. (CX-36 at ¶ 39; CX-81 at SAN 014639{
} CX-136 at SAN 011109, SAN 011112, SAN 011114 (Heng Bao markers offered for sale on eBay).)

Consistent with the fourth Restatement factor, the record establishes that the markers at issue are inexpensive items that consumers often purchase on impulse with little consideration. (CX-36 at ¶ 29; CX-60 at SAN001018, SAN001020, SAN001030; CRX-1 at ¶ 3; see also CX-60 at SAN001018-1033.) See Gateway, Inc. v. Companion Products, Inc., 384 F.3d 503, 510 (8th Cir. 2004) (noting that district court found that because defendant's product sold for less than

\$20, consumers would not spend substantial time considering their purchase).

Aside from consideration of the Restatement Factors considering whether a likelihood of confusion exists, the record also contains evidence of actual consumer confusion between Heng Bao's accused markers and complainant's genuine SHARPIE® markers. For example, the record contains several instances where{

} (See, e.g., CX-81C at SAN 14639-42, 14644, 14646, 14648 ({
})).

As further support for a finding that a likelihood of confusion exists, complainant argued that it "has submitted direct evidence in the form of a professionally conducted survey [of] Dr. Sandra Cogan [who] was retained to design and conduct a survey of consumers testing the likelihood of confusion between Respondents' products and Sanford's products based on the Protected Trade Dress" (Motion at 61); and that "[t]he results of Dr. Cogan's survey found a significant{ } level of confusion indicating a very strong likelihood that products bearing the Protected Trade Dress are confusingly similar to Sanford's SHARPIE® marker." (Id. citing CX-111C at 20; see also Motion at 61-72; Reply at 11-23.)

The staff argued "that the Cogan survey is seriously flawed in several respects and is therefore entitled to little, if any, weight" (Response at 26); and that "[s]pecifically, the survey is flawed because{

} (Id. at 28-29; see

id. at 29-33; Order No. 27 Response at 5-6.)

In support of Motion No. 522-38 and relating to the Cogan survey in issue, complainant offered the following material facts 108 and 109 for which it contended “that there is no genuine issue”:

108. A likelihood of confusion survey conducted by recognized expert Dr. Sandra Cogan indicates that there is a{ } level of confusion of products bearing the Protected Trade Dress, indicating a "very high level of confusion between the Sharpie marker and the Liqui-Mark marker." CX-111C at 20, 25.

a.{

}

b.{

} at the time the survey was commenced. CX-4C Reynolds Decl. 6.

c. Based on the high level of likelihood of confusion with the { } CX-113C at 68-69.

d.{

} CX-111C at 20-23.

e. After subtracting the control marker results from the total amount of confusion { } CX-111C at 24-25; CX-113C.

109. Dr. Cogan's survey was conducted in strict accordance with the factors stated in the Handbook of Recommended Procedures for the Trial of Protracted Cases. This handbook describes procedures for surveys to be entitled to admission into evidence and to be accorded strong weight. See generally CX-111C, CX-113C.

a. Dr. Cogan examined the proper universe{

} CX-111C at 11; CX-113C at 25-26.

- b. Dr. Cogan drew{
} CX-111C at 14.
- c. Dr. Cogan employed a correct mode of questioning{
} CX-111C at
9; CX-113C at 15, 18-22.
- d. Dr. Cogan's questions were clear and not leading. CX-111C
Attach. 3; CX-113C at 23-24.
- e. Dr. Cogan controlled for order effects{
} CX-111C Attach. 3;
CX-113C at 46.
- f.{
} was
appropriate and gave each survey participant the exact same amount of
controlled exposure. CX-113C at 34.
- g. The survey format replicated marketplace conditions,{
} CX-36C 27; CX-70; CX-113C at 26-28, 49, 84-85; CX-114C
at 3-6; CX-115C Ex.1-2, 4; CX-116C; CX-117C; CX-118C.
- h. In retail stores,{
} CX-36C 27.
- I. Fine point permanent markers are frequently sold through
commercial catalogs and the internet{
} CX-36C 27; CX-115C Ex. 1-2, 4;
CX-119C at SAN015388-SAN015389; CX-120.
- j. Dr. Cogan is a recognized survey expert who has conducted
trademark surveys designed to evaluate likelihood of confusion of trade
dress. CX-111C Ex. B at 8; CX-113C at 5-11.
- k. Dr. Cogan reported the data accurately, tabulated the results, and
verified the interviews. CX-111C at COG0015, COG0026-COG0028;
CX-113C at 42-43.
- l. Dr. Cogan's survey questionnaire and interviewing were conducted
in accordance with generally accepted standards of objective procedure

and statistics. CX-111C; CX-113C.

m. Dr. Cogan's survey and interviews were conducted independently of Sanford's attorneys. CX-113C at 20-21, 24-25.

n. Dr. Cogan's interviewers had no knowledge of the survey's purpose or desired the results. CX-111C at COG0015, COG0069-COG76; CX-113C at 22, 32.

(Statement of Material Facts at 22-24.) The staff objected to complainant's material facts 108 and 109 on grounds that they are "[a]gainst the weight of the evidence" and offered the following rebuttal findings of fact:

CFF108, CF109. Against the weight of the evidence.

SFF14. {
}
confused as to source, affiliation, or permission. CX-111C at 20. {

} CX-111C at 24; CX-113C at 67-70.

SFF15. The likelihood of confusion survey conducted by Dr. Cogan is flawed because{
} CX-113C at 26-27.

SFF16. The vast majority of consumers do not encounter
{
} See, e.g., CPX 15 (showing Oprah Winfrey shopping for{
}SHARPIE® markers at Office Max). Sanford states that it shipped{
} CX-114C. In 2004, however, Sanford shipped more than{
} markers. CX-27C.

SFF17. Fine point markers are{
} CX-151 (Walgreen's website showing products{
}); SX-5 (Walgreen's

material facts, complainant submitted “Rebuttal Material Findings” with its reply filed on May 23, in which complainant states that it “disagrees” with SFF15, SFF16, SFF17, SFF19, SFF20 and SFF21 set forth above, further indicating that there are material facts in dispute. (See Rebuttal Material Findings at 16-18; see also id. at 18, CRFF24.) Accordingly, the administrative law judge finds that complainant has not established that it is entitled to a summary determination that, as a matter of law, the Cogan survey establishes a likelihood of confusion between Sanford’s markers employing its protected trade dress and the trade dress used for the Motion Respondents’ accused markers.

Based on the foregoing, the administrative law judge finds that the Heng Bao and Yangtse River respondents’ use of the SHARPIE® stylized and word trademarks is so similar to Sanford’s use of the said trademarks so as to create the likelihood of confusion among an appreciable number of members of the public as to the source or sponsorship of the Heng Bao and Yangtse River accused markers. Thus, the administrative law judge finds that complainant has established that the Heng Bao and Yangtse River accused markers infringe the trademarks in issue.

X. Trade Dress Infringement

Complainant argued that respondents Lineplus, Heng Bao, Yangtse River and Mon Ami infringe the trade dress at issue. (Motion at 55, 58-61; Reply at 23-30.)

The staff argued that complainant has shown that there exists a likelihood of confusion with respect to the accused products of respondents Lineplus, Heng Bao, and Yangtse River (Response at 33-34); and that based on new evidence not produced in discovery and first submitted in connection with complainant’s reply to the staff’s response to Motion No. 522-38,

viz. that the accused Mon Ami markers are available for purchase in the United States in a blister pack through which the pen is visible, complainant has established that there is a likelihood of confusion with respect to the Mon Ami accused markers. (Order 27 Response at 7; see id. n.5-6.)

Where complainant has already proven that the trade dress in issue is nonfunctional and has acquired secondary meaning, to prove infringement of the trade dress, complainant must establish a “likelihood of consumer confusion as to origin, sponsorship, or approval due to similarity between” the Sanford trade dress and the trade dress employed by the respondents on their respective accused markers. Al-Site Corp. v. VSI Intern., Inc. 174 F.3d 1308, 1326 (Fed. Cir. 1999). The Federal Circuit has noted that “[w]hen marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.” Century 21 Real Estate Corp. v. Century Life of Am., 970 F.2d 874, 877 (Fed. Cir. 1992); see Nike, Inc. v. “Just Did It” Enter., 6 F.3d 1225, 1230 (7th Cir. 1993). In addition, the Federal Circuit has observed that “[w]hen the products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.” Recot, Inc. v. M.C. Becton, 214 F.3d 1322, 1329 (Fed. Cir. 2000).

Sanford’s protected trade dress and the trade dress employed by respondents Lineplus, Heng Bao, Yangtse River, and Mon Ami appear on identical goods designed for the same use - permanent markers - thereby reducing the degree of similarity necessary to support a finding of likely confusion. See Century 21 Real Estate Corp., 970 F.2d at 877. Moreover, the genuine markers with complainant’s trade dress and the respondents’ accused markers are typically sold in a manner that allows consumers to observe the trade dress when contemplating a purchase.

(Compare CX-1, Exh. 3 at 3-5 (SHARPIE® markers) with CX-1, Exh. 10 at 2-7 (Heng Bao markers), Exh. 11 at 2 (Yangtse River markers), Exh. 13 at 2 (Lineplus marker), CRX-7 at SAN016429 (Mon Ami markers), CRX-16 at SAN016462 (Mon Ami blister pack).) Evaluating the accused markers of Lineplus, Heng Bao, Yangtse River, and Mon Ami, the administrative law judge finds that said respondents' accused markers have an overall appearance that is nearly identical to complainant's protected trade dress. Respondents' accused markers have a distinctive, gray, tapered, cigar-shaped barrel; a tapered, fully-colored cap that contrasts with the gray color of the barrel; and a cap-to-barrel ratio of approximately 1/3 to 2/3 (a 1:2 ratio) of the total size of the marker. (See CX-1, Physical Exh. 9-12 (Heng Bao markers), Physical Exh. 13 (Yangtse River marker), Physical Exh. 14 (Lineplus marker), Physical Exh. 19 (Mon Ami marker).) Thus, the administrative law judge finds that complainant has established a likelihood of confusion between its protected trade dress and the trade dress used by Lineplus, Heng Bao, Yangtse River, and Mon Ami. The likelihood of confusion is further supported by the fact that the markers are inexpensive items that consumers often purchase on impulse with little consideration. (CX-36 at ¶ 29; CX-60 at SAN001018, SAN001020, SAN001030; see also CX-60 at SAN001018-1033.) See Recot, Inc., 214 F.3d at 1329.

Aside from the administrative law judge's comparison of the accused markers to complainant's protected trade dress, the record contains evidence of actual confusion where consumers purchased Heng Bao markers believing that they were complainant's markers. (See, e.g., CX-81C at SAN 14639-42, 14644, 14646, 14648 ({}))

Accordingly, the administrative law judge finds that complainant has established that Lineplus, Heng Bao, Yangtse River, and Mon Ami infringe Sanford's protected trade dress.

XI. Domestic Industry - Trademarks In Issue

The importation or sale of articles that infringe a valid and enforceable United States trademark constitutes a violation of Section 337 only if “an industry in the United States, relating to the articles protected by the . . . trademark . . . concerned, exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2); see 19 U.S.C. § 1337(a)(1)(C). This is referred to as the domestic industry requirement. Failure of proof regarding the existence of a domestic industry precludes a finding that Section 337 has been violated. Certain Removable Electronic Cards and Electronic Card Reader Devices, Inv. No. 337-TA-396, U.S.I.T.C. Pub. 3123, Comm’n Op. at 21 (Aug. 1998).

The domestic industry requirement of Section 337 comprises a “technical” prong and an “economic” prong. Certain Excimer Laser Systems for Vision Correction Surgery and Components Thereof and Methods for Performing Such Surgery, Inv. No. 337-TA-419, U.S.I.T.C. Pub. 3299, Comm’n Op. at 30 (Mar. 2000). In an analysis of the technical prong, the focus is on whether the domestic industry relates to the articles protected by the trademark at issue in the investigation. The technical prong is satisfied if the trademark at issue is practiced or exploited by the domestic industry. See 19 U.S.C. §1337(a)(2) and (3); see also Certain Microsphere Adhesives, Process for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes, Inv. No. 337-TA-366, U.S.I.T.C. Pub. 2949, Comm’n Op. at 8 (Jan. 1996), aff’d sub nom. Minnesota Mining & Mfg. Co. v. U.S. Int’l Trade Comm’n, 91 F.3d 171 (Fed. Cir. 1996). In an analysis of the economic prong, on the other hand, the focus is on whether a domestic industry exists or is in the process of being established that practices or exploits the trademark at issue. The economic prong is satisfied if there is in the United States,

with respect to the articles protected by the . . . trademark . . . concerned-

- (A) significant investment in plant and equipment;
- (B) significant employment of labor or capital; or
- (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. § 1337(a)(3). As the statute uses the disjunctive term “or,” a complainant need only satisfy one of the three tests set forth in Section 337(a)(3). See Certain Microlithographic Machines and Components Thereof, Inv. No. 337-TA-468, Order No. 27 at 4 (July 17, 2002).

The existence of a domestic industry is measured at the time the complaint is filed.

Bally/Midway Mfg. Co. v. U.S. Int'l Trade Comm'n., 714 F.2d 1117, 1122 (Fed. Cir. 1983). As complainant, Sanford bears the burden of proving the existence of a domestic industry. See, e.g., Certain Methods of Making Carbonated Candy Products, Inv. No. 337-TA-292, U.S.I.T.C. Pub. 2390, Comm'n Op. at 34-35 (June 1991).

The staff argued that complainant has demonstrated that its SHARPIE® markers use the registered trademarks. It also argued that complainant has presented substantial, reliable, and probative evidence that the economic prong of the domestic industry requirement is satisfied with respect to both of the asserted registered trademarks. (SBr at 35.)

1. Technical Prong

The administrative law judge finds that complainant has established by substantial, reliable, and probative evidence that its SHARPIE® markers use the registered trademarks. Thus those trademarks appear on each of the six SHARPIE® markers at issue, viz. the SHARPIE® Fine Point, the Super SHARPIE®, the SHARPIE® Industrial, the Chisel Tip SHARPIE®, the Metallic SHARPIE®, and the Touch-Up SHARPIE®, and on their packaging. (See CX-1,

Physical Exh. 1-6.)

2. Economic Prong

With respect to the economic prong, Sanford is a limited partnership registered in Illinois. (See CX-1, Exh. G; CX-17 at 6.) { } the components that go into creating each of the six markers at issue are made in the United States. (See CX-17 at 20.) Between 1964 and 2004, Sanford manufactured the six markers at issue at its Bellwood, Illinois facility. (See CX-17 at 10-11; CX-18; CX-20.) Once manufacturing was completed at the Bellwood facility, the markers were shipped to Sanford's distribution center in Shelbyville, Tennessee. (CX-17 at 11.) In 2004, Sanford expanded its Shelbyville operations by consolidating its manufacturing and distribution efforts at that location. (See id. at 10-11; CX-22; CPX-1.) The current market value of the factory and distribution center in Shelbyville is approximately{ } and as of September 2004, the net book value of all SHARPIE® assets exceeded{ } (CX-17 at 13; CX-44.) Each year, the Shelbyville distribution center ships between{ } of the six SHARPIE® markers at issue to customers throughout the United States. (See CX-27; CX-35.) These shipments translate to a total sales revenue of between{ } per year, which represents{ } of the overall sales revenue of SHARPIE® products. (See CX-37; CX-40.)

At the Shelbyville facility, the combined employment for both the manufacturing and distribution center was between{ } in 2002, between{ } in 2003, and between{ } individuals through August 2004. (CX-17 at 12-13; CPX-1.) At the Bellwood facility, during the years of 2000-2004, Sanford employed between{ } individuals. (See CX-47; CX-48; CX-49; CX-50; CX-51.) At both facilities numerous

employees were assigned to SHARPIE®-related activities. In 2004, at Shelbyville, up to{ } of the manufacturing employees were assigned exclusively to SHARPIE®-related activities with over{ } man hours dedicated to packing SHARPIE® products for distribution. (See CX-45; CX-46.) In 2004, at the Bellwood facility, Sanford employed approximately{ } individuals who spent{ } percent of their time on SHARPIE®-related activities, approximately 19 individuals who spent{ } percent of their time on SHARPIE®-related activities, and approximately{ } individuals who spent{ } percent of their time on SHARPIE®-related activities. (CX-17 at 13; CX-52.) The total annual salary for these SHARPIE®-related positions in 2004 was more than{ } million. (CX-52.)

Those employees working on SHARPIE®-related activities work in such areas as sales and marketing, research and development, customer service and public relations, web design and graphics, forecasting, plant operations, purchasing, and business administration. With regards to marketing in 2002, Sanford spent more than\${ } million in marketing SHARPIE® products and in 2004, the SHARPIE® advertising budget for television exceeded\${ } million. (See CX-36 ¶ 18; CX-199.) With regards to research and development, Sanford spent more than \${ } million in 2002 on such activities including { } (CX-59.)

In addition, Sanford used its research and development resources to{ } the SHARPIE® chisel tip introduced in 2001, the SHARPIE® metallic introduced in 2002, and new colors of the SHARPIE® fine point introduced in 2004. (See CX-54 at SAN010479-SAN010485; CX-64; CX-65; CX-66; CX-67; CPX-3.)

In addition, Sanford exploits the trademarks through various advertising campaigns,

which include the SHARPIE® internet website, numerous television advertisements, and product give-a-ways. (See CX-55; CX-56; CX-18; CPX-4; CX-36 ¶ 18; CPX-5.) Further, Sanford's sponsorship of such events as NASCAR's SHARPIE® 500 and NASCAR's SHARPIE® 250 races provide forums where thousands of people see the SHARPIE® trademarks prominently displayed on signs at the speedway, on race cars, and on the race track itself. (See CX-55; CPX-6; CX-71.)

Based on the foregoing, the administrative law judge finds that there is substantial, reliable, and probative evidence that the economic prong of the domestic industry requirement is satisfied with respect to both of the asserted registered trademarks. Thus, he finds that complainant has demonstrated that it has made significant investment in plant and equipment and significant employment of labor or capital in the manufacture of the SHARPIE® markers, all of which are made in the United States, and that it made a substantial investment in the exploitation of the trademarks through its advertising and promotion efforts that feature the trademarks, as well as research related to the SHARPIE® markers.

Since the Omnibus Trade & Competitiveness Act of 1988, proof of economic injury to a domestic industry caused by unfairly competing imports is required to establish a violation of section 337 only when the unfair act is other than infringement of an intellectual property right based on statute, i.e., other than registered patents, trademarks, copyrights, and maskworks. In other words, economic injury has to be proved in proceedings under section 337 only when the unfair competition consists of infringement of a common law trademark or other acts of unfair competition, e.g., false advertising, passing off, misappropriation of trade secrets, and trade dress. Hence with respect to the trademark in issue, injury to the domestic industry need not be

proved by complainant.

XII. Domestic Industry - Trade Dress In Issue

In order for complainant to establish a violation of section 337 based on trade dress infringement, it must show that the threat or effect of the Motion Respondents' alleged unfair acts involving the trade dress in issue is to "destroy or substantially injure an industry in the United States." 19 U.S.C. §1337(a)(1)(A)(I). Each of complainant and the staff has approached this issue in different ways. Thus complainant, in section III of its memo in support of Motion No. 522-38, argued that there is no genuine issue of material fact existing with respect to the establishment of a domestic industry as to the trademarks and trade dress in issue because complainant satisfies the economic prong and technical prong of the domestic industry requirement. Complainant, later section VII of its memorandum in support, then argued that there is no genuine issue of material fact existing as to the current and future injury of complainant by the "infringing markers." While complainant acknowledged that proof of injury is required only to substantiate complainant's trade dress claim, it then repeatedly refers to the trademark in issue,¹⁹ although establishment of injury with respect to any trademark in issue is not an issue in this investigation. (See Motion at 86.)

The staff, in contrast to complainant, while it does make reference to the economic and technical prongs of the domestic industry with respect to the registered trademarks in issue,²⁰

¹⁹ For example, complainant argued under the heading "Products Of The Infringing Markers Have Targeted Sanford's Customers" that "[t]he infringing markers are sold at many of the same venues as Sanford's markers. Respondents have a presence at dollar stores where SHARPIE ® markers are sold." (Memo at 87.)

²⁰ (See Response at 35.)

under the heading “VIII. Injury To The Domestic Industry With Respect To Trade Dress,” argued that the domestic industry for purposes of section 337(a)(1)(A) is Sanford’s operation devoted to the production and sale of SHARPIE® fine point permanent markers. It was argued that the survey conducted to determine whether consumers associate the trade dress at issue with a single source was limited to fine point markers and hence complainant has only established the existence of protectible trade dress with respect to the SHARPIE® fine point marker. (Response at 36.) However, the staff also argued, “given that all of the markers alleged to embody the trade dress are in the record, the Judge is certainly free to examine them to determine if these other markers use the trade dress at issue” and in the staff’s view such a visual inspection would support the “judgment” of Mr. Rappeport that{

} (Response at 36-37.)

The staff then proceeded to treat actual injury and threat of injury in its response to Motion No. 522-38.

In closing arguments on July 14, 2005, the staff argued that its reference to “Sanford’s operations devoted to the production and sale of SHARPIE® fine point permanent markers” was “somewhat of a shortcut, because the domestic industry would be articles protected by the intellectual property and that would mean Sanford’s products that embody the trade dress.” (Tr. at 88.) It later argued that the industry for the trade dress in issue “would constitute the production-related activities. And I suppose that the staff shortcut that discussion in the brief because there is a plant . . . and clearly there is a lot of people and money spent making the five or six pens that embody the trade dress.” (Tr. at 110.)

Both complainant and the staff at closing argument agreed that in order to determine

whether there is a threat or effect of the alleged unfair acts involving the trade dress in issue to destroy or substantially injure an industry in the United States, the industry must be defined. The administrative law judge finds that investigations prior to the Omnibus Trade & Competitiveness Act of 1988 (1988 Act) and when injury to a domestic industry had to be established for all unfair acts, including statutory intellectual property based cases, are helpful in determining how to define the industry for the acts relating to the trade dress in issue.

In In The Matter Of Woodworking Machines, Inv. No. 337-TA-174, which was before the 1988 Act, the unfair acts under investigation included both statutory and non-statutory intellectual property, viz. alleged patent infringement, common-law and registered trademark infringement, false representation of manufacturing source, passing off, and false or deceptive advertising. Woodworking Machines, Comm'n Op., 1987 WL 303562, at *9 (May 1987). In issue was the importation or sale of certain 14-inch band saws, 10-inch table saws, tilting arbor saws, 8-inch motorized bench saws, 6-inch jointers, shapers, disk/belt finishers, wood-planing machines, blade guards and vertically adjustable rip fences. Id. at *22. The Commission defined the "domestic industry" as being one industry without separately analyzing a specifying technical prong and an economic prong as is done with statutory intellectual property since the 1988 Act. Id. at *22. The reasons for doing so included (1) that complainant's exploitation of the registered trademark and logo related to all of complainant's power tools, (2) that complainant's exploitation of the subject trademarks and patents overlapped, to a certain extent, with respect to the woodworking machines in controversy and (3) that the same facilities were used in the manufacture of the products at issue. Id.

Based on CX-24, CX-25 and CX-45, the administrative law judge finds that the domestic

industry involved in the trademarks and trade dress in issue is one industry. Thus he finds that complainant's exploitation of the registered trademarks in issue relate to all of the markers in issue; and that complainant's exploitation of the trademarks and trade dress in issue overlaps with the same facilities used in the manufacture of the products in issue. As with the trademarks in issue, where a technical prong and economic prong were analyzed supra, he thus finds that there is a domestic industry involving the trade dress in issue, which is the same domestic industry at least as to the economic prong that was found for the trademarks in issue.

As to what markers are included in the domestic industry with respect to causing an injury involving the trade dress in issue,²¹ visual inspection by the administrative law judge of CX-1, Physical Exh. 1-6, which are the markers employing the alleged trade dress in issue shows that in addition to the fine point markers the trade dress in issue is found in all of the other markers with the exception of the chisel tip marker.²²

1. Injury

With respect to the trade dress in issue, a complainant must prove that the Motion

²¹ Rappeport testified that the{
tip marker, Rappeport testified:
{
} (CX-92 at 53.) Referring to the SHARPIE® chisel

(CX-92 at 53; see Motion at 35 n.10).

²² At closing argument complainant's counsel represented that "exhibits" in support of Motion No. 522-38 show that complainant's{
} (Tr. at 98-99.)

Respondents' practices have caused substantial injury to the domestic industry. Certain Electric Power Tools, Battery Cartridges & Battery Chargers, Inv. No. 337-TA-284, U.S.I.T.C. Pub. 2389, Unreviewed Initial Determination at 246 (1990) (Power Tools); see also Textron, Inc. v. U.S. Int'l. Trade Comm'n, 753 F.2d 1019, 1029 (Fed. Cir. 1985) (Textron). Complainant must also prove a nexus between the Motion Respondents' unfair acts and the injury to the domestic industry. Power Tools, at 246; see also Certain Nut Jewelry and Parts Thereof, Inv. No. 337-TA-229, U.S.I.T.C. Pub. 1929, Initial Determination at 33 (Nov. 1986) (unreviewed in relevant part).

The Commission has considered a "broad range of indicia" in determining whether unfair acts have the effect of substantially injuring the domestic industry, including: (1) the respondent's volume of imports and penetration into the market, (2) the complainant's lost sales, (3) underselling by the respondent, and (4) the complainant's declining production, profitability and sales. Power Tools, at 246; Nut Jewelry, at 32. Additionally, the Commission has considered harm to goodwill and reputation in determining if there has been substantial injury. Certain Compound Action Metal Cutting Snips and Components Thereof, Inv. No. 337-TA-197, U.S.I.T.C. Pub. 1831, Initial Determination at 102 (April 18, 1985).

The injury requirement can also be met "[w]hen an assessment of the market in the presence of the accused imported products demonstrates relevant conditions or circumstances from which probable future injury can be inferred." Power Tools, at 248 (emphasis added); see also Certain Air Impact Wrenches, Inv. No. 337-TA-311, 1991 WL 788551, at *69 (May 1991). Such circumstances may include: (1) foreign cost advantages and production capacity, (2) the ability of the imported product to undersell the domestic product, or (3) substantial foreign manufacturing capacity combined with the respondent's intention to penetrate the United States

market. Air Impact Wrenches, 1991 WL 788551, at *69; see also Certain Methods of Extruding Plastic Tubing, Inv. No. 337-TA-110, U.S.I.T.C. Pub. 1287, Commission Determination at 15 (Sept. 1982). Additionally, the threatened injury must be “substantive and clearly foreseen” and the complainant must show a causal connection between the respondent’s unfair act and the alleged future injury. See Air Impact Wrenches, 1991 WL 788551, at *69.

The administrative law judge finds evidence that markers of the Motion Respondents with the trade dress in issue and complainant’s markers having the trade dress are available at some of the same low-cost outlets such as Dollar stores and on eBay, which indicates head-to-head competition between the Motion Respondents’ and complainant’s products. Thus, Heng Bao and other defaulting respondents’ markers have been found in dollar stores – venues to which Sanford also makes sales. (CX-36 ¶ 26.) Said infringing markers are sold at these dollar stores right alongside genuine SHARPIE® markers. (CX-149.) Also the evidence indicates infringing markers on the internet (many of which are offered on eBay, for example) where they are sold to the same market segment that purchases SHARPIE® markers. (CX-134.)

In addition, as to the domestic industry in issue, the administrative law judge finds evidence that the Motion Respondents’ products are sold at significantly lower prices than the equivalent products of complainant. (CX-1, Conf. Exh. C (Declaration of Russell Snow).) The following chart compares the price of complainant’s product embodying the protected trade dress with the prices of the Motion Respondents’ markers found to infringe the protected trade dress.

the evidence shows that the foreign manufacturing costs of Ningbo Beifa (a terminated, settling respondent) are about{ }percent lower than Sanford’s cost of domestic manufacture. Sanford’s manufacturing cost for the black fine point marker is{ }²³ and the manufacturing cost of representative foreign respondent Ningbo Beifa’s black fine point permanent marker is { } (CX-173 (showing marker production cost); CX-1, Physical Exh. 20 (showing model number for Ningbo Beifa black fine point marker); CX-74, Exh. 8 (showing MainSTAYS marker manufacturing cost in Chinese currency RMD); CX-28, ¶ 38 (showing MainSTAYS marker manufacturing cost in U.S. dollars).) Also, complainant has offered an{

} (CX-36C at 15 (Declaration of Phillip Dolcimascolo).) Additionally, there is evidence that shows that a manufacturing plant can be set up quickly and relatively inexpensively in China. (CX-36C at 15-16.)

Also with respect to defaulting respondent Mon Ami, the administrative law judge in his Order No. 28 made the following adverse inferences against defaulting respondent Mon Ami (1) Mon Ami manufactures, markets, or sells the markers at Exhibit 19 of Sanford’s Verified Complaint (Mon Ami’s subject markers) under the name Acculiner; (2) Mon Ami’s subject markers were imported and/or sold after importation in the United States; (3) Mon Ami’s subject markers were imported and/or sold after importation in the United States in substantial quantities; (4) Mon Ami has the capacity to produce significant additional quantities of its

²³ CX-173 shows “frozen costs” for the SHARPIE® black fine point marker. The cost of components alone constitutes \${ } While it is not clear from the document that labor and overhead costs are factored into the cost listing, it is assumed that these items are included in the “total cost” of \${ }

subject markers; (5) Mon Ami has substantial inventories of its subject markers; (6) Mon Ami is likely to ship its inventory of the subject markers to the United States; (7) Mon Ami sells the subject markers to the same customers through the same trade channels as Sanford; (8) Mon Ami sells its subject markers at lower prices than genuine SHARPIE® markers; (9) Sanford has lost customers and sales to Mon Ami's subject markers; (10) Mon Ami has the intent and ability to further penetrate the U.S. market with its subject markers; and (11) Mon Ami is not authorized, licensed, or otherwise permitted to use Sanford's Protected Trade Dress.

The administrative law judge in his Order No. 19 made the following adverse inferences against defaulting respondent Lineplus: (1) Lineplus has manufactured, marketed and sold the markers at Exhibit 13 of Sanford's Verified Complaint (Lineplus's subject markers) under the name Lineplus; (2) the accused markers were imported and/or sold after importation in the United States; (3) Lineplus has the capacity to produce significant additional quantities of the accused markers; (4) Lineplus has substantial overseas inventories of its accused markers; and (5) Lineplus has sold its accused markers at prices lower than those of complainant for its SHARPIE® markers. In this Order No. 30, he further has made adverse inferences that the remaining defaulting respondents have the capacity to produce significant additional quantities of their markers and that the defaulting respondents have substantial overseas inventories of their markers.

Based on the foregoing, the administrative law judge finds that the evidence of record shows that the importation and sale of the infringing products involving the trade dress in issue of the Motion Respondents Lineplus, Heng Bao, Yangtse River, and Mon Ami substantially injure, and threaten to substantially injure, complainant's domestic industry.

XIII. Remedy

Sanford seeks a general exclusion order with respect to the registered trademarks and the trade dress at issue. Sanford also requests that a cease and desist order issue against Mon Ami.

The staff argued that a general exclusion order should issue, assuming one or more of the Motion Respondents are found to be in violation. It further argued that to the extent that Mon Ami is found to be in violation of Section 337, it would be appropriate to enter a cease and desist order against Mon Ami, which would extend to its agents and affiliates, to prohibit the sale of Mon Ami's domestic inventory, citing Certain Abrasive Products Made Using a Process For Powder Preforms, and Products Containing Same, Inv. No. 337-TA-449, Comm'n Op. on Remedy, the Public Interest, and Bonding at 7-8 (May 9, 2002). (See Response at 43-47.)

1. General Exclusion Order

Section 337(d)(2) authorizes the issuance of a limited exclusion order unless the Commission determines that:

(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or

(B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19 U.S.C. §1337 (d)(2). The Commission has held that the standards expressed in the statute "do not differ significantly" from the standards espoused in Certain Airless Paint Spray Pumps and Components Thereof, Inv. No. 337-TA-90, U.S.I.T.C. Pub. 1199, Comm'n Op. at 17 (1981); see also Certain Two-Handle Centerset Faucets and Escutcheons, and Components Thereof, Inv. No. 337-TA-422, U.S.I.T.C. Pub. 3332, Unreviewed Initial Determination at 60-61 (July 2000).

The factors considered in determining if there is a widespread pattern of unauthorized use

are:

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

Faucets, at 62. The factors relevant to showing that “certain business conditions” from which one might infer that foreign manufacturers other than the respondents may attempt to bring infringing articles into the U.S. market are:

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

Id.

The administrative law judge finds that “certain business conditions” from which one might infer that foreign manufacturers other than the respondents may attempt to bring infringing articles into the U.S. market exist in this instance. The evidence shows a large, established market for the markers at issue with low barriers to entry. Thus, there exists a well-developed and diverse network of distribution from large and established discount retailers like Wal-Mart

and Target all the way down to small stands at untraceable flea markets. This expansive network is illustrated in at least{ } of Sanford and certain respondents, as well as the multitude of recently identified domestic importers and retailers that sell markers that infringe the SHARPIE® trademarks and/or Sanford's protected trade dress. (See CX-2 Au Decl., Attach. C (Asia Global); CX-3 Hioe Decl., Attach. B (Bangkit); CX-4 Reynolds Decl. ¶ 9, Attach. I (Big Lots and Midwestern); CX-7 Tasman Decl., Exh. C-E (Southern States); CX-8 Kuo Decl. ¶ 8, Attach. C (Two Powers), CX-12 ¶ 1 (Lineplus); CX-73 at 1 (Luxor); CX-74, Exh. 9-10 (Ningbo); CX-83 (flea market sales); CX-115, Exh. 3 (Uchida); CX-121 (retailers of infringing markers); CX-122 (flea market sales); CX-188 (importers of infringing markers); CPX-16.)

Additionally, foreign and domestic entities take full advantage of the ease of internet commerce, by selling ink markers on a variety of websites. (See, e.g., CX-1, Exh. 12, 15, 17, 20, 24; CX-121; CX-129 at 17; CX-175; CX-176; CX-177; CX-178; CX-179; CX-180; CX-181; CX-182.)

Even the on-line auction website, eBay, is replete with infringing markers, about which{ } (See CX-80C ¶¶ 5-7; CX-134.)

Additionally, there is evidence that a manufacturing facility to produce these markers can be set up relatively quickly and inexpensively. Thus respondent{ } (See CX-129 at 15.)

Another non-respondent manufacturer,{ } (Id. at 22.)

Further, rudimentary facilities can be converted for marker production using rather

²⁴ Currency conversion calculations based on conversion rate from RMB to USD on April 6, 2005.

small amounts of space and equipment. For example, respondent{

} (See id. at 17.) Non-respondent

manufacturer,{

} (Id. at 23.){

} (See CX-130 at 2, 4; CX-131 at 2, 4.)

Also pursuant to Sanford's{

} that the barriers of admittance

to the marker manufacturing arena are low, and that the market is ripe for foreign competition to export products to the United States in droves. (See generally CX-36 ¶¶ 39-45.) For example, in order to establish a marker manufacturing facility in China that is{

} (CX-36 ¶ 40; see CX-130 at 1-2 ({

)).) The equipment required for

this scale of marker factory is minimal – {

}

(CX-36 ¶ 42.) {

} (Id.) The entire manufacturing

set-up could fit in the equivalent of{

} also illustrate. (See id. ¶ 41; see also CX-129 at 17, 23.)

Also when looking at costs,{

} (CX-36 ¶ 43.) Said costs would be far less to retool an existing facility to produce the same amount of markers,{

} set forth above. (Id.; CX-129 at 17, 23.)

In addition there is evidence that the marker manufacturing set-ups in China can be dismantled as easily and as quickly as they can be assembled. Thus, respondent{

} (See CX-131 at 1-

2.) Sanford employees{

} (CX-36 ¶ 45.) Hence, the

administrative law judge finds that “there is a pattern of violation of [Section 337] and it is difficult to identify the source of infringing products.” 19 U.S.C. § 1337(d)(2). Thus, the issuance of a general exclusion order is warranted. See, e.g., Certain Agricultural Tractors Under 50 Power Take-Off Horsepower, Inv. No. 337-TA-380, 44 U.S.P.Q. 2d (BNA) 1385 (1997); Certain Agricultural Vehicle And Components Thereof, Inv. No. 337-TA-487, U.S.I.T.C. Pub. 3735 (Dec. 2004); Certain Compound Action Metal Cutting Snips And Components Thereof, Inv. No. 337-TA-197, U.S.I.T.C. Pub. 1831 (March 1986).

The administrative law judge further finds that Sanford has demonstrated the existence of a widespread pattern of violation with respect to the registered trademarks at issue. Specifically, in addition to the products of the defaulted Motion Respondents, there is evidence that Asia

Global, a respondent that was terminated pursuant to a consent order, imported an infringing marker labeled with the name “Sharper Marker.” (CX-2 (including{
}).) Additionally, several other imported products have been found that infringe its registered trademarks and constitute part of the widespread pattern of violation. Thus since this investigation was instituted, there is evidence of fifteen additional manufacturers/suppliers not named in the complaint that are exporting, or suspected of exporting, ink markers into the United States that infringe Sanford’s SHARPIE® trademarks and/or protected trade dress. (See CX-175; see also Certain Battery-Powered Ride On Toy Vehicles And Components Thereof, Inv. No. 337-TA-314, U.S.I.T.C. Pub. 2483, Comm’n Op. at 7 (Apr. 9, 1991) (“We have indicated that we may consider evidence of widespread foreign manufacture of products that would be likely to be found infringing if sold in the United States pertinent to our examination of whether a ‘widespread pattern of unauthorized use’ exists.”). Included with Motion No. 522-38 were three physical samples from such manufacturers/suppliers. The first physical sample, CPX-19,{

} (See CX-78 ¶ 6; CX-185.) This marker has a design which consists of a gray, cigar-shaped barrel, a plastic tapered cap that is colored differently than the barrel, and an approximate 1:2 ratio between the cap and the barrel. (See generally CX-184; CPX-19.) In fact,{

}).” (CX-185; see CX-78 ¶¶ 6, 9.)

The second physical sample, CPX-20, is a 4-count package of chisel tip permanent ink markers, which are labeled as being “Made in China” and sold under the name “Star Mate.” (See CX-80C ¶ 13; CX-186.) Those markers were{

} (See CX-80 ¶ 13.) Each marker prominently features on its barrel the word “SHARPIE” in its federally registered stylized form. (See generally CX-186; CPX-20.)

The third physical sample, CPX-21,{

} (See CX-187.) This package{

} (See CX-187; CPX-21.) Those markers were

{

} (See CX-197 ¶ 4; CX-197.) Each marker prominently features on its barrel the word “SHARPIE” in its federally registered stylized form. (See generally CX-187; CPX-21.) Further, each of these markers embodies a gray, cigar-shaped barrel, a plastic tapered cap that is colored differently than the barrel, and an approximate 1:2 ratio between the cap and the barrel, which infringe Sanford’s protected trade dress. (See generally CX-187; CPX-21.)

The evidence indicates that potential volumes of the above-mentioned sorts of ink markers from these fifteen newly-identified foreign manufacturers/suppliers, and others, that are

destined for the United States are great. (See, e.g., CX-129 at 21 {

} There is further evidence

that, at least in certain parts of the world, obtaining these types of markers for export to the United States is not at all difficult, as they can be “purchased on the open market in China, where they [are] readily available.” (CX-2, Au Decl. ¶ 5; see CX-12 ¶ 5 (indicating that there are Chinese companies{ }))

Since the institution of the investigation, evidence was developed that indicates that there are numerous domestic entities importing respondents’ infringing ink markers for sale or for further distribution to even more domestic retailers. (See CX-121; CX-188.) Filed with Motion No. 522-38 was a physical sample from one such entity. Thus CPX-22 is a 3-count package of permanent ink markers, which are the approximate size of SHARPIE® Supers. (See CX-189.) These markers are purportedly “Made in China,” according to the designation on the packaging, and distributed under the name “Chicago Tools of Illinois.” (See CX-189; CX-190 ¶ 3; CPX-22.) There is no manufacturer’s name printed on the marker barrels or on the packaging. (See CX-189; CPX-22.) The markers were purchased by representatives for Sanford on February 22, 2005 from a Dollar Tree Store in Chicago, Illinois. (See CX-190 ¶ 3.) These markers have a gray, cigar-shaped barrel, a plastic tapered cap that is colored differently than the barrel, and an approximate 1:2 ratio between the cap and the barrel. (See generally CX-189; CPX-22.)

The administrative law judge further finds that Sanford has shown that each of the following respondents that was terminated on the basis of a consent order imported markers that

evidence shows that Mon Ami has a domestic inventory of approximately{

} (Id.) The administrative law judge, considering the magnitude of Mon Ami's domestic inventory, thus recommends that the Commission issue an order against Mon Ami, its affiliates, subsidiaries, assigns, and any other related business entities to cease and desist from the importation, sale, offering for sale, marketing, advertising, distributing, transfer, or solicitation of U.S. distributors, dealers, agents, or the like for imported ink markers and packaging thereof that infringe the trade dress in issue.

XIV. Bond

Infringing products and packaging may only enter the United States under bond during the Presidential review period. See 19 U.S.C. §1337(j)(3); Commission rule 210.50(a)(3). The "bond prescribed by the Secretary [shall be] in an amount determined by the Commission to be sufficient to protect the complainant from any injury." 19 U.S.C. §1337(j)(3).

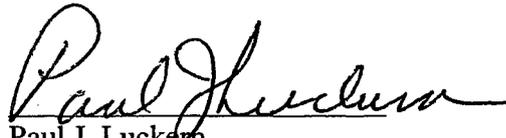
In cases where no reliable comparative pricing information has been available, the Commission has set a 100 percent bond. See, e.g., Certain Compact Multipurpose Tools, Inv. No. 337-TA-416, Unreviewed Final Initial and Recommended Determination at 29 (May 27, 1999). To this end, the record indicates that none of the Motion Respondents provided any discovery. Certain Oscillating Sprinklers, Sprinkler Components, and Nozzles, Inv. No. 337-TA-448, U.S.I.T.C. Pub. 3498, Limited Exclusion Order at 4-5 (Mar. 2002) (noting that traditionally, 100% bond is appropriate when a respondent fails to provide discovery regarding pricing of its products). Hence, the administrative law judge recommends a 100-percent bond.

XV. Conclusion

Motion No. 522-38 is granted to the extent indicated.

This initial determination, pursuant to Commission rule 210.42(C), is hereby CERTIFIED to the Commission. Pursuant to Commission rule 210.42(h)(3), this initial determination which involves violation of section 337 and establishment of a domestic industry shall become the determination of the Commission within thirty (30) days after the date of service hereof unless the Commission grants a petition for review of this initial determination pursuant to Commission rule 210.43, or orders on its own motion a review of the initial determination or certain issues therein pursuant to Commission rule 210.44. The recommended determination portion of this initial determination, issued pursuant to Commission rule 210.42(a)(1)(ii), will be considered by the Commission in reaching a determination on remedy and bonding pursuant to Commission rule 210.50(a).

This order will be made public unless a bracketed confidential version is received no later than August 8, 2005.


Paul J. Lucken
Administrative Law Judge

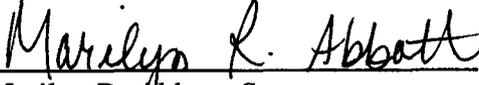
Issued: July 25, 2005

**CERTAIN INK MARKERS AND PACKAGING
THEREOF**

Investigation No. 337-TA-522

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **Public Version Order 30** was served by hand upon Commission Investigative Attorney Anne Goalwin, Esq. and upon the following parties via first class mail, and air mail where necessary, on October 28, 2005.


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THEREOF**

Investigation No. 337-TA-522

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