

In the Matter of

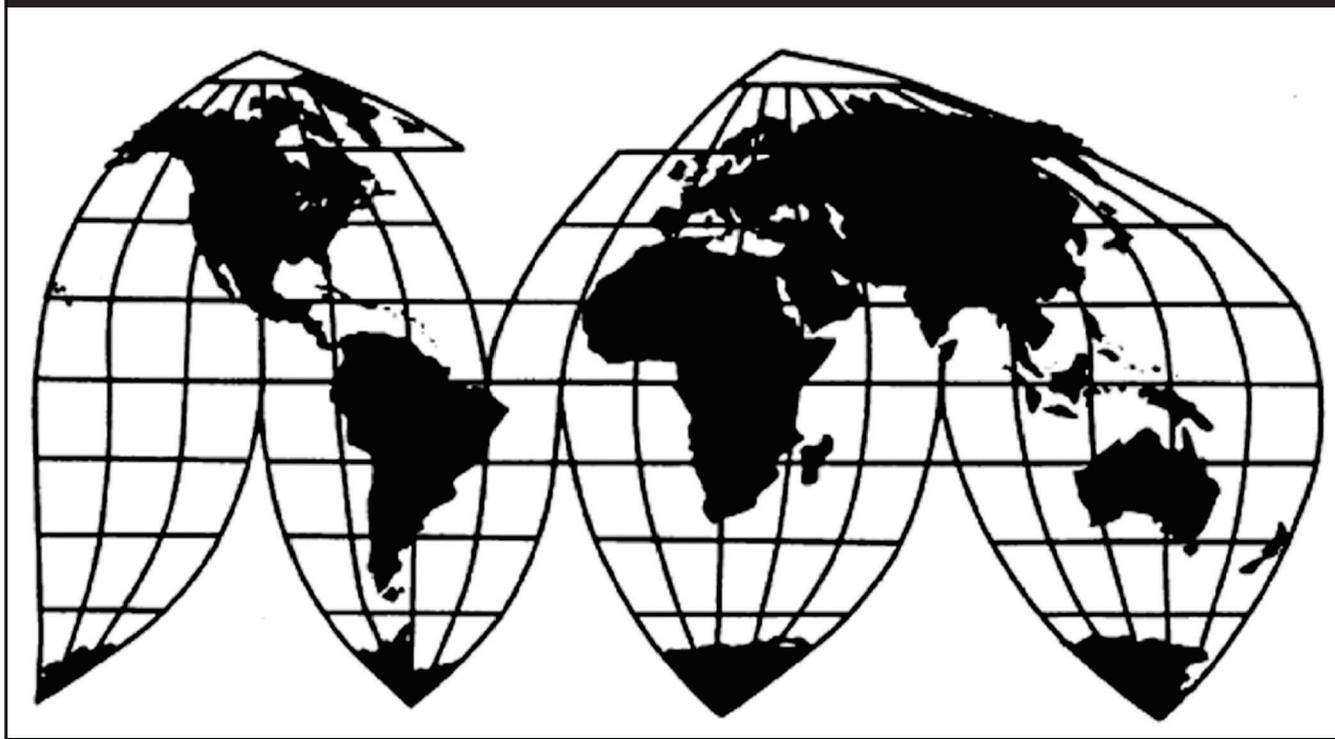
**CERTAIN MOTORIZED SELF-BALANCING
VEHICLES**

Investigation No. 337-TA-1000

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U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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Washington, DC 20436
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In the Matter of

CERTAIN MOTORIZED SELF-BALANCING VEHICLES

Investigation No. 337-TA-1000



UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN MOTORIZED
SELF-BALANCING VEHICLES**

Investigation No. 337-TA-1000

**NOTICE OF A COMMISSION DETERMINATION TO REVIEW-IN-PART AN
INITIAL DETERMINATION FINDING NO VIOLATION OF SECTION 337; ON
REVIEW, TO VACATE ONE PORTION OF THE INITIAL DETERMINATION AND
TAKE NO POSITION ON ONE ISSUE; AND AFFIRMANCE OF THE FINDING OF NO
VIOLATION AND TERMINATION OF THE INVESTIGATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review-in-part a final initial determination (“ID”) of the presiding administrative law judge (“ALJ”) finding no violation of section 337. On review, the Commission has determined to vacate one portion of the ID and to take no position with respect to one issue. The Commission has also determined to affirm the ID’s finding of no violation of section 337 and has terminated the investigation.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, D.C. 20436, telephone (202) 708-2310. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on May 26, 2016, based on a complaint filed on behalf of Razor USA LLC of Cerritos, California; and Inventist, Inc. and Shane Chen, both of Camas, Washington. 81 FR 33548-49. The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, by reason of infringement of certain claims of U.S. Patent No. 8,738,278 (“the ‘278 patent”). The complaint further alleged violations of section 337 based upon false advertising,

misrepresentation, and unfair competition, the threat or effect of which is to destroy or substantially injure an industry in the United States or to prevent the establishment of such an industry. The Commission's notice of investigation named the following twenty-eight respondents: Contixo Co. of Ontario, California and ZTO Store a.k.a. ZTO Trading, Inc. of Monterey Park, California (collectively, "Contixo"); Joy Hoverboard a/k/a Huizhou Aoge Enterprise Co. Ltd ("Joy Hoverboard") of Huizhou, China; Shenzhen Chenduoxing Electronic Technology Ltd. ("Chenduoxing"), Shareconn International, Inc. ("Shareconn"), and Shenzhen R.M.T. Technology Co., Ltd. ("RMT"); all of Guangdong, China; Cyboard LLC a/k/a Shark Empire Inc. ("Cyboard") of Glendale, California; GyroGlyder.com ("GyroGlyder") of Stockton, California; Soibatian Corporation d.b.a. IO Hawk and d.b.a. Smart Wheels ("Soibatian") of Glendale, California; PhunkeeDuck, Inc. ("PhunkeeDuck") of Floral Park, New York; Shenzhen Jomo Technology Co., Ltd. ("Jomo") of Shenzhen City, China; Shenzhen Kebe Technology Co., Ltd. ("Kebe") and Shenzhen Supersun Technology Co. Ltd., a.k.a. Aottom ("Supersun"), both of Shenzhen, China; Twizzle Hoverboard ("Twizzle") of La Puente, California; Uwheels of Santa Ana, California; InMotion Entertainment Group LLC ("InMotion") of Jacksonville, Florida; HoverTech of Hebron, Kentucky; Leray Group a/k/a ShanDao Trading Co., Ltd. ("Leray") of Beijing, China; Spaceboard USA ("Spaceboard") of Norcross, Georgia; Genius Technologies a.k.a. Prime Capital ("Genius Technologies") of Hastings, Minnesota; Hangzhou Chic Intelligent Co., Ltd. ("Chic") of Hangzhou, China; Swagway, LLC ("Swagway") of South Bend, Indiana; Modell's Sporting Goods, Inc. ("Modell's") of New York City, New York; Powerboard a.k.a. Optimum Trading Co. ("Powerboard") of Hebron, Kentucky; United Integral, Inc. dba Skque Products ("Skque") of Irwindale, California; Alibaba Group Holding Ltd. of Causeway Bay, Hong Kong and Alibaba.com Ltd. of Hangzhou, China (collectively, "Alibaba"); Jetson Electric Bikes LLC ("Jetson") of New York City, New York; and Newegg, Inc. ("Newegg") of City of Industry, California. The Office of Unfair Import Investigations ("OUII") is also a party to the investigation. *Id.* Eight respondents remain in the investigation, *i.e.*, Chic, Swagway, Modell's, Powerboard, Skque, Alibaba, Jetson, and Newegg (collectively, "respondents"). Every other respondent was terminated from the investigation based on a consent order stipulation and proposed consent order or good cause, or was found in default.

On August 10 and November 17, 2016, respectively, the Commission issued notice of its determinations not to review the ALJ's IDs (Order Nos. 11 and 22) terminating the investigation as to Contixo based on a consent order stipulation and proposed consent order, and as to InMotion based on a consent order stipulation, proposed consent order, and settlement agreement. On October 19 and 27, 2016, respectively, the Commission issued notice of its determinations not to review the ALJ's IDs (Order Nos. 19 and 20) terminating the investigation as to claim 9 of the '278 patent and claim 4 of the patent. On September 7, October 11, and December 13, 2016, respectively, the Commission issued notice of its determinations not to review the ALJ's IDs (Order Nos. 14, 18, and 26) finding respondents GyroGlyder, Soibatian, PhunkeeDuck, Jomo, Kebe, Supersun, Twizzle, and Uwheels in default, respondents Joy Hoverboard, Chenduoxing, Shareconn, RMT, and Cyboard in default, and respondents HoverTech, Leray, and Spaceboard in default, respectively. On January 17, 2017, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 27) terminating the investigation as to Genius Technologies for good cause. On February 15, 2017, the Commission issued notice of its determination not to review the ALJ's ID (Order No. 42)

granting complainants' unopposed motion to terminate the investigation as to their Lanham Act, common law, and state unfair and deceptive trade practices allegations under section 337(a)(1)(A).

On May 26, 2017, the ALJ issued his final ID and recommended determination ("RD") on remedy and bonding. The ID finds that Alibaba is not an agent of the other respondents and therefore is not within the jurisdiction of section 337. It also finds that none of the respondents' accused products infringe the '278 patent, but that all of the defaulting respondents' accused products infringe the asserted patent based on taking the allegations in the complaint as true. The ID also finds that the technical prong of the domestic industry requirement was not satisfied with respect to the '278 patent. The cover page of the ID/RD, however, states that a violation of section 337 was found, page 75 of the ID/RD states that a violation was found as to the defaulting respondents, and the separately issued "Notice Regarding Initial Determination on Violation of Section 337 and Recommended Determination on Remedy and Bond" (May 26, 2017) ("Notice Regarding the ID") states that a violation of section 337 was found. On June 5, 2017, the ALJ issued an erratum clarifying that there was no violation of section 337 because complainants had not satisfied the technical prong of the domestic industry requirement. He also issued a corrected ID/RD and Notice Regarding the ID on June 5, 2017; however, the error on page 75 of the ID/RD was not corrected. The Commission clarifies that the erratum also applies to (1) page 75 of the ID/RD and corrects that page to delete the statement that a violation has been found as to the defaulting respondents; and (2) footnote 47 on the same page, and corrects the footnote by striking "infringe the '278 patent" and substituting "violate section 337".

On June 12, 2017, OUII, complainants, respondent Chic, and a group of three respondents (Swagway, Modell's, and Newegg) filed separate petitions for review of the final ID. On June 20, 2017, OUII, complainants, respondent Jetson, respondent Alibaba, and a group of four respondents (Swagway, Modell's, Chic, and Newegg) filed separate responses to the opposing petitions.

Having examined the record of this investigation, including the ID, the parties' petitions for review, and the responses thereto, the Commission has determined to review-in-part the final ID. Specifically, the Commission has determined to review (1) the ID's finding that the Commission has no jurisdiction over Alibaba; and (2) the ID's analysis regarding infringement by the defaulting respondents. The Commission has determined not to review the remainder of the final ID.

On review with respect to issue (1), the Commission determines to take no position on the ID's finding that the Commission has no jurisdiction over Alibaba. On review with respect to issue (2), the Commission vacates the ID's findings in the last paragraph on page 39 (and paragraph 5 on page 72, as well as the first sentence on page 83) that complainants have established that the defaulting respondents infringe the '278 patent. These respondents have been found in default by virtue of their failure to respond to the complaint and notice of investigation. See Comm'n Notice (September 7, 2016); Comm'n Notice (October 11, 2016); Comm'n Notice (December 13, 2016). Section 337(g)(1), 19 U.S.C. 1337(g)(1), provides the conditions and procedures applicable for issuing a default remedy. In light of the

Commission's determination not to review the remainder of the final ID, including but not limited to the finding that the technical prong of the domestic industry requirement for the '278 patent has not been satisfied, the analysis under Section 337(g)(1) is moot.

The Commission therefore affirms the ID's finding of no violation of section 337 and terminates the investigation.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in part 210 of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

By order of the Commission.

A handwritten signature in black ink, appearing to read "Lisa R. Barton".

Lisa R. Barton
Secretary to the Commission

Issued: July 28, 2017

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, Paul Gennari, Esq., and the following parties as indicated, on **July 28, 2017**.



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CERTAIN MOTORIZED SELF-BALANCING VEHICLES

Inv. No. 337-TA-1000

Certificate of Service – Page 4

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CERTAIN MOTORIZED SELF-BALANCING VEHICLES

Inv. No. 337-TA-1000

Certificate of Service – Page 5

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PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

CERTAIN MOTORIZED SELF-BALANCING
VEHICLES

Inv. No. 337-TA-1000

INITIAL DETERMINATION ON VIOLATION OF SECTION 337 AND
RECOMMENDED DETERMINATION ON REMEDY AND BOND

Chief Administrative Law Judge Charles E. Bullock

(May 26, 2017)

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c)	“a first wheel associated with the first foot placement section and a second wheel associated with the second foot placement section, the first and second wheels being spaced apart and substantially parallel to one another”	26
d)	“a first position sensor and a first drive motor configured to drive the first wheel, a second position sensor and a second drive motor configured to drive the second wheel; and”	27
e)	“control logic that drives the first wheel towards self-balancing the first foot placement section in response to position data from the first sensor and that drives the second wheel toward self-balancing the second foot placement section in response to position data from the second foot placement section.”	27
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LIST OF ABBREVIATIONS

The following abbreviations may be used in this Initial Determination:

CDX	Complainants' demonstrative exhibit
CPX	Complainants' physical exhibit
CX	Complainants' exhibit
CIB	Complainants' initial post-hearing brief
CRB	Complainants' reply post-hearing brief
CPHB	Complainants' pre-hearing brief
Dep	Deposition
JX	Joint Exhibit
RDX	Respondents' demonstrative exhibit
RPX	Respondents' physical exhibit
RX	Respondents' exhibit
RIB	Respondents' initial post-hearing brief
RRB	Respondents' reply post-hearing brief
RPHB	Respondents' pre-hearing brief
RX	Respondents' exhibit
RIB	Respondents' initial post-hearing brief
RRB	Respondents' reply post-hearing brief
SIB	Staff's initial post-hearing brief
SRB	Staff's reply post-hearing brief
SPHB	Staff's pre-hearing brief
Tr.	Transcript
PHB	Pre-hearing brief

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN MOTORIZED SELF-BALANCING
VEHICLES**

Inv. No. 337-TA-1000

**INITIAL DETERMINATION ON VIOLATION OF SECTION 337 AND
RECOMMENDED DETERMINATION ON REMEDY AND BOND**

Chief Administrative Law Judge Charles E. Bullock

(May 26, 2017)

Pursuant to the Notice of Investigation, this is the Initial Determination in the matter of Certain Motorized Self-Balancing Vehicles, Investigation No. 337-TA-1000.

For the reasons stated herein, the undersigned has determined that no violation of section 337 of the Tariff Act of 1930, as amended, has been found in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain motorized self-balancing vehicles with respect to U.S. Patent No. 8,738,278.

I. INTRODUCTION

A. Procedural History

On March 22, 2016, Complainants Razor USA LLC, Inventist, Inc., and Shane Chen (collectively, “Complainants”) filed a Complaint alleging violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain motorized self-balancing vehicles. *See* 81 Fed. Reg. 33,548-50 (Mar. 22, 2016). Complainants supplemented the Complaint on March 23, April 12 and 13, and May 5, 2016. *Id.*

On May 26, 2016, the Commission instituted this Investigation. *Id.* Specifically, the Commission instituted this Investigation to determine:

- (a) Whether there is a violation of subsection (a)(1)(B) 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 motorized self-balancing vehicles by reason of infringement of one or more of claims 1–9¹ of the ’278 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337.²

Id.

¹ Claims 4 and 9 have been terminated from this Investigation. (*See* Order Nos. 19 (Sept. 20, 2016) and 20 (Sept. 27, 2016); *see also* Notice of Comm’n Determination Not to Review an Initial Determination Terminating the Investigation as to Claim 9 of U.S. Patent No. 8,738,278 (Oct. 19, 2016); Notice of Comm’n Determination Not to Review an Initial Determination Terminating the Investigation as to Claim 4 of U.S. Patent No. 8,738,278 (Oct. 27, 2016).)

² The Commission also instituted this Investigation to determine “whether there is a violation of subsection (a)(1)(A) of section 337 in the importation into the United States, or in the sale of certain motorized self-balancing vehicles by reason of false advertising and misrepresentation and unfair competition, the threat or effect of which is to destroy or substantially injure an industry in the United States or to prevent the establishment of such an industry.” 81 Fed. Reg. 33,549 (May 26, 2016). These claims have been terminated from this Investigation. (*See* Order No. 42 (Jan. 30, 2017); *see also* Notice of Comm’n Determination Not to Review an Initial Determination Terminating the Investigation as to Complainants’ False Advertising, Misrepresentation, and Unfair Competition Claims under Section 337(a)(1)(A) (Feb. 15, 2017).)

The Notice of Investigation named 28 respondents. During the course of this Investigation, a number of respondents have been found in default,³ others have been terminated based on a consent order stipulation⁴ or for good cause.⁵ On August 9, 2016, the undersigned found Respondents GyroGlyder.com, Soibatian Corporation d.b.a. IO Hawk and d.b.a. Smart Wheels, Shenzhen Kebe Technology Co., Ltd., PhunkeeDuck, Inc., Shenzhen Jomo Technology Co., Ltd., Shenzhen Supersun Technology Co. Ltd., a.k.a. Aottom, Twizzle Hoverboard, and Uwheels in default.⁶ (See Order No. 14.) On August 11, 2016, the undersigned found five additional respondents in default – Joy Hoverboard a/k/a Huizhou Aoge Enterprize Co. Ltd., Shenzhen Chenduoxing Electronic Technology Ltd., Shareconn International, Inc., Shenzhen R.M.T. Technology Co., and Cyboard LLC a/k/a Shark Empire Inc.⁷ (See Order No. 15.) On October 27, 2016, the undersigned found Respondents HoverTech, Leray Group a.k.a. ShanDao Trading Co., Ltd., and Spaceboard USA in default.⁸ (See Order No. 24.) None of the Defaulting Respondents have contested Complainants’ allegations that they have violated and continue to violate section 337. Hangzhou Chic Intelligent Technology Co., Ltd. (“Chic”), Swagway, LLC (“Swagway”), Modell’s Sporting Goods, Inc. (“Modell’s”), Powerboard a.k.a. Optimum Trading

³ Those respondents found in default are referred to herein as the “Defaulting Respondents.”

⁴ Respondents InMotion Entertainment Group LLC, Contixo Co., and ZTO Store a.k.a. ZTO Trading, Inc. were terminated based on a consent order stipulation and proposed consent order. (See Order Nos. 11 (July 12, 2016) and 22 (Oct. 19, 2016).) The Commission determined not to review these initial determinations. (See Notice of Comm’n Determination Not to Review an Initial Determination Terminating the Investigation as to Respondents Contixo Co. and ZTO Store A.K.A. ZTO Trading, Inc. Based on a Consent Order Stipulation and Consent Order (Aug. 10, 2016); Notice of Comm’n Determination Not to Review an Initial Determination Terminating the Investigation as to Respondent InMotion Entertainment Group LLC Based on a Consent Order Stipulation, Proposed Consent Order, and Settlement Agreement (Nov. 17, 2016).)

⁵ Respondent Genius Technologies a.k.a. Prime Capital was terminated for good cause pursuant to Commission Rule 2.10.21(a)(1). (See Order No. 27 (Dec. 15, 2016).) The Commission did not review this initial determination. (See Notice of a Comm’n Decision Not to Review an Initial Determination Terminating the Investigation as to Respondent Genius Technologies A.K.A. Prime Capital for Good Cause (Jan. 17, 2017).)

⁶ The Commission determined not to review this initial determination. (See Notice of Comm’n Determination Not to Review an Initial Determination Finding Eight Respondents in Default (Sept. 7, 2016).)

⁷ The Commission determined not to review this initial determination. (See Notice of Comm’n Determination Not to Review an Initial Determination Finding Five Respondents in Default (Oct. 11, 2016).)

⁸ The Commission determined not to review this initial determination. (See Notice of a Comm’n Determination Not to Review an Initial Determination Finding Three Respondents in Default (Dec. 13, 2016).)

Co. (“Powerboard”), United Integral, Inc. dba Skque Products (“Skque”), Alibaba Group Holding Ltd. and Alibaba.com Ltd. (collectively, “Alibaba”), Jetson Electric Bikes LLC (“Jetson”), and Newegg, Inc. (collectively, “Respondents”) are the only respondents who remain active in this Investigation.

The evidentiary hearing was held February 13–17, 2017.

B. The Private Parties

1. Complainants

a) Inventist, Inc.

Inventist is a family-owned and operated corporation organized and existing under the laws of Washington. (Compl. at ¶ 15.) Inventist conceives, designs, develops, and commercializes sports-related products. (*Id.*)

b) Shane Chen

Shane Chen is the founder, President, and co-owner of Inventist. (*Id.*) Mr. Chen is also the owner of the patent-in-suit, subject to certain exclusive license rights granted to Razor and Inventist. (*Id.* at ¶ 10.)

c) Razor USA LLC

Razor is a privately-held limited liability company organized and existing under the laws of Delaware with its principal place of business in Cerritos, California. (*Id.* at ¶ 17.) Razor designs and develops in the United States human and battery-powered scooters and vehicles. (*Id.* at ¶ 18.) In November 2015, Razor entered into a patent and trademark license agreement with Shane Chen and Inventist, whereby Razor was granted certain exclusive rights to the ’278 patent. Razor was also granted the right to use the trademark Hovertrax™ in connection with the Razor Hovertrax. (*Id.* at ¶¶ 14, 19.)

2. Respondents

a) **Alibaba Group Holding Ltd. and Alibaba.com Ltd.**

Alibaba Group Holding Ltd. (“AGHL”) is a Cayman Islands holding company with its principal operating business located in Hong Kong. (*Id.* at ¶ 21.) AGHL directly or indirectly owns a number of operating companies, including Alibaba.com Ltd. (“Alibaba.com”). (RIB at 2 n. 1.) Alibaba.com is a wholly-owned subsidiary of AGHL and is also incorporated in the Cayman Islands. (Compl. at ¶ 23.) Alibaba.com’s principal operating business is located in Hangzhou, China. (*Id.*) Alibaba.com focuses on wholesale commerce for the global market. (RX-0265C at Q/A 6-7.)

b) **Hangzhou Chic Intelligent Technology Co., Ltd.**

Chic is a Chinese corporation with its principal place of business located in Hangzhou, China. (Compl. at ¶ 28.)

c) **Swagway, LLC**

Swagway is an Indiana corporation with its principal place of business in South Bend, IN. (*Id.* at ¶ 53.)

d) **Modell’s Sporting Goods, Inc.**

Modell’s is a New York corporation with its principal place of business located in New York, NY. (*Id.* at ¶ 42.)

e) **Jetson Electric Bikes LLC**

Jetson is a limited liability company with its principal place of business in New York, NY. (*Id.* at ¶ 38.)

f) Powerboard a.k.a. Optimum Trading Co.

Powerboard is a U.S. company with its place of business located at 1600 Worldwide Blvd., Hebron, KY. (*Id.* at ¶ 45.)

g) United Integral, Inc. dba Skque Products

Skque is a California company with its principal place of business in Irwindale, CA. (*Id.* at ¶ 51.)

h) Newegg.com Inc.

Newegg is a Delaware corporation with its principal place of business in City of Industry, CA. (*Id.* at ¶ 43.)

C. Asserted Patent – U.S. Patent No. 8,738,278

The '278 patent, entitled “Two-Wheel, Self-Balancing Vehicle with Independently Movable Foot Placement Sections,” issued on May 27, 2014. Shen Chen is the named inventor. The '278 patent is directed to “two-wheel, self-balancing vehicles” and, in particular, “to such vehicles with two platform sections or areas that are independently movable with respect to one another.” (JX-001 at 1:15-18.)

D. Products at Issue

1. The Accused Products

Complainants accuse the following products of infringing claim 1-3 and 5-8 of the '278 patent:

RESPONDENT	PRODUCTS AT ISSUE
Chic	Smart B, Smart C, Smart F, Smart S, and ■ products ⁹
Swagway	Swagway X1, Swagtron T1, Swagtron T3
Jetson	V-5, V-6, V-8
Skque	Smart Balance Wheel
Powerboard	Hoverboard
Modell's	Swagway's X1, T1, and T3 products
Newegg	Swagway's X1, T1, and T3 products
Alibaba	Chic's Smart B, Smart C, Smart F, and Smart S products

(CPHB at 16-17, 41, 72.)

2. The Domestic Industry Products

Complainants contend that the following devices practice at least one claim of the '278 patent:

- Inventist Hovertrax
- Razor Hovertrax and Hovertrax DLX 1.0

⁹ Order No. 44 requested briefing from the parties on whether the Commission has *in rem* jurisdiction as to Chic's ■ products. In their response, Complainants conceded that the Commission has *in rem* jurisdiction over the ■ products. (See Complainants' Response to Order No. 44 at 3 (Feb. 9, 2017) ("The Commission therefore has *in rem* jurisdiction over all Chic motorized self-balancing vehicles, including any future products that might fall within the scope of the NOI such as the ■ product."); see also Bullock, Tr. at 13:2-5 ("Ruling in response to Order No. 44. Based on the parties' submissions, there appears to be no dispute that the Commission has *in rem* jurisdiction over the ■ products.")) To the extent Complainants now argue that the ■ products are not sufficiently final and thus any infringement determination would be akin to an advisory opinion, such an argument has been waived. See Section V.B.3., *infra*.

- Razor Hovertrax and Hovertrax DLX 2.0

(CPHB at 17; CIB at 7-8.)

II. JURISDICTION AND IMPORTATION

With the exception of Alibaba, none of the other Respondents dispute that the Commission has subject matter, personal, or *in rem* jurisdiction. (*See generally* RIB at 2-9; Chic PHB 11; CX-1348; JX-15C at 85:3-8, 86:3-8; Newegg PHB at 4; JX-11C at 85:14-86:19; CX-591C at .10, .16; CX-216C; JX-17C at 29:1-20; CX-1301 at .31, .32; JX-20C at 87:22-88:2.) In this regard, Modell's, Swagway, and Jetson have stipulated that each imports accused products and/or sells accused products after importation into the United States. (JX-28 (Modell's); JX-29 (Swagway); JX-30 (Jetson).)

A. Jurisdiction as to Alibaba

To be liable for a section 337 violation, Alibaba must be found to violate § 1337(a)(1)(B), which deems unlawful “the importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that infringe” the '278 patent. Section 337 defines “owner, importer, or consignee” to include “*any agent* of the owner, importer, or consignee.” 19 U.S.C. § 1337(a)(4) (emphasis added).

Complainants assert that “Alibaba’s activities on behalf of many Respondents, including Chic, establish that Alibaba acts on their behalf as an ‘agent,’ pursuant to 19 U.S.C. §1337(a)(4), and is therefore subject to the Commission’s remedial jurisdiction.”¹⁰ (CIB at 2-3 (claiming that it is “undisputed” that Chic and several Defaulting Respondents imported accused products that

¹⁰ According to Complainants, “[a] GEO without a CDO directed to Alibaba will not prevent sales from U.S. warehouses by the many Chinese Sellers that use Alibaba.com to sell infringing hoverboards after importation.” (CRB at 2.) They therefore insist that “[o]nly a CDO directed to Alibaba, ordering it to stop aiding and abetting the U.S. sale of the Accused Products, can prevent circumvention of the GEO.” (*Id.*)

were advertised, marketed, offered for sale, and sold in the United States after importation using the services of Alibaba.com), 6-7.) In particular, they assert that Alibaba and its employees were authorized by Chic to perform – and did perform – many critical sales, marketing, advertising and transactional tasks in connection with Chic’s sales after importation and in so doing, Alibaba acted as Chic’s “agent.” (CIB at 4-6 (arguing that Alibaba acted as Chic’s agent because it profited by doing so); CRB at 1 (“But for Alibaba’s involvement, U.S. Buyers would not have purchased the Accused Products from unknown Chinese Sellers because the buyers would ‘[have] no idea about the credibility of the Chinese Sellers’ without the assurances Alibaba provides.”).)

Alibaba asserts that because it does not import, sell for importation, or sell after importation the accused products, the Commission does not have authority to issue a remedial order against it. (RIB at 2-3.) Alibaba explains that it is neither the seller nor importer of goods; rather, it is merely an electronic venue for participating merchants to makes themselves known to customers. (*Id.* at 3-5.) Alibaba contends that these merchants do not control it in the manner required to establish that Alibaba acts as an agent in any alleged sale. (RIB at 3-5 (claiming that key aspects of any sales transaction (*e.g.*, the terms of the offer, acceptance and delivery) are not delegated to or performed by Alibaba); RRB at 2 (“That Alibaba’s services may have value to sellers does not make it their agent.”).) Alibaba also contends that sale after importation requires proof that the sale is made by the “owner, importer, or consignee” of the imported articles and because it has not taken title nor imported the products, it is “none of these in any accused transaction.”¹¹ (RIB at 5-8 (noting that Alibaba’s Free Membership Agreement “plainly” states

¹¹ Alibaba asserts that even if it were the agent of the owner, importer, or consignee, it would only potentially be liable if Alibaba itself were selling the accused products. (RIB at 8.) Alibaba reiterates that it is not the seller and notes that Complainants do not contend otherwise. (*Id.*)

there is no “agency” or “partnership” agreement created).) In addition, Alibaba argues that having to pre-screen listings for potential patent infringement would “present immense challenges for an online marketplace” and also “have major repercussions for the economy, domestic and international trade, and the intellectual property system.” (*Id.* at 8-9.)

In Staff’s view, Complainants have not met their burden of proof on this issue. (SIB at 10-18.) First, Staff contends that the agreements relied upon by Complainants to demonstrate that an agency relationship exists between Chic and Alibaba contain choice-of-law provisions. (SIB at 10-11; SRB at 4-5.) These choice-of-law provisions state that the agreements are to be governed by the laws of Hong Kong or the Peoples Republic of China. (*Id.*) According to Staff, Complainants “have made no attempt to demonstrate an agency relationship under Hong Kong or Chinese law.” (SIB at 11.) Second, Staff submits that the agreements explicitly state that “no agency” relationship exists. (SIB at 11-12; SRB at 5.) Lastly, Staff asserts that the services rendered by Alibaba pursuant to the agreements do not establish that Alibaba is an agent of Chic. (SIB at 12-18.)

Alibaba does not import or sell the accused products. (RIB at 2.) Complainants do not allege otherwise. As discussed above, Complainants’ only theory of liability is that Alibaba acted as the agent of Chic under 19 U.S.C. § 1337(a)(4) in Chic’s alleged sales after its importation of Chic’s accused hoverboards. (CPHB at 18; CIB at 3.) As the party asserting the existence of an agency relationship, Complainants bear the burden of proof. *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1296 (5th Cir. 1994) (“Agency is never to be presumed; it must be shown affirmatively.”)

In their prehearing brief, Complainants relied on the legal definition of “agency” set forth in the Restatement and applied by federal courts. (*See, e.g.*, CPHB at 20-28.) Complainants

appear to have abandoned this theory in their post-hearing briefing.¹² (*See generally* CIB at 2-7; CRB at 1-2; G.R. 11.1 (“The post-trial brief shall discuss the issues and evidence tried. . . . All other issues shall be deemed waived.”).) Now, for the first time in their initial post-hearing brief, Complainants argue that the term “agent” is not defined in section 337 and should be construed in accordance with “its ordinary or natural meaning.”¹³ (CIB at 4 (citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).) Because Complainants failed to raise this argument in their prehearing brief, the argument is waived per Ground Rule 8.2. (*See* G.R. 8.2 (“Any contentions not set forth in detail . . . shall be deemed abandoned or withdrawn.”).)

The evidence adduced at the hearing demonstrates Alibaba is **not** acting as an agent of its on-line marketplace members – like Chic – in the sale of goods listed on Alibaba’s website. (*See* RX-245; CX-0196.) For example, the Free Membership Agreement expressly states:

8.2 Alibaba.com and the Member are independent contractors, and no agency, partnership, joint venture, employee-employer or franchiser-franchisee relationship is intended or created by this Agreement.

(RX-245 at § 8.2) The Gold Supplier Services Agreement also contains provisions inconsistent with finding an agency relationship between Alibaba and its users in any alleged sale after importation. The agreement provides it is assignable and delegable to anyone, not just those

¹² Complainants have not established that U.S. law applies. Moreover, even if U.S. law does apply, unambiguous contracts are enforced as written. *See Wi-LAN USA, Inc. v. Ericsson, Inc.*, 574 Fed.App’x. 931, 937 (Fed. Cir. 2014 (“When an agreement is unambiguous on its face, it must be enforced according to the plain meaning of its terms.”).) Here, the evidence establishes that the Alibaba.com agreements have a choice of law provision stating that they are governed by Chinese or Hong Kong law. (RX-245 at § 8.7; RX-253 at § 12.7; CX-0196 at § 10.2.) Complainants provide no analysis regarding whether an agency relationship exists under either Hong Kong or Chinese law. (*See generally* CIB at 2-7.) This alone is sufficient to find that Complainants have not met their burden of proving the existence of an agency relationship.

¹³ Complainants also argue that courts consistently impute agency where individuals employed by one entity perform tasks for the benefit of another entity. (CIB at 4.) The undersigned agrees with Respondents that such an argument is untenable as it “would make everyone from the credit card company who processes the payment, to the courier who drops the package at the customer’s door, an agent under Section 337.” (RRB at 2; *see also* SRB at 3-4.)

affiliated with Alibaba.com. (CX-0196 at § 10.6.) In the agreement, Alibaba “reserves the right to change, upgrade, modify, limit or suspend the Services or any of its related functionalities or applications at any time temporarily or permanently without prior notice.” (*Id.* at § 3.3.) Alibaba also retains the right to modify or suspend the “core features” of the Gold Supplier Service “for scheduled or unscheduled maintenance purposes, from time to time at the sole discretion of Alibaba.com upon notification.” (*Id.* at § 3.1.)

The undersigned finds this evidence dispositive. Accordingly, Complainants have failed to show that Alibaba is an agent of an owner, importer, or consignee such that Alibaba’s actions (related to the sale of the accused products) are actionable under section 337.

III. ORDINARY SKILL IN THE ART

The undersigned has previously determined that one of ordinary skill in the art with respect to the ’278 patent would have had at least (1) a bachelor’s degree in mechanical engineering, electrical engineering, computer science, or a related field, or equivalent experience, and (2) at least two years of experience in the area of (1) robotics or feedback control for electromechanical systems; (ii) mechanical design, dynamic analysis, and/or control design for mechatronic systems, or (iii) equivalent experience. (*See* Order No. 25 at 27 (Nov. 1, 2016).)

IV. RELEVANT LAW

A. Infringement

In a section 337 investigation, the complainant bears the burden of proving infringement of the asserted patent claims by a preponderance of the evidence. *Spancion, Inc. v. Int’l Trade Comm’n*, 629 F.3d 1331, 1349 (Fed. Cir. 2010). This standard “requires proving that infringement was more likely than not to have occurred.” *Warner-Lambert Co. v. Teva Pharm. USA, Inc.*, 418 F.3d 1326, 1341 n.15 (Fed. Cir. 2005).

1. Literal Infringement

Literal infringement is a question of fact. *Finisar Corp. v. DirecTV Grp., Inc.*, 523 F.3d 1323, 1332 (Fed. Cir. 2008). Literal infringement requires the patentee to prove that the accused device contains each limitation of the asserted claim(s). If any claim limitation is absent, there is no literal infringement of that claim as a matter of law. *Bayer AG v. Elan Pharm. Research Corp.*, 212 F.3d 1241, 1247 (Fed. Cir. 2000).

B. Validity

A patent is presumed valid. 35 U.S.C. § 282; *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2242 (2011). A respondent who has raised patent invalidity as an affirmative defense has the burden of overcoming this presumption by clear and convincing evidence. *Microsoft*, 131 S. Ct. at 2242. As with an infringement analysis, an analysis of invalidity involves two steps: determining the scope of the claim and comparing the properly construed claim with the prior art to determine whether the claimed invention is anticipated and/or rendered obvious.

1. Obviousness (35 U.S.C. § 103)

Under 35 U.S.C. §103, a patent may be found invalid for obviousness if “the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.” 35 U.S.C. §103(a). Because obviousness is determined at the time of invention, rather than the date of application or litigation, “[t]he great challenge of the obviousness judgment is proceeding without any hint of hindsight.” *Star Scientific, Inc. v. R.J. Reynolds Tobacco Co.*, 655 F.3d 1364, 1375 (Fed. Cir. 2011) (“*Star II*”).

When a patent is challenged as obvious, the critical inquiry in determining the differences between the claimed invention and the prior art is whether there is an apparent reason to combine the known elements in the fashion claimed by the patent at issue. *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 417-418 (2007). The Federal Circuit has since held that when a patent is challenged as obvious, based on a combination of several prior art references, “the burden falls on the patent challenger to show by clear and convincing evidence that a person of ordinary skill in the art would have had reason to attempt to make the composition or device, or carry out the claimed process, and would have had a reasonable expectation of success in doing so.” *PharmaStem Therapeutics, Inc. v. ViaCell, Inc.*, 491 F.3d 1342, 1360 (Fed. Cir. 2007) (citations omitted).

Obviousness is a determination of law based on underlying determinations of fact. *Star II*, 655 F.3d at 1374. The factual determinations behind a finding of obviousness include: (1) the scope and content of the prior art, (2) the level and content of the prior art, (3) the differences between the claimed invention and the prior art, and (4) secondary considerations of non-obviousness. *KSR*, 550 U.S. at 399 (citing *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966)). These factual determinations are referred to collectively as the “*Graham* factors.” Secondary considerations of non-obviousness include commercial success, long felt but unresolved need, and the failure of others. *Id.* When present, secondary considerations “give light to the circumstances surrounding the origin of the subject matter sought to be patented,” but they are not dispositive on the issue of obviousness. *Geo. M. Martin Co. v. Alliance Mach. Sys. Int'l.*, 618 F.3d 1294, 1304-06 (Fed. Cir. 2010). A court must consider all of the evidence from the *Graham* factors before reaching a decision on obviousness. For evidence of secondary considerations to be given substantial weight in the obviousness determination, its proponent must establish a

nexus between the evidence and the merits of the claimed invention. *W. Union Co. v. MoneyGram Payment Sys. Inc.*, 626 F.3d 1361, 1372-73 (Fed. Cir. 2010) (citing *In re GPAC Inc.*, 57 F.3d 1573, 1580 (Fed. Cir. 1995)).

2. Written Description (35 U.S.C. § 112, ¶1)

The hallmark of the written description requirement is the disclosure of the invention. *Ariad Pharm., Inc. v. Eli Lilly and Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc). The test for determining the sufficiency of the written description in a patent requires “an objective inquiry into the four corners of the specification from the perspective of a person of ordinary skill in the art. Based on that inquiry, the specification must describe an invention understandable to that skilled artisan and show that the inventor actually invented the invention claimed.” *Id.* Compliance with the written description requirement is a question of fact and “the level of detail required to satisfy the written description requirement varies depending on the nature and scope of the claims and on the complexity and predictability of the relevant technology.” *Id.*

3. Enablement (35 U.S.C. § 112, ¶1)

To satisfy the enablement requirement a patent specification must “contain a written description of the invention . . . to enable any person skilled in the art . . . to make and use the same.” 35 U.S.C. §112 ¶1. The specification must enable a person of ordinary skill in the art to practice the claimed invention without undue experimentation. *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Contractors USA, Inc.* 617 F.3d 1296, 1305 (Fed. Cir. 2010). Although a specification need not disclose minor details that are well known in the art, this is “merely a rule of supplementation, not a substitute for a basic enabling disclosure.” *Auto. Tech. Int’l Inc., v. BMW of N. Am.*, 501 F.3d 1274, 1283 (Fed. Cir. 2007) (quoting *Genentech, Inc. v. Novo Nordisk, A/S*, 108 F.3d 1361, 1366 (Fed. Cir. 1997)). “It is the specification, not the knowledge

of one killed in the art, that must supply the novel aspects of an invention in order to constitute adequate enablement.” *Auto. Tech.* 501 F.3d at 1283.

Enablement is a question of law with underlying questions of fact regarding undue experimentation. *Transocean*, 617 F.3d at 1305. The factors weighed by a court in determining whether a disclosure requires undue experimentation include: (1) the quantity of experimentation necessary, (2) the amount of direction provided, (3) the presence of working examples, (4) the nature of the invention, (5) the state of the prior art, (6) the relative skill of those in the art, (7) the predictability of the art, and (8) the breadth of the claims. *In re Wands*, 858 F.2d 731, 737 (Fed. Cir. 1988). Undue experimentation is “a matter of degree” and “not merely quantitative, since a considerable amount of experimentation is permissible, if it is merely routine, or if the specification in question provides a reasonable amount of guidance with respect to the direction in which the experimentation should proceed.” *PPG Indus., Inc., v. Guardian Indus. Corp.*, 75 F.3d 1558, 1564 (Fed. Cir. 1996); *Northpoint Tech., Ltd. v. MDS Am., Inc.* 413 F.3d 1301, 1318 (Fed. Cir. 2005).

C. Domestic Industry

In a patent-based complaint, a violation of section 337 can be found “only if an industry in the United States, relating to the articles protected by the patent . . . concerned, exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2). Under Commission precedent, this “domestic industry requirement” of section 337 consists of an economic prong and a technical prong. *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm’n Op. at 12-14, 2009 WL 5134139 (U.S.I.T.C. Dec. 2009). The complainant bears the burden of establishing that the domestic industry requirement is satisfied. *See Certain Set-Top*

Boxes and Components Thereof, Inv. No. 337-TA-454, Final Initial Determination at 294, 2002 WL 31556392 (U.S.I.T.C. June 21, 2002) (unreviewed by Commission in relevant part).

1. Economic Prong

Section 337(a)(3) sets forth the following economic criteria for determining the existence of a domestic industry in such investigations:

(3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design 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.

Given that these criteria are listed in the disjunctive, satisfaction of any one of them will be sufficient to meet the economic prong of the domestic industry requirement. *Certain Integrated Circuit Chipsets and Prods. Containing Same*, Inv. No. 337-TA-428, Order No. 10, Initial Determination (unreviewed) (May 4, 2000).

2. Technical Prong

The technical prong of the domestic industry requirement is satisfied when the complainant in a patent-based section 337 investigation establishes that it is practicing or exploiting the patents at issue. See 19 U.S.C. § 1337(a)(2) and (3); *Certain Microsphere Adhesives, Process for Making Same and Prods. Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Op. at 8, 1996 WL 1056095 (U.S.I.T.C. Jan. 16, 1996). “The test for satisfying the ‘technical prong’ of the industry requirement is essentially [the] same as that for infringement, i.e., a comparison of domestic products to the asserted claims.” *Alloc, Inc. v. Int’l Trade Comm’n*, 342 F.3d 1361, 1375 (Fed. Cir. 2003). To

prevail, the patentee must establish by a preponderance of the evidence that the domestic product practices one or more claims of the patent, either literally or under the doctrine of equivalents. *Bayer*, 212 F.3d at 1247. It is sufficient to show that the products practice any claim of that patent, not necessarily an asserted claim of that patent. *Certain Microsphere Adhesives*, Comm'n Op. at 7-16.

V. U.S. PATENT NO. 8,738,278

A. Overview

1. Asserted Claims

Complainants are asserting claims 1-3 and 5-8, which read as follows:

1. A two-wheel, self-balancing vehicle device, comprising: a first foot placement section and a second foot placement section that are coupled to one another and are independently movable with respect to one another; a first wheel associated with the first foot placement section and a second wheel associated with the second foot placement section, the first and second wheels being spaced apart and substantially parallel to one another; a first position sensor and a first drive motor configured to drive the first wheel, a second position sensor and a second drive motor configured to drive the second wheel; and control logic that drives the first wheel toward self-balancing the first foot placement section in response to position data from the first sensor and that drives the second wheel toward self-balancing the second foot placement section in response to position data from the second foot placement section.
2. The device of claim 1, wherein the first foot placement section and the second foot placement section are rotatably coupled to one another.
3. The device of claim 1, wherein the first foot placement section and the second foot placement section are positioned substantially linearly between the first and second wheel.
5. The device of claim 1, further comprising: a first housing section on which the first foot placement section is provided, the first housing section housing the first sensor and first drive motor; and a second housing section on which the second foot placement section is provided, the second housing section housing the second sensor and second drive motor.
6. The device of claim 5, wherein the control logic include a first control logic controlling the first drive motor located in the first housing section and a second control logic controlling the second drive motor located in the second housing section.

7. The device of claim 5, wherein the first drive wheel extends from the first housing section on an end substantially opposite where the first housing section is coupled to the second housing section, and the second drive wheel extends from the second housing section on an end substantially opposite where the second housing section is coupled to the first housing section.
8. The device of claim 1, further comprising a platform sensor provided at at least one of the first and second foot placement sections that detects when a user is standing on that foot placement section.

2. Claim Construction

On November 1, 2016, Order No. 25 issued construing the following claim limitations of the '278 patent:

TERM	CLAIM(S)	CLAIM CONSTRUCTION
“control logic” and related terms	1 and 6	electronic control circuitry
“foot placement section”	1-3, 5, and 7-8	Plain and ordinary meaning
“substantially [parallel/linearly/opposite]”	1, 3, and 7	Plain and ordinary meaning

(Order No. 25 at 8-21 (Nov. 1, 2016).)

B. Infringement

Complainants assert that the accused products infringe claims 1-3 and 5-8 of the '278 patent.

1. Claim 1

- a) **“A two-wheel, self-balancing vehicle device, comprising:”**

The majority of the Respondents do not contest that the preamble is met.¹⁴ The evidence shows that these accused products satisfy the preamble. (CX-182C at Q/A 203-204 (Chic), 271-273 (Swagway), 374-375 (Skque); CPX-007 – CPX-012, CPX-015.) Powerboard and Jetson

¹⁴ The parties do not address whether the preamble is limiting. In light of the undersigned’s findings, it is unnecessary to decide this issue.

allege that their products do not infringe because they are not self-balancing. (RIB at 22-23.) Powerboard and Jetson ground this argument in the fact that “neither the Powerboard nor the Jetson accused products righted themselves when powered on.” (*Id.* at 22.)

Complainants assert that “there is no meaningful dispute that all of the Accused Products perform self-balancing.” (CIB at 20.) Complainants explain how Dr. Richter verified that each of the accused products drive the wheels towards self-balancing and that, while he “couldn’t balance on [the products] with the power off,” he “could balance on [them] with the power on.” (*Id.* at 21 (quoting Richter, Tr. at 441:4-10).) Complainants further note that the claims do not require self-balancing in the absence of a human operator riding upon the product. (*Id.*)

Staff asserts that “[t]he evidence clearly demonstrates that all the accused products, including Powerboard’s and Jetson’s are self-balancing.” (SIB at 31.)

The undersigned agrees with Complainants and Staff that the evidence shows that both Powerboard’s and Jetson’s products are self-balancing. In fact, the evidence is overwhelming on this point and consists of testimony from each of the testifying experts, one of Chic’s engineers, and Powerboard’s and Jetson’s own documents. (CX-182 at 331-332 (Jetson), 413-414 (Powerboard); Richter, Tr. at 531:10-539:1; Nourbakhsh, Tr. at 711:2-17; Singhose, Tr. at 834:24-835:3, 970:8-11.) CPX-013 – CPX-015 (physical accused products); CX-206C at .0001, .0002 (Powerboard’s product specification describing product as a “self-balancing scooter”); CX-1380 at .003 (user manual for Jetson’s V-5 device describing product as a “self-balancing scooter”); JX-17C at 12:6-16 (deposition transcript of Powerboard employee); Lin, Tr. at 632:22-25 (Chic engineer).) Respondents – including Powerboard and Jetson – themselves acknowledge, without any disclaimer: “There is no dispute that position sensors generate data used to drive the wheels towards self-balancing.” (RIB at 16.)

Powerboard and Jetson attempt to circumvent this evidence by arguing that their products are not self-balancing when not in use by a human occupant. No one disputes that this is true, but it is irrelevant to this case. There is no requirement in the claim that the device must balance on its own without a user in order to be “self-balancing.” (Richter, Tr. at 531:10-22.)

For the reasons set forth above, the accused products meet the limitations of the preamble.

b) “a first foot placement section and a second foot placement section that are coupled to one another and are independently moveable with respect to one another”

The evidence shows that the accused products include a first foot placement section and a second foot placement section. (CX-182C at Q/A 205 (Chic), 274 (Swagway), 333 (Jetson), 376 (Skque), 415 (Powerboard); CPX-007 – CPX-009.)

All Respondents¹⁵ dispute that the foot placement sections are “independently moveable with respect to one another.” Chic also disputes that the foot placement sections are “coupled to one another.”

i. “coupled to one another”

Chic asserts that the foot placement sections “are not ‘coupled to one another’ in the mechanical sense because they are not touching through a ‘coupling.’” (RIB at 17-18 (citing RX-357C at Q/A 104-16).) According to Chic, the foot placement sections must “touch each other through a mechanical coupling or otherwise” to meet this limitation. (*Id.* at 18.)

Complainants contend that the evidence shows that the foot placement sections are coupled to one another. (CIB at 16 (citing CX-182C at Q/A 205-208, 211, 274-277, 280, 333-335, 376-378, 415-417).) Complainants also argue that coupling does not require direct physical

¹⁵ Respondents Powerboard and Jetson did not present any evidence of noninfringement at the hearing with respect to their products, as the testimony of their expert was struck from the record. (Order No. 36 (striking the rebuttal expert report and deposition testimony of Jason Janet and precluding Powerboard and Jetson from presenting untimely non-infringement contentions); Order No. 55 (striking portions of Jetson’s and Powerboard’s pre-hearing brief).)

touching, but can include “connections made through an intermediate element such as a coupling or other mechanical component for joining the two sections.” (*Id.* (citing CX-182C at Q/A 41-42).) Complainants note that Chic’s expert, Dr. Nourbakhsh, “applied widely varying interpretations of ‘coupled’ depending on whether he was analyzing infringement or validity, in violation of well-established Federal Circuit precedent.” (*Id.* at 16.) Finally, Complainants contend that, “based on [Dr. Nourbakhsh’s] understanding of ‘coupled,’ even the preferred embodiment of Figure 1 of the patent would not be considered to include ‘coupled’ foot placement sections.” (*Id.* at 17 (citing Nourbakhsh, Tr. at 699:18-22).)

Staff agrees with Complainants that this limitation is met. (SIB at 24.) Staff argues that Chic’s interpretation of “coupled to one another” “is at odds with the ALJ’s *Markman* ruling,” which “rejected the notion that the claimed ‘foot placement section’ had to be located on a top housing member and had to exclude internal components, such as sensors.” (*Id.* at 23, 25.) Staff also notes that “Respondents’ application of this term to the prior art . . . demonstrates that Respondents tacitly concede that the two foot placement section do not need to touch in order to be coupled together.” (*Id.* at 26-27.)

The evidence shows that the foot placement sections are coupled to one another. (CX-182C at Q/A 205-208, 211 (Chic), 274-277, 280 (Swagway), 333-335 (Jetson), 376-378 (Skque), 415-417 (Powerboard).) Contrary to Chic’s assertions, coupling does not require direct physical touching, but can include connections made through an intermediate element such as a coupling or other mechanical component for joining the two sections. (CX-182C at Q/A 42.)

[REDACTED]

[REDACTED]

Swagway’s expert also agrees that the foot placement sections of Swagway’s product – a device

in which the foot placement sections are joined together in a similar manner – is coupled. (RX-829C at Q/A 89 (explaining that “foot placement sections [are] coupled...”); Singhose, Tr. at 885:13-15).)

Additionally, the undersigned does not find Chic’s argument to the contrary persuasive. In its brief, Chic only dedicates a paragraph to this argument and fails to discuss any specific evidence. (RIB at 17-18.) Without more, Chic has not rebutted Complainants’ evidence that the foot placement sections are coupled to one another.

Chic’s argument is also inconsistent with the position that Chic takes with respect to invalidity. For purposes of invalidity, Dr. Nourbakhsh testified that it was possible to have two foot placement sections that are coupled, even if they do not directly touch each other, but, for purposes of infringement, testified that, without direct physical contact, foot placement sections cannot satisfy the coupled limitation. (Nourbakhsh, Tr. at 697:6-9, 698:10-13.) Dr. Nourbakhsh admitted that he “used a different interpretation of coupled for the Chic products as compared to what [he] used for the prior art.” (*Id.* at 698:14-17.) Dr. Nourbakhsh even went so far as to say that a roller skate-like device could be considered coupled, as the rider’s legs connect the two. (*Id.* at 696:13-697:9; *see also id.* at 691:1-695:2 (testimony regarding prior art references Conrad, Gang, and Potter).) Dr. Nourbakhsh’s position with respect to invalidity undermines his position with respect to infringement. Accordingly, the undersigned does not find his testimony with respect to coupling credible.

For the reasons set forth above, the accused products meet this limitation.

ii. “independently moveable”

Respondents dispute that the two foot placement sections are independently moveable. (RIB at 9.) Respondents argue that “just because the [two foot placement] sections can move

differently does not mean they move independently.” (*Id.*) According to Respondents, “the un rebutted evidence establishes that the two sides of the device act in a dependent, not independent, manner.” (*Id.* at 9-10.)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In support, Respondents point to testing performed by Dr. Singhose showing that “the dependency between the two sides [is] based on . . . mathematical equations.” (*Id.* at 12 (citing RX-829C at Q/A 73-132).)

Complainants assert that “the consistent testimony of fact witnesses and experts, documentary evidence, and repeated live demonstrations of the products themselves” establishes that this limitation is met. (CIB at 8.) Complainants point to the demonstration of the product by Dr. Richter in which “with one hand on either side of the accused Chic product, he could easily rotate one side of the hoverboard and not the other.” (*Id.* (citing Richter, Tr. at 541:25-542:12).) Complainants’ explain that Dr. Richter also demonstrated independent movability while riding the vehicle. (*Id.* (citing Richter, Tr. at 544:5-545:9).)

Complainants disagree that [REDACTED]

[REDACTED] the foot placement sections are not independently moveable. Complainants assert that “the preferred embodiment expressly permits ‘biasing’ between the two sides.” (*Id.* at 11.) “[A]ccording to the teachings of the patent itself, the mere fact that movement of one foot placement section could cause some attenuated movement or effect on the other does not mean

that the foot placement sections are not ‘independently moveable.’” (*Id.* (citing Nourbakhsh, Tr. at 707:15-19).)

Staff agrees that the two foot placement sections are independently moveable. Staff believes that both the testimony of Mr. Lin and the demonstrations performed by Mr. Lin and Dr. Richter confirm this. (SIB at 20.) Staff also asserts that Dr. Nourbakhsh testified that, even though one foot placement section is affected by the other through controller software, this would not disqualify the accused products from having independently moveable sections. (*Id.* at 21 (citing Nourbakhsh, Tr. at 708:3-14).) Staff also argues that Dr. Nourbakhsh conceded that the patent specifically contemplates overcoming a friction or bias force. (*Id.* at 21-22 (citing Nourbakhsh, Tr. at 707:15-19, JX-001 at 3:59-62).)

The undersigned agrees with Complainants and Staff that the foot placement sections are independently moveable. A simple observation of the accused products confirms this: The first foot placement section moves independently of the second foot placement section. (CPX-007 – CPX-012.) This was demonstrated by multiple individuals during the course of the hearing and is confirmed by observing the physical exhibits. (Nourbakhsh, Tr. at 683:1-13; Richter Tr. at 543:25-545:9; CPX-007 – CPX-012, CPX-015). A user can move one foot placement section with his/her foot while keeping the other foot horizontal, causing the accused product to turn. (*See, e.g.,* Richter, Tr. at 543:25-545:9.) Indeed, Dr. Singhose confirmed that, while keeping the left foot placement section in a horizontal position, he was able to independently move the right foot placement section over 35 degrees without impacting the left foot placement section. (Singhose, Tr. at 846:20-847:17.) The evidence at the hearing confirmed that all of the accused products operate in the same way, and there was no evidence to contradict this. (Richter, Tr. at

545:10-14; *see also* CX-182C at Q/A 205-206, 209-211 (Chic), 274-275, 278-280 (Swagway), 333-335 (Jetson), 376-378 (Skque), 415-417 (Powerboard)).)

Respondents' argument to the contrary distorts the plain and ordinary meaning of "independently movable." A foot placement section can be independently moveable, yet still be influenced by the other foot placement section. (*See, e.g.*, CX-182C at Q/A 210.) The '278 patent expressly contemplates this, by disclosing that the foot placement sections are coupled, yet independently moveable. (JX-001 at 4:60-64.) By virtue of the fact that the foot placement sections must be joined together in some manner, it is evident that they cannot freely move without some restriction by each other. (Nourbakhsh, Tr. at 707:15-19.) Additionally, the patent specifically discloses the type of bias force which forms the basis of Respondents' argument. For example, Respondents' expert, Dr. Nourbakhsh, testified that the patent discloses a bias mechanism that could be implemented through software. (*Id.* at 705:2-18.) This bias mechanism causes the left and right halves of the machine to return to equivalent angles whenever outside pressure is removed. (*Id.* at 705:19-23.) Thus, as conceded by Dr. Nourbakhsh, the patent contemplates the need to overcome a friction or bias force. (*Id.* at 707:15-19.) Finally, the evidence confirms that there is nothing in the patent that requires unbounded independent movability of the two foot placement sections. (Richter, Tr. at 549:12-19, Nourbakhsh, Tr. at 701:7-16 (testimony that this claim element does not require independence in every possible way).)

Once again, Respondents' position is undermined by the conflicting testimony of their experts when analyzing infringement versus invalidity. Both Dr. Nourbakhsh and Dr. Singhose testified that the Sasaki paper titled "Steering control of the Personal riding-type wheeled Mobile Platform (PMP)" (hereinafter, "Sasaki") discloses independently moveable foot placement

sections, but that the accused products do not have this feature. (Nourbakhsh, Tr. at 797:20-798:8; RX-271 at Q/A 100 (Nourbakhsh Witness Statement); RX-242C at Q/A 104 (Singhose Witness Statement); Singhose, Tr. at 887:10-15.) For example, Dr. Singhose testified that the standing plate of Sasaki is independently moveable because “the rider places his/her feet on the standing plate and moves his/her center of gravity to cause deformation of the standing plate to control movement. This deformation causes the left foot and right foot placement sections of the standing plate to move with respect to one another.” (RX-242C at Q/A 104.) Yet, the evidence shows that the maximum amount of movability between the two foot placement sections in Sasaki is less than one degree, while it is over 35 degrees in the accused products. (Singhose, Tr. at 821:18-20, 824:8-10; 846:11-847:17.) At the hearing, Staff even asked Dr. Singhose to consider a piece of plywood about a half-inch thick, six inches wide, and two and a half feet long with wheels attached. (*Id.* at 887:16-888:6.) Dr. Singhose testified that if one drew two squares on the board to represent two foot placement sections, these foot placement sections would be independently moveable. (*Id.* at 888:7-18.) It appears as if Respondents’ experts shaped their testimony to fit with their desired conclusions – applying different standards for infringement and invalidity to do so. Such testimony undermines their credibility.

For the reasons set forth above, the accused products meet this limitation.

- c) **“a first wheel associated with the first foot placement section and a second wheel associated with the second foot placement section, the first and second wheels being spaced apart and substantially parallel to one another”**

The evidence shows that the accused products meet this limitation. (CX-182C at Q/A 214-216 (Chic), 283-285 (Swagway), 336-338 (Jetson), 379-381 (Skque), 418-420 (Powerboard); CPX-007 – CPX-015.) Respondents do not contest that this limitation is met.

- d) “a first position sensor and a first drive motor configured to drive the first wheel, a second position sensor and a second drive motor configured to drive the second wheel; and”**

The evidence shows that the accused products meet this limitation. (CX-182C at Q/A 217-219 (Chic), 286-290 (Swagway), 339-341 (Jetson), 382-384 (Skque), 421-423 (Powerboard); CPX-007 – CPX-015.) Respondents do not contest that this limitation is met.

- e) “control logic that drives the first wheel towards self-balancing the first foot placement section in response to position data from the first sensor and that drives the second wheel toward self-balancing the second foot placement section in response to position data from the second foot placement section.”**

The evidence shows that the accused products include a first foot placement section and a second foot placement section. (CX-182C at Q/A 205-206 (Chic), 274 (Swagway), 333 (Jetson), 376 (Skque). 415 (Powerboard); CPX-007 – 15.)

All respondents dispute that the position data is “from the second foot placement section.” Additionally, Swagway and Modell’s dispute the “control logic . . .” limitation.

i. “control logic . . .”

According to Respondents, Complainants “failed to present evidence that the alleged control logic actually performs the claimed function.” (RIB at 18.) Respondents contend that, in order to establish that this limitation has been met, one must analyze the source code, review schematics, or undergo reverse-engineering. (*Id.* at 19.) Because Dr. Richter did not do any of these things, Respondents argue that Complainants cannot prove that the accused products actually meet this limitation.

Swagway also contends that the microprocessors identified by Complainants as the “control logic” cannot drive the wheels. (*Id.* at 20.) According to Swagway, this microprocessor “lacks the ability to generate sufficient power to drive the wheel motors.” (*Id.* (citing RDX-

359.49; RX-829C at Q/A 153.) Swagway contends that the component that performs this function “is the motor-drive circuitry” but that this component “is attached to a completely different electronics board.” (*Id.*)

Complainants argue that the inspection conducted by Dr. Richter was sufficient to establish that the control logic performs the claimed functions. (CIB at 18 (citing CX-182C at Q/A 220-224, 292-296, 342-344, 385-387, 424-426).) Complainants note that Chic’s expert, Dr. Nourbakhsh, utilized a similar approach and did not find it necessary to analyze source code. (*Id.* at 19 (citing Nourbakhsh, Tr. at 708:15-22, 723:7-724:24).) Complainants further explain that Razor’s engineer does “not even have access to the control logic source code for the initial design” and found that it was not something he needed “to understand the design and operation” of the products. (*Id.* (citing McLean, Tr. at 93:10-95:7).)

Staff agrees with Complainants that this limitation is met. (SIB at 29.) Staff contends that, even if Swagway is correct that the identified microprocessor does not actually drive the wheel motors, there is still infringement. (*Id.* at 28.) Staff explains: “[T]he microprocessors identified by Complainants are not required to actually drive the wheels; they are required to control the device that drives the wheels.” (*Id.* at 29.) Staff notes that “there is nothing in the claim language . . . that imposes the additional limitation proposed by Swagway and Modell’s that the ‘control logic’ must be the device that directly drives the wheels.” (*Id.*)

Staff further disagrees with Respondents’ argument that Complainants failed to establish that the control logic actually performs the claimed functions. (*Id.* at 29.) Staff notes that “Dr. Singhose testified that in Swagway’s accused products, the measured data from the position sensors located on each side of the device are fed to the control logic which in turn controls the

motors on each side of the device, for balancing the vehicle.” (*Id.* at 29 (citing Singhose, Tr. at 970:8-972:10).)

The undersigned agrees with Complainants and Staff that this limitation is met. First, the undersigned finds that all respondents other than Swagway and Modell’s have waived this argument, as only Swagway and Modell’s raised this argument in their pre-hearing brief. Thus, pursuant to Ground Rule 8.2, these arguments are deemed waived with respect to the other respondents. Additionally, the evidence shows that this limitation is met with respect to Chic, Skque, Powerboard, and Jetson. (CX-182C at Q/A 220-221 (Chic); 342-344 (Jetson); 385-387 (Skque); 424-426 (Powerboard); Lin, Tr. at 632:2-25 (testimony that data is sent from the position sensors to the main control chip and that the main control chip controls the electric motors, which balance the vehicle; RX-358C at Q/A 9, 16 (direct testimony from Mr. Lin).)

Second, the undersigned is not persuaded by the argument that one must inspect source code or conduct similar analyses to determine infringement. First, Dr. Nourbakhsh was able to analyze this limitation with respect to the Chic Accused Products without performing a source code analysis and testified that it was not necessary to look at the code to determine whether or not a product infringes. (Nourbakhsh, Tr. 708:15- 709:1.) Additionally, Dr. Singhose himself was able to determine that this limitation was present in the prior art without requiring a review of source code. (*See, e.g.*, RX-271 at Q/A 114-118; 138-139.) If a source code review was a prerequisite to finding whether this limitation is present, Dr. Singhose would not have been able to provide his invalidity opinions. Swagway cannot have it both ways: Require source code for infringement, but contend that it is unnecessary to have source code determine invalidity.

More importantly, however, Dr. Singhose essentially admits that this limitation is likely met. While he refuses to say so conclusively, the evidence shows that it is more likely than not

that the control logic drives the wheels towards self-balancing in responses to position data. The evidence shows that the Swagway accused product has control logic and a component that drives the wheels. (JX-0025 at 148:12-22, 149:10-150:2 (testimony from corporate representative confirming that there is a controller within the Swagway accused products); RX-829C at Q/A 153 (testimony from Swagway's expert that there is a component that drives the second wheel).) Dr. Singhose testified that the control logic sends signals to the motor to control the wheels (Singhose, Tr. at 894:12-23) and that the motors are controlled to drive both wheels towards self-balancing the foot placement sections. (*Id.* at 970:8-11.) The evidence shows that there are two microcontroller units, one of which resides on the left side of the vehicle and the other on the right.¹⁶ (CX-0182C at Q/A 292.) Dr. Singhose testified that the position sensors of the Swagway accused product likely send data to the control logic of the machine. (Singhose, Tr. at 893:22-25.) He confirmed that the data obtained from the position sensors makes its way to the control logic and that the control logic makes certain other decisions about that data, such as sending off other signals to the motor to control the wheels. (*Id.* at 894:12-23.) Dr. Singhose further admits that the Swagway accused products all have electronic circuitry that uses data from sensors as part of controlling the vehicle's motion. (*Id.* at 862:14-863:9.) While riding the accused product, Dr. Singhose confirmed that "the control of each motor was influenced by the amount of rotation or pitch angle of the two respective platform sections" on which he was standing and that "the pitch angle of the two platform sections is detected or measured by the position sensor located on the respective side of the vehicle." (*Id.* at 970:12-15; 970:21-24). Finally, he testified that "the position data is used" at least in part "to control the motors to drive the wheels." (*Id.* at 971:18-972:10.) Accordingly, the evidence – mostly from Swagway's own witnesses – establishes that this limitation is met.

¹⁶ Swagway and Modell's have now conceded that their products contain position sensors. (SIB at 38 n. 45.)

Swagway's argument that the microprocessor "lacks the ability to generate sufficient power to drive the wheel motors" is also insufficient to rebut the evidence of infringement. There is no requirement in the claims that the control logic must also be the component that provides the power to drive the wheels. Additionally, the evidence shows that the identified microprocessor controls the device that controls the wheels. (*Id.* at 970:8-972:10.)

Accordingly, the undersigned finds that the accused products meet this limitation.

ii. "from the second foot placement section"

Respondents argue that none of the accused products "meet this limitation because position data does not come from the 'second foot placement' section. Instead, they assert that it comes from a sensor that is distant from the second foot placement section." (RIB at 13.)¹⁷ Respondents contend that "[t]he patent teaches that the foot placement section is, quite explicitly, a portion of the upper housing, which is itself part of the 'platform section.'" (*Id.* at 14 (citing JX-0001 at 2:46-63, 5:21-6:3; RDX-376, Richter, Tr. at 298-309; RX-357C at Q/A 63).) According to Respondents, "[o]nce one determines that the foot placement section is the top portion of the accused products where the feet must trigger the pressure sensors to operate the device, it is clear that this claim element is not satisfied." (*Id.* at 16.) Respondents explain: "There is no dispute that . . . the position sensors are located inside the housing, in fact in the lower part of the vehicle, not in the foot placement section that is on the top housing section in the accused products." (*Id.* (citing RX-357C at Q/A 134-38, RX-829C at Q/A 145-50, Singhose, Tr. at 679).) Respondents also assert that "[i]n the accused products, [the foot placement section] is the rubber pads over the sensors that detect the rider's presence . . . and there is no dispute that

¹⁷ Respondents do not dispute that "position sensors generate data used to drive the wheels towards self-balancing." (RIB at 16.)

the rubber pads or the top portion of the devices where the rider places her feet do not provide position data.” (RRB at 8.)

Complainants assert that “[t]here is no dispute that all of the accused products include foot placement sections and sensors.” (CIB at 12.) Complainants further contend that Dr. Richter’s testimony confirms that data from the foot placement sections and sensors generate control signals that tell the motors how to drive the wheels. (*Id.* (citing CX-182C at Q/A 217, 220, 286, 292, 339, 342, 382, 385, 421, 424).) According to Complainants, “Respondents’ argument that ‘foot placement section’ was limited to a ‘top section or area’ of the vehicle” was rejected by the Markman Order. (*Id.* at 14; CRB at 5.) Complainants also assert that whether or not the sensors are located in the “lower part of the vehicle” rather than in the “top housing section” is irrelevant. (CRB at 6.)

Staff agrees that this limitation is met. (SIB at 22.) Staff explains that “

[REDACTED]

[REDACTED]

[REDACTED] Staff notes that the evidence shows that Swagway’s accused products operate in the same manner. (*Id.* (citing Singhose, Tr. at 970:8-972:10).) Staff asserts that Respondents’ position “misinterpret[s] the *Markman* order and misrepresent[s] the opinions of Complainants’ expert.” (*Id.*)

The undersigned agrees with Respondents that this limitation is not met. The evidence shows that the position data sensors are located on each side of the vehicle underneath each foot pad in a cavity of the housing. (RX-358C at Q/A 9, 16; Nourbakhsh, Tr. at 712:16-19, Singhose Tr. at 970:8-972:10.) The question then becomes: Is this cavity part of the foot placement section? Complainants and Staff believe that this question is answered in the affirmative by the

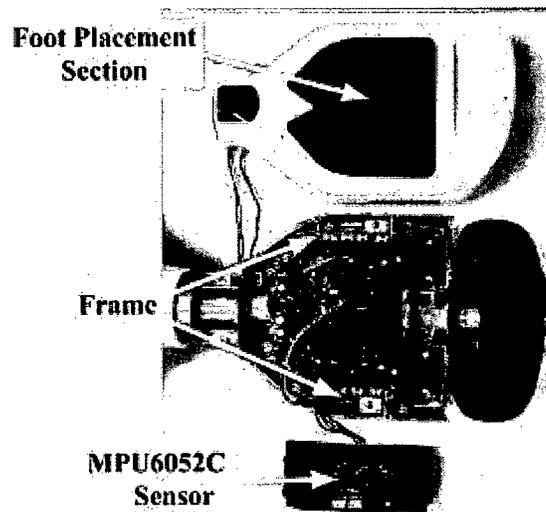
Markman order. (CRB at 5 (“Respondents focus on rehashing the claim construction issues they already lost); SIB at 23 (“According to the ALJ, the ‘foot placement section’ . . . can include the entire housing and internal components, such as sensors.”).) In that order, the undersigned explained: “Nothing in the ’278 patent evidences an express intent by the patentee to require that foot placement sections be located on a top housing member, or to preclude foot placement sections from including internal components, such as sensors.” (Order No. 25 at 17.) As Complainants note, this Order construes the term “foot placement section” “to permit inclusion of a corresponding sensor.” (CRB at 6.) This does not mean, however, that a foot placement section *always* includes internal components, such as sensors, and it certainly does not mean that the foot placement section can include the entire housing. Indeed, it is clear from the patent that the foot placement section is distinct from the housing members. The patent states:

Vehicle 100 may have a first and second platform section 110, 130. Each platform section 110, 130 may include a housing formed of a bottom housing member 111, 131 and a top housing member 112, 132. The top housing members may have a foot placement section or area 113, 133 formed integrally therewith or affixed thereon. The foot placement section is preferably of sufficient size to receive the foot of a user and may include a tread or the like for traction and/or comfort.

(JX-001 at 2:46-53.) Thus, the patent provides that the foot placement section is part of the larger housing and platform, not that the entire housing or platform is part of the foot placement section. Accordingly, the *Markman* order does not foreclose the possibility that the cavity under the foot pad is separate from the foot placement section.

The evidence shows that the “foot placement section” is the area on which the rider must place his or her foot to operate the device. (Richter, Tr. at 329:3-23 (testimony that “the foot placement section in general should be defined by where you can place your foot functionally and operate the vehicle”).) The evidence further shows that the position sensors in the accused products are not located within this foot placement section, but are instead located in the bottom

housing member. Dr. Nourbakhsh testified that “[t]he position sensing system in the Chic Smart products is located well below the foot placement section. . . . In the Chic Smart products, position sensors are contained on electronics boards held within the main cavity of axial rotation of the device and well away from the foot placement sections.” (RX-357C at Q/A 137, 138.) Dr. Singhose likewise testified that the position sensor in the Swagway accused products is located on an electronics board bolted to the bottom of the frame of the product. (RX-829C at Q/A 148.) The foot placement section, on the other hand, is bolted to the top of the frame. (*Id.*) Dr. Singhose includes a demonstrative in his testimony to illustrate his point:



(*Id.* at Q/A 148 (showing RDX-359 at 44).) In further support of his opinion, Dr. Singhose measured the distance between the rubber foot placement pads and the position sensor, finding that the two were apart by 13 cm using one method and 5.5 cm using another. (*Id.* at Q/A 149-150.)

Notably, Dr. Richter does not rebut this evidence. In his direct testimony, Dr. Richter includes pictures of the position sensors but does not explain the location of the sensors relative to the foot placement section. (CX-182C at Q/A 220-224 (Chic), 292-296 (Swagway).) Instead,

he essentially admits that the sensors are not located near the foot placement pads, but argues that this does not matter. (*Id.* at Q/A 223 (Chic), 295 (Swagway).) Thus, the evidence clearly establishes that the position sensor is not in the foot placement section.

Skque, Powerboard, and Jetson did not introduce evidence of non-infringement at the hearing. It remains, however, Complainants' burden to establish infringement. In his testimony, Dr. Richter identifies the position sensors for these accused products, but it is unclear if these sensors are in the top or bottom housing. (CX-182C at Q/A 339; CDX-0182.065 (Jetson), CX-182C at QA 385; CDX-0182.076 (Skque); CX-182C at Q/A 424; CDX-0182.087 (Powerboard).) Dr. Richter does not provide any testimony about the location of the sensors relative to the foot placement sections. (*Id.*) Without such evidence, the undersigned finds that Complainants have failed to establish that the control unit receives position data from the second foot placement section for these products.

Complainants also argue that, even if the position sensor was not located within the foot placement section, it still meets the limitation because "the foot platform sections causes position sensors in either side of the housing to generate data that is used to control and balance the accused products." (CRB at 6.) The evidence shows that the pitch of the foot placement section is related to the position data sensor. (RX-358C at Q/A 15, Nourbakhsh, Tr. at 711:4-9, 713:25-715:23.) Dr. Richter testifies that "a person of ordinary skill in the art would . . . recognize the fixed and definite relationship between the position of the foot placements section and the electronic data issued by the position sensor corresponding to that section, yielding a one-to-one relationship between the foot placement section position data and the position sensor data (*See* CX-182C at Q/A 223 (Chic), 295 (Swagway).) This does not mean, however, that a person of

ordinary skill in the art would consider the position data to come *from* the second foot placement section. Moreover, Dr. Richer does not provide any evidence to support this statement.

Complainants also imply that the patent contemplates that the position sensor can be part of the foot placement section, even when it is located in the bottom housing.¹⁸ This can, of course, be true. For example, a vehicle could be doughnut-shaped with the foot placement section near the bottom. (Nourbakhsh, Tr. at 766:2-767:15.) Such an embodiment would be consistent with the portion of the patent that provides:

Referring to FIG. 2, a block diagram of components within vehicle 100 in accordance with the invention is shown. The dot-dash line represents a rough outline of the housing members. Each platform section preferably includes a position sensor 120, 140 which may be a gyroscopic sensor, for independent measurement of the position of the respective platform section. The sensors are preferably mounted on circuit boards 121, 141, *that may be attached to the interior of the respective bottom housings.*

(JX-001 at 3:1-9 (emphasis added).)

Finally, it should be noted that the patentee has filed for a reissue application, noting that the last clause of the “control logic” limitation “erroneously ended with the term ‘second foot placement section’ instead of ‘second sensor.’” (JX-0003.044.) Thus, it was the inventor’s intention that the sensor need not be located in the second foot placement section and could, for example, be located in the bottom housing. If the claim was written this way, the evidence would show that this limitation was met. Courts must, however, “construe the claim as written, not as the patentees wish they had written it.” *Chef Am., Inc. v. Lamb-Weston, Inc.*, 358 F.3d 1371, 1374 (Fed. Cir. 2004). Thus, as the patent is currently written, the undersigned finds that this limitation is not met because Complainants have not shown that the position data comes from the second foot placement section.

¹⁸ Complainants do not explicitly make this argument. Instead, they cite to a portion of the patent without explanation.

f) Conclusion

For the reasons set forth above, the undersigned finds that the accused products do not infringe claim 1 of the '278 patent.

2. Claims 2-3 and 5-8

Because the undersigned has found that independent claim 1 is not infringed, it is not necessary to determine whether dependent claims 2-3 and 5-8 are infringed. The undersigned notes, however, that Respondents do not appear to dispute that, if claim 1 is infringed, then claims 2-3, 5, and 7-8 are infringed as well. (See RIB at 9-25 (non-infringement portion of the brief in which Respondents do not specifically address any claims except claims 1 and 6.) Respondents do, however, dispute that the additional limitation of claim 6 has been met.

3. ■ Products

According to Complainants, "Chic indicates that later this year it wants to sell a product named ■ (CIB at 22.) Complainants argue that the ■ Product is not sufficiently final and thus any opinion on the product would constitute an advisory opinion. (*Id.*) Complainants further argue that Chic has not provided sufficient evidence to determine whether the ■ Product infringes. (*Id.* at 23-24.) Complainants write: "The future product was not shown to any of the experts in this proceeding, and there is no evidence in the record that it exists as anything more than a concept." (*Id.* at 22.)

Respondents state that "[t]he Commission has jurisdiction over Chic's ■ products." (RIB at 25.) Respondents also argue that "the unrebutted evidence established that the ■ products do not infringe any asserted claims of the '278 patent." ■

Staff notes that “Complainants did not put forward any contrary infringement contentions or expert opinions. The Staff therefore believes that Complainants have not demonstrated that the [REDACTED] product infringes claim 1.” (SIB at 35.)

Complainants concede that the Commission has *in rem* jurisdiction over the [REDACTED] products. (Complainants’ Response to Order No. 44 at 3 (Feb. 9, 2017) (“The Commission therefore has *in rem* jurisdiction over all Chic motorized self-balancing vehicles, including any future products that might fall within the scope of the NOI such as the [REDACTED] product. . .”) Due to this concession, any argument that the design of the [REDACTED] product is not sufficiently final has been waived. Such an argument specifically relates to whether there is *in rem* jurisdiction.¹⁹

Likewise, Complainants’ argument that there is insufficient evidence to assess infringement is unpersuasive. Complainants could have sought additional discovery, including by filing a motion to compel or a request for leave to take discovery out of time. Complainants chose not to do and cannot therefore now complain that they do not have the discovery that they need.

The evidence in the record shows that the [REDACTED] products do not infringe the ’278 patent.

[REDACTED]

[REDACTED]

[REDACTED] This evidence stands un rebutted.²⁰

Accordingly, the undersigned finds that the [REDACTED] products do not infringe claim 1 of the ’278

¹⁹ Complainants cite, for example, to *Certain GPS Chips*, Inv. No. 337-TA-596, Initial Determination, USITC Pub. No. 4133, 2010 WL 1502175 at *34-35 (Mar. 1, 2010) in their brief. (CIB n. 22 n.10.) This case analyzed whether the Commission had *in rem* jurisdiction over a design-around product.

²⁰

[REDACTED]

patent. Because the ■ products do not infringe claim 1, the undersigned finds that the ■ products also do not infringe dependent claims 2-3 or 5-8.

4. Defaulting Parties

Complainants assert that “[t]he allegations in the Complaint regarding importation by the Defaulting Respondents are presumed true.” (CIB at 2; *see also id.* at 7.) Complainants note: “Once a party is found in default, ‘the Commission shall presume the facts alleged in the complaint to be true and shall, upon request, issue an exclusion from entry or a cease and desist order, or both.’ 19 U.S.C. § 1337 (g)(1).

The undersigned finds that Complainants have established that the Defaulting Respondents’ accused products infringe the ’278 patent. In the Complaint, Complainants asserted that each of the parties and their products infringe. (Compl. at ¶ 85, Ex. 79 (Chenduoxing); ¶ 71, Ex. 84 (Cyboard); ¶ 72, Ex. 86 (GyroGlyder), ¶ 73, Ex. 87 (HoverTech), ¶ 86, Ex. 80 (Jomo), ¶ 77, Ex. 91 (Joy Hoverboard), ¶ 78, Ex. 92 (Kebe), ¶ 79, Ex. 93 (Leray), ¶ 82, Ex. 96 (PhunkeeDuck), ¶ 87, Ex. 81 (RMT), ¶ 84, Ex. 98 (Shareconn), ¶ 75, Ex. 89 (Soibatian), ¶ 90, Ex. 100 at 3 (Spaceboard), ¶ 88, Ex. 82 at 3 (Supersun), ¶ 92, Ex. 101 (Twizzle), and ¶ 93, Ex. 102 at 3 (Uwheels).) Because the Commission presumes the facts alleged in the complaint to be true, Complainants have satisfied their burden of demonstrating infringement. Additionally, the undersigned is not aware of any evidence to the contrary with respect to infringement by the Defaulting Respondents. Accordingly, the undersigned finds that the Defaulting Respondents’ accused products infringe the ’278 patent.

C. Domestic Industry – Technical Prong

Complainants assert that the Inventist Hovertrax, the Razor Hovertrax, Razor Hovertrax DLX 1.0, and the Razor Hovertrax DLX 2.0 (collectively, “Hovertrax products”) practice claims 1-3 and 5-8 of the ’278 patent. (CIB at 25.) Staff agrees. (SIB at 36-38.)

Respondents explain that “the accused and domestic industry products have similar design and functionality.” (RIB at 29 (citing Richter, Tr. at 433, 459).)²¹ Thus, Respondents do not set forth new arguments with respect to the technical prong, but rather assert that it is not met “[f]or the same reasons set forth above regarding non-infringement by the accused products.” (*Id.* at 29 (“independently moveable”), *id.* at 30 (“from the second foot placement section”), *id.* at 32 (“coupled to one another”), *id.* at 33 (“control logic that [performs the claimed function]”).)

1. “independently moveable”

Respondents allege that “the evidence showed that these products [REDACTED] [REDACTED]” (RIB at 29.) Therefore, in Respondents’ opinion, the foot placement sections of the Hovertrax are not “independently moveable.”

The undersigned agrees with Complainants and Staff that the foot placement sections of the Hovertrax are independently moveable. As with the accused products, this can be confirmed by a simple observation of the product. (CPX-0001; CPX-0002; CPX-0005.) A user can move one foot placement section with his foot while keeping the other foot horizontal, causing the Hovertrax to turn. (CX-182C at Q/A 76, 111, 153) As discussed above, the fact that the Hovertrax [REDACTED] does not render the foot placement sections dependently moveable. The patent contemplates the need to overcome a

²¹ Besides the specific limitations discussed here, Respondents do not dispute that the Hovertrax products practice the ’278 patent. The evidence shows that the remaining limitations have been met. (CX-182C at Q/A 72-101 (Inventist Hovertrax), 109–135 (Razor Hovertrax and Hovertrax DLX 1.0), 149-178 (Razor Hovertrax DLX 2.0).)

friction or bias force and nothing in the patent requires unbounded independent movability of the two foot placement sections. (*See, e.g.*, Nourbakhsh, Tr. at 705:2-18, 707:7-6; 707:15-19; Richter Tr. at 549:12-19.) Accordingly, the evidence establishes that the Hovertrax products meet this limitation.

2. “from the second foot placement section”

Respondents argue that “[t]he evidence showed that the Razor Hovertrax 1 has the same design as the accused products, namely rubber pads on each half of the device with pressure sensors used to activate the self-balancing functions.” (RIB at 30 (citing CX-0185C at Q/A 83, 174; RX-357C at Q/A 170).) According to Respondents, “the same arguments set forth above for the accused products apply to the Razor Hovertrax 1 domestic industry product.” (*Id.*)

For the Razor Hovertrax 2 and Inventist Hovertrax products, Respondents assert that “the position sensors are located in the cavity of the housing . . . not in the foot placement section.” (*Id.* at 31 (citing CX-185C at Q/A 49; RX-357 at Q/A 194-202).) According to Respondents, “Dr. Richter’s testimony that the ‘foot placement section’ means one entire half of the device stands alone on that issue, is contradicted by other more credible witnesses, and goes against the clear language of the patent and the plain and ordinary meaning of the English words.” (*Id.*)

Complainants and Staff do not make any arguments specific to this limitation, instead relying on Dr. Richter’s testimony (CIB at 26) and their arguments with respect to infringement (SIB at 37).

There is insufficient evidence to conclude that the Hovertrax products meet this limitation. Most importantly, Dr. Richter never opines that the position sensors in the Hovertrax products are located within the second foot placement section. Instead, he refers to an interrogatory response, in which Complainants assert that the Hovertrax products “each have left

and right position sensor boards located, respectively, in left and right halves of the board. Each of the left and right position sensor boards include respective gyroscopes and accelerometers detecting levelness of the corresponding half of the board relative to the ground.” (CX-182 at Q/A 86; *see also id.* at Q/A 121, 163.) Without more, this evidence is insufficient to establish that this limitation is met.

Additionally, there is evidence in the record that the position sensors are *not* located within the second foot placement sections. Dr. Nourbakhsh testified that the position sensors are located “inside the ‘body cavity’ of each side of the device, well away from each foot placement section.” (RX-357C at Q/A 195.) In support of his opinion, Dr. Nourbakhsh disassembled the Hovertrax products and concluded: “In each disassembled model, the gyroscopic/accelerometer sensors reside on circuit boards well within the body cavity. . .” (*Id.* at Q/A 196; *see also id.* at Q/A 197.) Accordingly, the undersigned finds that this limitation is not met for the Hovertrax products.

3. “coupled to one another”

Respondents allege that “[f]or the Razor Hovertrax 1, once one determines the foot placement sections are the areas where the rider must place her feet to activate the pressure sensors and operate the device, it is not difficult to conclude that those portions are not ‘coupled to one another’ in the mechanical sense because they are not touching through a ‘coupling.’” (RIB at 32 (citing RX-357C at Q/A 168-170, 178-180).) With respect to the Razor Hovertrax 2 and Inventist Hovertrax, Respondents allege that the inboard area of the product “is not designated for [a] user to place his or her feet” and therefore the foot placement sections are not coupled together. (*Id.* at 33.)

The evidence shows that the foot placement sections are coupled to one another. (CX-182C at Q/A 76, 111, 153.) As explained above, coupling does not require direct physical touching, but can include connections made through an intermediate element such as a coupling or other mechanical component for joining the two sections. (*Id.* at Q/A 42; RX-829C at Q/A 89,107, 109; Singhose, Tr. at 885:13-15.) Accordingly, the evidence establishes that the Hovertrax products meet this limitation.

4. “control logic that [performs the claimed function]”

Respondents argue that it was necessary for Dr. Richter to analyze the computer code that runs on the microprocessor to determine whether this limitation is met. (RIB at 33.)

Staff notes that this argument was not raised by Respondents in the pre-hearing briefs and is therefore waived. (SIB at 38.) Staff also believes that Complainants have demonstrated that their domestic industry products satisfy this limitation. (*Id.*)

The undersigned agrees with Staff that this issue was not raised in the pre-hearing briefs and is therefore waived.

5. Conclusion

For the reasons set forth above, the undersigned finds that the Hovertrax products do not practice claim 1 of the '278 Patent. Because the undersigned has found that the Hovertrax products do not practice independent claim 1, it is not necessary to determine whether the Hovertrax products practice dependent claims 2-3 and 5-8.

D. Validity

Subsequent to the hearing, Complainants requested that the undersigned take judicial notice of the March 16, 2017 U.S. Patent and Trademark Office decision *Denying* Institution of *Inter Partes* Review. (EDIS Docket No. 605773 (Mar. 17, 2017).) In this decision, the Patent and

Trial and Appeal Board declined to institute an *inter partes* review of claims 1-9 of the '278.²² Neither Respondents nor Staff opposed the request. Accordingly, Complainants' request is hereby granted.

1. Obviousness

The following are the specific obviousness combinations asserted in this Investigation and by whom:

- Sasaki + Conrad: Chic, Swagway, Modell's, and Newegg²³
- Sasaki + Smith: Swagway, Modell's, and Newegg^{24, 25}
- Kamen + Nishikawa + Conrad: Chic only^{26, 27}
- Li + Conrad (+ Sasaki for claims 5-7): Chic only^{28, 29}

a) Sasaki and Conrad or Smith

Respondents assert that claims 1-3 and 5-8 are invalid in view of Sasaki in combination with Conrad or Smith. (RIB at 34-40.) Sasaki is a paper entitled "Steering Control of the Personal Riding-type Wheeled Mobile Platform." (RX-0208.) It describes a single platform that

²² The undersigned notes that several of the prior art references asserted in this Investigation were also at issue in the PTAB proceeding.

²³ Ground Rule 8.2 requires a party's contentions to be set forth in detail in the prehearing brief. (*See* G.R. 8.2.) Jetson, Powerboard, Skque, and Alibaba either incorporated by reference the defenses asserted by the other respondents in their respective prehearing briefs or reserved the right to rely on said defenses. (*See* Skque PHB at 7; Jetson/Powerboard PHB at 39-40; Alibaba PHB at 42.) This is not sufficient to comply with Ground Rule 8.2 and as a result, these respondents have waived their right to assert this obviousness combination.

²⁴ For the same reason as set forth above in Footnote 23, Jetson, Powerboard, Skque, and Alibaba have waived their right to assert this obviousness combination. (*Id.*)

²⁵ Chic did not assert this combination in its prehearing brief and have therefore waived this argument per Ground Rule 8.2. (*See* Chic PHB at 48.)

²⁶ For the same reason as set forth in Footnote 23, Newegg, Jetson, Powerboard, Skque, and Alibaba have waived their right to assert this obviousness combination. (*See* Newegg PHB at 15; Skque PHB at 7; Jetson/Powerboard PHB at 39-40; Alibaba at 42.)

²⁷ Swagway and Modell's did not assert this combination in their prehearing brief and have therefore waived this argument per Ground Rule 8.2. (*See generally* Swagway/Modell's PHB at 99-146.)

²⁸ For the same reason as set forth in Footnote 23, Newegg, Jetson, Powerboard, Skque, and Alibaba have waived their right to assert this obviousness combination. (*See* Newegg PHB at 15; Skque PHB at 7; Jetson/Powerboard PHB at 39-40; Alibaba PHB at 42.)

²⁹ Swagway and Modell's did not assert this combination in their prehearing brief and have therefore waived this argument per Ground Rule 8.2. (*See generally* Swagway/Modell's PHB at 99-146.)

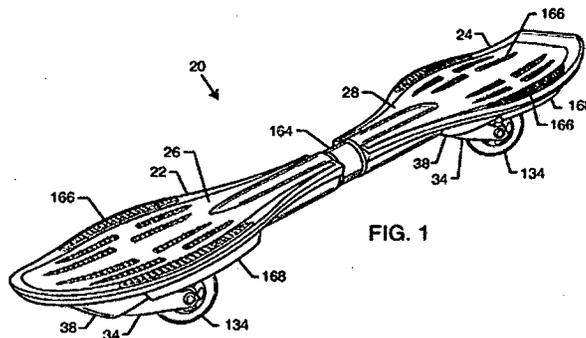
a rider stands on to drive or steer the mobile platform using forced-sensor based steering. (*Id.*)

Figure 2 of Sasaki is reproduced below:

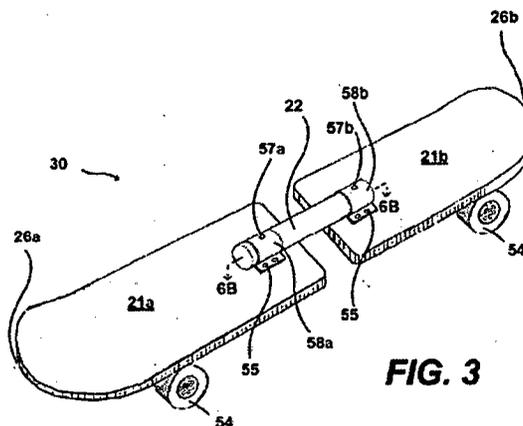


Fig. 2 Second prototype (PMP-2) of personal riding-type wheeled mobile platform

(*Id.* at .002 (Fig. 2).) Conrad and Smith are articulated skateboards. (RX-0162; RX-0174.) As Figure 1 illustrates, Conrad discloses front and rear platforms interconnected by a bar, “allowing the platforms to rotate independently about the common axis.” (RX-0162 at .008 [0006]).



(*Id.* at .002, Fig. 1.) Smith similarly discloses two foot placement sections connected by a flexible connector, which allows the two foot placement sections to flex horizontally and vertically. (RX-0174.0012-.013 at [0035], [0043]-[0044].)



(*Id.* at .003 (Fig. 3).)

i. Claim 1

Respondents contend that Sasaki discloses most of the elements of claim 1.³⁰ (RIB at 35-36 (arguing that Sasaki discloses the claimed foot placement sections; first and second wheels that are substantially parallel to each other; first and second position sensors and drive motors for driving each wheel and self-balancing the device; and control logic that balances the device in response to the position data).) While they concede it does not have two “independently moveable” foot placement sections, Respondents assert that Sasaki discloses that “the standing plate of the vehicle deforms, causing the left foot and right foot placement sections to move with respect to one another,” as well as “independent control of the left and right wheels and driving the wheels based on the tilt angle of the rider’s platform.” (RIB at 36-37.) Thus, Respondents argue that it would have been obvious to a person of ordinary skill in the art to split the Sasaki

³⁰ They note that if the undersigned agrees with Respondents that the control logic must drive the second wheel toward self-balancing in response to position data from the second foot placement section and finds that the accused products do not infringe, then that same interpretation would mean that element [d] is also not present in the prior art. (RIB at 36 at n.11.)

device into two separate platforms as taught in articulated skateboard references like Conrad and Smith.³¹ (RIB at 37; RRB at 20.)

Complainants dispute that Respondents have proven by clear and convincing evidence that the asserted claims of the '278 patent would have been obvious in view of Sasaki plus Conrad or Smith. (CIB at 30-32.) They assert that combining Sasaki with an articulated skateboard fails to disclose all elements of claim 1. (*Id.*) For example, Complainants argue that Sasaki would require “additional components such as an additional gyroscope” to satisfy claim 1, and Smith and Conrad lack those components. (CIB at 30 (citing Nourbakhsh, Tr. at 752:25–753:3, 754:12-20); CRB at 14-15.) Complainants also contend that Respondents “have failed to provide adequate objective rationale to support the proposed combinations and modifications of Sasaki and Smith or Conrad.” (CIB at 30-31; *see also* CRB at 14-16.)

Staff likewise does not believe that Sasaki in combination with Conrad or Smith renders the asserted claims obvious. (SIB at 40-43.) In Staff's view, Sasaki does not disclose “at least elements [a], [c] and [d] of claim 1” and Smith and Conrad fail to resolve this deficiency.³² (SIB at 40.)

As previously noted, Respondents submit that if the undersigned agrees with their interpretation of the claim requirement that the control logic must drive the second wheel toward self-balancing in response to position data from the second foot placement section and finds that the accused products do not infringe, then that same interpretation would mean this element is not present in the prior art. (RIB at 36 n. 11.) The undersigned did indeed agree with

³¹ They also claim a person of ordinary skill in the art “would know that splitting Sasaki in two based on the teachings of Conrad or Smith would only require reproducing the control system and sensing modalities already present in Sasaki in each half of the device by, for example, adding a second gyroscope.

³² While Conrad or Smith “potentially” add the two independently moveable foot placement sections missing from Sasaki (*i.e.*, element [a] of claim 1), Staff does not believe elements [c] and [d] of the claim are disclosed in either Conrad or Smith. (SIB at 42-43.)

Respondents and as detailed in Section V.B.1.e., found that this limitation is not practiced by the accused products. Respondents are therefore bound by their concession that this same limitation is not present in the prior art. Thus, because the “control logic that drives the first wheel toward self-balancing the first foot placement section in response to position data from the first sensor and that drives the second wheel toward self-balancing the second foot placement section in response to position data from the second foot placement section” limitation is not disclosed in the asserted prior art, Respondents’ argument that Sasaki in view of Conrad or Smith renders claim 1 invalid must fail.³³

Accordingly, the undersigned finds that claim 1 of the ’278 patent is not invalid due to Sasaki in view of Conrad or Smith.

ii. Dependent Claims

Respondents allege that claim 2, 3, and 5-8 are obvious under 35 U.S.C. § 103 in view of Sasaki and Conrad or Smith. Claims 2, 3, and 5-8 all depend – directly or indirectly – from claim 1 and include all of the limitations of claim 1. Thus, for the reasons stated above in the discussion of claim 1, the undersigned finds that Respondents have failed to show by clear and convincing evidence that the combination of Sasaki with Conrad or Smith renders claims 2, 3, and 5-8 invalid as obvious. *See, e.g., Callaway Golf Co. v. Acushnet Co.*, 576 F.3d 1331, 1344-

³³ Even if the Commission determines that the accused products satisfy the entirety of the “control logic” limitation, Respondents would still be unable to establish that the combination of Sasaki plus Conrad or Smith discloses all the elements of claim 1. First, Respondents concede that Sasaki does not disclose “a first foot placement section and a second foot placement section that are coupled to one another and are independently moveable with respect to one another.” (RIB at 36; *see also* CX-1520C at Q/A 36, 211.) Second, Sasaki does not disclose “a first position sensor and a first drive motor configured to drive the first wheel, a second position sensor and a second drive motor configured to drive the second wheel” as “Sasaki’s principle of operation for controlling its wheels is not based on ‘independent measurement of the position of [each] respective foot placement section,’ but rather on ‘detect[ion] of the rider’s COG [center of gravity] on the standing base . . . [using] four force plates with strain gauges.’” (CX-1520C at Q/A 213; *see also* RX-0208 at .003.) Even Dr. Nourbakhsh admitted on cross-examination that Sasaki would need additional components such as an additional gyroscope to satisfy claim 1 (Nourbakhsh, Tr. at 752:25-753:3.) Given that neither Conrad nor Smith discloses any sensors (or electronic components), they cannot cure the deficiency of Sasaki discussed above. (Nourbakhsh, Tr. at 754:12-20 (admitting that Conrad and Smith have no sensors; RX-0174; RX-0162.)

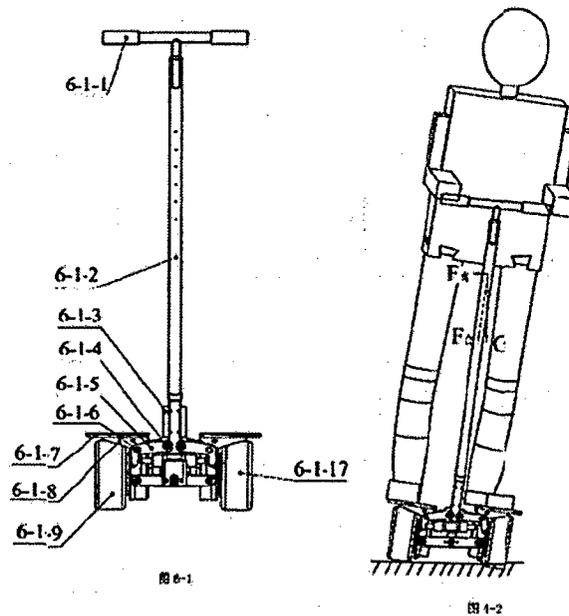
1345 (Fed. Cir. 2009) (finding a dependent claim improperly held obvious when the independent claim is not obvious).

b) Li in combination with Conrad (and Sasaki for claims 5-7)

Chic asserts that claims 1-3 and 8 are invalid in view of Li and Conrad. (RIB at 46-51.)

Chic further asserts that by adding the housing of Sasaki to the combination of Li and Conrad, claims 5, 6, and 7 are also invalid as obvious. (*Id.*)

Li discloses a two-wheel self-balancing vehicle having two platform sections that are moveable through connecting bars so that they remain in a parallel relationship to each other, as depicted in Figures 4 and 6:



(RX-0062.052, .067 (Fig. 4-2), .069 (Fig. 6-1).)

i. Claim 1

Chic claims Li discloses a two-wheel, self-balancing vehicle with a left and a right foot plate that are connected, but independently movable.³⁴ (RIB at 46-47 (citing RX-242C at Q/A 330-336; RX-0062); RRB at 22-23.) It also contends that the vehicle in Li includes “a first position sensor and a first drive motor configured to drive the first wheel, a second position sensor and a second drive motor configured to drive the second wheel,” as well as the claimed “control logic” element of claim 1. (RIB at 47 (arguing, for example, that Li discloses a vehicle with “a dynamic equilibrium sensor system composed of an acceleration sensor, a gyroscope, and an encoder, as well as a drive circuit, and a central control system.”).) According to Chic, a person of ordinary skill in the art “would have found it obvious to provide the disclosed forward- and backward-drive control in Li to the left and right sides separately based in Conrad . . . in order to achieve differential drive steering systems,” which may result in a reduction in the “cost and complexity of the steering control system.” (*Id.* at 46.)

Complainants assert that the combination of Li and Conrad fails to render claim 1 obvious. (CIB at 37-42.) They explain:

Li itself lacks numerous limitations of claim 1, including based on its use of a linkage mechanism between step plates that prevents independent motion. Li also discloses only a single “dynamic equilibrium sensor system composed of an acceleration sensor, a gyroscope, and an encoder,” and does not show separate first and second position sensors arranged, as required by the claim, to affect control logic and motors based on position data from each foot placement section. And no matter how Li’s sensors are interpreted, there is no sign that its “computing unit 21” “drives the first wheel toward self-balancing the first foot placement section in response to position data” from one, and “drives the second wheel toward self-balancing the second foot placement section in response to position data” from the other.

³⁴ While Respondents dispute that the platforms of Li are connected by a parallelogram structure, they submit that even if Li used a parallelogram connector, the device would “still have independently movable platforms because they can move up and down independently, on uneven ground.” (RIB at 49.)

(*Id.* at 39-40 (internal citations omitted).) Complainants also contend that Chic has failed to “prove that it would have been obvious to modify Li to make its step plates independently movable, replacing Li’s own linkage mechanism with Conrad’s skateboard part, and to make additional modifications (such as adding sensors) to change the basis of Li’s steering mechanism from a handlebar angle, instead using the tilt of separate first and second foot placement sections.” (CRB at 22.)

Staff likewise does not believe Chic has demonstrated that claim 1 is obvious based on Li and Conrad. (SIB at 50; SRB at 13-14.) In Staff’s view, Chic has failed to establish that Li discloses elements [a], [c] and [d] of claim 1 and Li’s combination with Conrad does not resolve Li’s deficiencies. (SIB at 50-53.)

The undersigned agrees that Chic has failed to show that the asserted combination discloses “a first foot placement section and a second foot placement section that are coupled to one another and are independently movable with respect to one another,” “a first position sensor and a first drive motor configured to drive the first wheel, a second position sensor and a second drive motor configured to drive the second wheel,” and “control logic that drives the first wheel toward self-balancing the first foot placement section in response to position data from the first sensor and that drives the second wheel toward self-balancing the second foot placement section in response to position data from the second foot placement section.” For example, because the linkage system of Li maintains the two foot placement sections in a parallel relationship, they are not independently moveable. (CX-1520C at Q/A 112 (testifying that “[t]here is no indication, nor has Respondent cited any teaching, that a rider would be able to move one foot plate without the other moving in a linked and dependent manner.”); RX-0062.052 at [0061].) In other words, “[w]here one foot plate descends, the other ascends, and vice versa.” (CX-1520C at Q/A 112.) Li

also discloses only a single “dynamic equilibrium sensor system composed of an acceleration sensor, a gyroscope, and an encoder” that drives the wheels based on overall positioning of the vehicle (not based on position data from each foot placement section) and thus, does not show separate first and second position sensors arranged as required by the claim. (CX-1520C at Q/A 113, 334; RX-0062.0052 at [0062], .057 at [0077].) Furthermore, as Complainants’ expert explained, “there is no indication that its ‘computing unit 21’ ‘drives the first wheel toward self-balancing the first foot placement section in response to position data’ from one of them, and ‘drives the second wheel toward self-balancing the second foot placement section in response to position data’ from the other.” (CX-1520C at Q/A 336.) And, as discussed above, Conrad is a mechanical skateboard with no sensors or electronic components. (See RX-0162.) As such, Li’s combination with Conrad does not resolve Li’s deficiencies.

Additionally, Chic has not demonstrated that one of ordinary skill in the art would have motivation to combine the references. To successfully invalidate the asserted claims, Respondents must provide “an apparent reason to combine the known elements in the fashion claimed by the patent at issue.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007); *see also InTouch Techs. v. VGO Commcn’s*, 751 F.3d 1327, 1351 (Fed. Cir. 2014) (“A reason for combining disparate prior art references is a critical component of an obviousness analysis.”) For this combination, Chic’s expert’s testimony is conclusory in nature. (See, e.g., RX-0242C at Q/A 341-340.) While he alleges that combining these two references would result in a reduction in cost and complexity in the steering control system, Dr. Nourbakhsh fails to explain how this would be possible given that such a modification would result in a complete change in Li’s principle of operation. (RX-0062.0050-.0051 at [0050]; CX-1520C (Richter) at Q/A 338-339.) In fact, as Dr. Richter testified, modifying the steering control system in the way Chic proposes

would likely increase, not decrease, the complexity of the steering system, as well as increase the cost due to the need for additional sensors and/or more control algorithms. (CX-1520C at Q/A 339.)

For the above reasons, the undersigned finds that claim 1 of the '278 patent is not invalid in view of Li and Conrad.

ii. Claims 2, 3, and 8

Chic alleges that claim 2, 3, and 8 are obvious under 35 U.S.C. § 103 in view of Li and Conrad. Claims 2, 3, and 8 all depend from claim 1 and include all of the limitations of claim 1. Thus, for the reasons stated above in the discussion of claim 1, the undersigned finds that Chic has failed to show by clear and convincing evidence that the combination of Li with Conrad renders claims 2, 3, and 8 invalid as obvious. *See, e.g., Callaway Golf Co.*, 576 F.3d at 1344-1345 (finding a dependent claim improperly held obvious when the independent claim is not obvious).

iii. Claims 5-7

Chic also contends that claims 5-7 are obvious under 35 U.S.C. § 103 in view of Li, Conrad and Sasaki. As discussed above in Section V.D.1.a., Sasaki does not disclose at least the “a first foot placement section and a second foot placement section that are coupled to one another and are independently movable with respect to one another” and “a first position sensor and a first drive motor configured to drive the first wheel, a second position sensor and a second drive motor configured to drive the second wheel” elements and thus, cannot resolve the deficiencies of Li and Conrad.

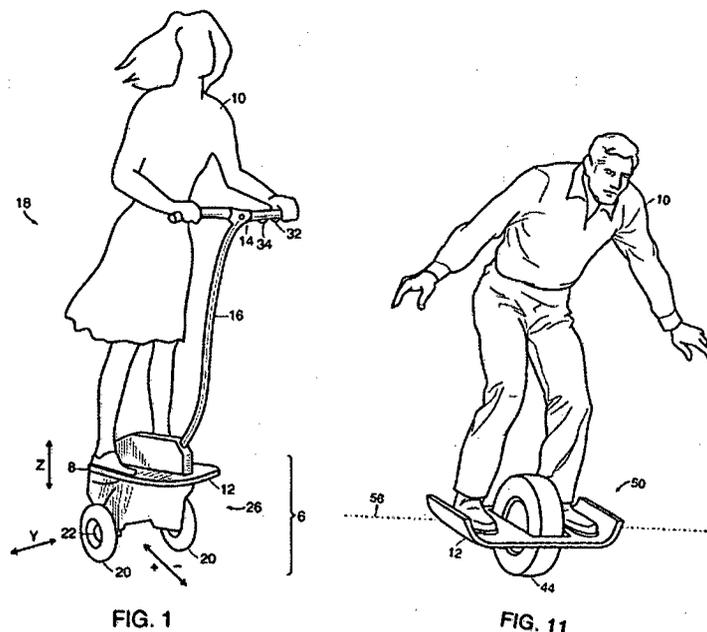
The undersigned therefore finds that because claims 5-7 depend from claim 1 and include all of the limitations of claim 1, Chic has failed to show by clear and convincing evidence that the combination of Li with Conrad and Sasaki renders these claims invalid as obvious. *See, e.g., Callaway Golf Co.*, 576 F.3d at 1344-1345.

c) Kamen, Nishikawa, and Conrad

Chic asserts that claims 1-3 and 5-8 are invalid as obvious in view of the combination of Kamen, Nishikawa, and Conrad. (RIB at 41-46.)

Kamen is a U.S. patent entitled “Personal Mobility Vehicles and Methods.” (RX-0111.) Kamen discloses various embodiments having “a motorized drive, mounted to the ground-contacting module that causes operation of the vehicle in an operating position that is unstable with respect to tipping when the motorized drive arrangement is not powered.” (*Id.* at Abstract.)

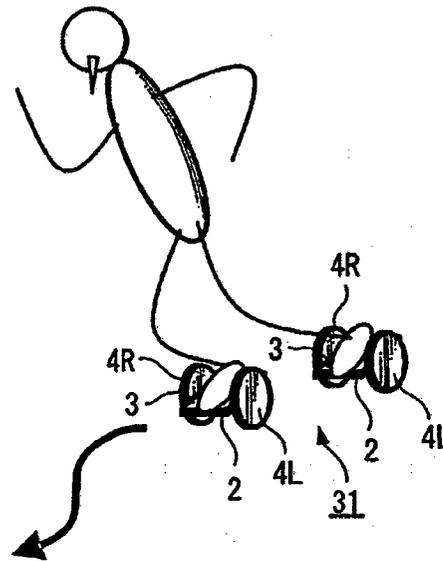
Two such embodiments are reproduced below:



(*Id.* at Figs. 1 and 11.) Nishikawa is also a U.S. patent entitled “Vehicle Steerable by Movement of Center of Gravity.” (RX-0128.) It discloses a vehicle having “base 2, a step-board 3, two

wheels 4L, 4R, two drive motors, 5L, 5R, [and] four pressure sensors.” (*Id.* at 5:10-15.) Nishikawa also discloses that instead of the rider standing on a single platform that is mounted to the vehicle’s wheels, individual units – that are not coupled or connected to each other – can be attached to the rider’s feet, like roller skates. (*Id.* at 9:58-65.) This embodiment is depicted below:

FIG. 10



(*Id.* at Fig. 10.)

i. Claim 1

Chic contends that Kamen and Nishikawa each disclose a type of self-balancing device. (RIB at 41 (describing Kamen as disclosing one-wheel vehicles, while Nishikawa discloses a pair of self-balancing vehicles used in a roller skating configuration).) It asserts that a person of ordinary skill in the art “would have been motivated to modify the vehicle of Kamen by providing two one-wheeled devices—one for each foot of the rider as shown in the roller skate configuration of Nishikawa—and couple the two devices based on the disclosures in Conrad to improve the maneuverability and stability of the vehicle.” (*Id.* at 41 (citing RX-242C at Q/A

413-464).) Thus, Chic claims that the resulting combination “provides all the elements of claim 1.” (*Id.* at 42 (citing RX-242C at Q/A 420-434).)

Complainants dispute Chic’s allegations, arguing that Chic – “by retroactively cobbling together three disparate references” – is engaging in “the essence of impermissible hindsight reasoning.” (CIB at 34.) They insist that Chic has failed to provide any meaningful explanation of how and why Kamen, Nishikawa, and Conrad could be combined to render the claims obvious. (*Id.* at 34-36.) Staff concurs. In Staff’s view, Chic has not established by clear and convincing evidence that one of ordinary skill in the art would have had a motivation to combine these three references to arrive at the invention in claim 1. (SIB at 45-49.)

Complainants and Staff do not appear to dispute that this combination arguably covers all the limitations of claim 1. (CIB at 34-36; SIB at 48-49.) Thus, the focus must center on whether Chic has shown by clear and convincing evidence that one of ordinary skill in the art would have been motivated to combine these three references.³⁵ For the reasons set forth below, the undersigned finds that Chic has failed to do so.

To successfully invalidate the asserted claims, Chic must provide “an apparent reason to combine the known elements in the fashion claimed by the patents at issue.” *KSR Int’l*, 550 U.S. at 418. In determining whether there would have been a motivation to combine prior art references to arrive at the claimed invention, it is insufficient to simply conclude the combination would have been obvious without identifying any reason why a person of skill in the art would

³⁵ As both Complainants and Staff correctly note, this type of combination was before the patent examiner during prosecution of the ’278 patent (CIB at 34 (noting “[d]espite awareness of single-wheel, self-balancing vehicles and articulated skateboards, the Examiner deemed the claimed invention non-obvious.”; SIB at 49.) The background section of the ’278 patent summarizes the prior art as: [1] Segway-type devices that have a single platform and conceptually similar to Kamen; [2] two-wheel self-balancing vehicles with two platform section that are linked (and thus not independently moveable); and [3] articulated skateboards like Conrad. (*See* JX-0001.0007 at 1:24-67.) In addition, several prior art references (*e.g.*, U.S. applications 2013/0032422, 2013/0032423, and 2013/0228385) similar to Nishikawa were also cited during prosecution. (*Id.* at .0002.)

have made the combination. *See In re Van Os*, 844 F.3d 1359, 1361 (Fed. Cir. 2017); *see also Metalcraft of Mayville, Inc. v. The Toro Co.*, 848 F.3d 1358, 1366 (Fed. Cir. 2017). It is also not enough for Chic to merely demonstrate that every element of the claimed invention was independently known in the prior art. *KSR Int'l*, 550 U.S. at 418 (“a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.”) As the Federal Circuit has recognized, “[o]ften, every element of a claimed invention can be found in the prior art.” *In re Kotzab*, 217 F.3d 1365, 1370 (Fed. Cir. 2000). Moreover, “knowledge of a problem and motivation to solve it are entirely different from motivation to combine particular references.” *Innogenetics, N.V. v. Abbott Labs.*, 512 F.3d 1363, 1373 (Fed. Cir. 2008).

Here, Chic’s and its expert’s rationales for combining these three disparate references are conclusory in nature. (RIB at 41-43; RX-0242C at Q/A 423.) For example, Chic argues that it would have been obvious to modify the vehicle of Kamen by providing two one-wheeled devices – one for each foot of the rider as shown in Nishikawa – (and to couple the devices based on the disclosures in Conrad) to improve the stability of the vehicle.³⁶ (RIB at 41; *see also* RX-0242C at Q/A 423, 426-427.) According to Chic, the benefit of such a modification would be “greater stability.” (RIB at 41; *see also* RX-0242C at Q/A 423, 433.) Beyond this bare assertion, Chic does not explain why a skilled artisan would have expected this combination to result in a more stable vehicle. In fact, as Dr. Richter testified, such a combination may very well result in the exact opposite result – *i.e.*, a more unstable and potentially inoperable vehicle. (CX-1502C at Q/A 290, 292-293; *see also* RX-0366C at .012 [REDACTED])

³⁶ Chic’s other argument that Conrad’s coupling of the two Kamen vehicles together would enable “differential drive steering . . . by simply tilting . . . left and right feet independently of each other” is similarly unavailing. Yet again, Dr. Nourbakhsh does not explain why a person of ordinary skill in the art would believe coupling two of Kamen’s single-wheel devices together would yield any improvement in differential drive steering capability. (*See* RX-0242C at Q/A 425; CX-1520C at Q/A 291.)

[REDACTED]

[REDACTED]

[REDACTED].) Chic also fails to explain why a person of ordinary skill in the art would connect such different devices with a semi-flexible connector. (*Id.* at Q/A 290; *see also* RX-0242C at Q/A 426 (testifying that Conrad was a “suitable mechanism” for providing independent rotational movement); Nourbakhsh, Tr. at 736:16-20, 750:16-751:7 (conceding that there would be many ways to connect the two Kamen devices together and at deposition, stating that “independently moveable” foot placement sections would not add any “benefit” from the perspective of a person of ordinary skill in the art).)

Without any real explanation as to how or why these references would be combined to arrive at the claimed invention, it appears that Chic is improperly relying on hindsight reconstruction or *ex post* reasoning. *See KSR*, 550 U.S. at 421 (“A factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning.”). And, as the Federal Circuit has stated: “[W]hile we understand that ‘[t]he obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation,’ we also recognize that we cannot allow hindsight bias to be the thread that stitches together prior art patches into something that is the claimed invention. *Metalcraft of Mayville, Inc.*, 848 F.3d at 1367; *see also KSR*, 550 U.S. at 419, 421.

The undersigned therefore finds that Chic has failed to meet its burden to show that the asserted combination renders claim 1 obvious.

ii. Dependent Claims

Chic alleges that claims 2-8 are obvious under 35 U.S.C. § 103 in view of Kamen, Nishikawa, and Conrad. Claims 2-8 all depend from claim 1 and include all of the limitations of

claim 1. Thus, for the reasons stated above in the discussion of claim 1, the undersigned finds that Chic has failed to show by clear and convincing evidence that one of ordinary skill in the art would have been motivated to combine these three references to arrive at the claimed invention. (See CX-1520C at Q/A 294-301.) Accordingly, claims 2-8 are not obvious over the asserted prior art references.

2. Invalidity under 35 U.S.C. § 112

Respondents contend that the asserted claims are invalid for lack of written description and lack of enablement based on the ‘control logic’ claim limitation.”³⁷ (RIB at 55.)

a) Written Description

Respondents assert that the patent specification fails to describe the specific claimed “control logic” in such a way that a person of ordinary skill in the art would have understood it. (RIB at 56.) Respondents explain that the ’278 patent’s specification “does not disclose *what* electronic circuitry or *how* such electronic circuitry would perform the claimed functions to show that the inventor was in possession of the invention at the time of filing.” (*Id.* at 57.) According to Respondents, the patent “discloses the claimed ‘control logic’ only as an empty box in the figures and attributes to it general properties, without explaining how to achieve those properties.” (*Id.*)

According to Respondents: “If Mr. Chen possessed the claimed ‘control logic’ on the filing date, he could and should have described it in the patent’s specification as he did regarding other aspects of the claimed invention.” (*Id.* at 56.) Respondents explain that the evidence shows

³⁷ Ground Rule 8.2 requires a party’s contentions to be set forth in detail in the prehearing brief. (See G.R. 8.2.) Jetson, Powerboard, Alibaba, and Skque either incorporated by reference the defenses asserted by the other Respondents in their respective prehearing briefs or reserved their rights as to this issue. (See Skque PHB at 7; Jetson/Powerboard PHB at 39-40; Alibaba PHB at 42-43.) This is not sufficient to comply with Ground Rule 8.2 and as a result, these Respondents have waived the right to assert any § 112 arguments.

that Mr. Chen “ [REDACTED] ” (*Id.* at 58.)

Complainants argue that Respondents fail to carry their burden to prove lack of written description by clear and convincing evidence. (CIB at 48.) Complainants assert that Respondents “repeat arguments made during claim construction.” (*Id.* at 49.) Complainants further assert that evidence with respect to “the existing knowledge in the particular field, the extent and content of the prior art, the maturity of the science or technology,” and “the predictability of the aspect at issue” support a finding that the patent satisfies the written description requirement. (*Id.* at 49-51.)

Staff asserts that “the patent is not required to teach all the details involved in the ‘control logic’ term, as such are already well known in the art.” (SIB at 56.) Staff explains that the undersigned acknowledged as much in the *Markman* order. (*Id.*) Staff further asserts that the ’278 specification also discloses on a high level “the functional operations of the control circuitry such that one of ordinary skill in the art would understand that the inventor was in possession of the invention claimed.” (*Id.*)

A patent’s written description “must clearly allow persons of ordinary skill in the art to recognize that the inventor invented what is claimed.” *Ariad Pharm. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010). “In other words, the test for sufficiency is whether the disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.” *Id.* “[T]he level of detail required to satisfy the written description requirement varies depending on the nature and scope of the claims and on the complexity and predictability of the relevant technology.” *Id.* In making this determination, courts consider factors such as “the existing knowledge in the particular field, the

extent and content of the prior art, the maturity of the science or technology, and the predictability of the aspect at issue.” *Id.*

The purpose of the written description requirement is to allow a person of ordinary skill in the art to recognize that the inventor invented what is claimed. *Id.* Complainants assert that the “control logic” - while a component of the invention - is not the inventive aspect of what is claimed. Indeed, Mr. Chen testified that he [REDACTED] [REDACTED]” (Chen, Tr. 149:9-11, 164:15-25, 166:13-167:11.) Accordingly, the patent need not describe the “control logic,” in great detail, just as a patent is not required to describe a feature or component of an invention that is already within the knowledge of a person of ordinary skill in the art.³⁸ *LizardTech, Inc. v. Earth Resource Mapping, Inc.*, 424 F.3d 1336, 1345 (Fed. Cir. 2005) (“[T]he patent specification is written for a person of skill in the art, and such a person comes to the patent with the knowledge of what has come before. Placed in that context, it is unnecessary to spell out every detail . . . only enough must be included to convince a person of skill in the art that the inventor possessed the invention.”). As Complainants note, the patent “likewise omits detailed discussion of how to build a motor or a gyroscopic position sensor.” (CRB at 29.)

Respondents do not dispute that “control logic” was within the knowledge of a person of ordinary skill in the art. They assert that this *specific* control logic – one that drives the wheels towards self-balancing – is not adequately described. They do not, however, introduce clear and convincing evidence that a person of skill would not understand what the inventor possessed. The evidence shows that the “existing knowledge in the particular field” and the “maturity of the

³⁸ Accordingly, Respondents argument that Mr. Chen “could and should have described [the claimed ‘control logic’] in the patent’s specification as he did regarding other aspects of the claimed invention” falls flat. (See RIB at 56.) “A patent need not teach, and preferably omits, what is well known in the art.” *Hybritech, Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367, 1384 (Fed. Cir. 1986).

science of technology” factors both weigh in favor of a determination that the written description requirement is satisfied. The evidence shows that there is a history of self-balancing vehicles going back to “the ‘60s or ‘70s” and that “the dynamics of self-balancing two wheel vehicles in the pitch direction were pretty well understood by the time Shane Chen filed for his ’278 patent.” (Singhose, Tr. at 880:14-881:6.) Therefore, the undersigned finds that the written description requirement is met.

b) Enablement

Respondents assert: “To the extent the CALJ finds that the asserted claims are not invalid under 35 U.S.C. § 103 because the claimed ‘control logic’ was not disclosed in the prior art, then the asserted claims are invalid because they are not enabled by the ’278 patent’s specification.” (RIB at 59; *see also* RRB at 28.) Although the undersigned found that Li, in combination with Conrad and Sasaki, did not disclose “control logic that drives the first wheel towards self-balancing . . .,” this finding was not based on a lack of “control logic” in the asserted combination, but rather the failure of the asserted combination to disclose that a control logic that drives one wheel in response to *position data from a first sensor* and the other wheel in response to *position data from a foot placement section*. Accordingly, Respondents’ enablement argument need not be decided.

VI. DOMESTIC INDUSTRY – ECONOMIC PRONG

A. Razor’s Domestic Industry

Complainants use two methods to allocate Razor’s expenses under sections 337(a)(3)(A), (B), and (C). 19 U.S.C. § 1337(c)(3)(A), (B), and (C). Complainants state that the first method is a “headcount-based allocation,” which estimates the amount of time that each employee spends on Hovertrax production-related activities. They argue that this is determined by dividing the

number of Hovertrax full-time equivalents (“FTEs”) for each department by the total number of employees in each department. (CIB at 59-60.) Complainants assert that the second method is a “sales-based allocation” methodology. They note that the portion of Razor’s U.S. expenses allocable to Hovertrax is determined by comparing Razor’s U.S. sales of Hovertrax to its U.S. sales of all of its products. Complainants argue that the reliability of each method is demonstrated by the fact that the headcount-based and sales-based methodologies yield similar results. (*Id.* at 60.)

Complainants assert that Razor has met the economic prong under section 337(a)(3)(A) because it has made significant investments in plant and equipment at its Cerritos, California headquarters. Applying the headcount-based allocation method, they state that the portion of Razor’s plant and equipment expenses for Hovertrax production-related and support activities was approximately \$ [REDACTED] between October and December 2015 and \$ [REDACTED] between January and September 2016. They note that using the sales-based allocation of Razor’s Cerritos headquarters for the same time periods yields \$ [REDACTED] between October and December 2015 and \$ [REDACTED] between January and September 2016. Complainants state that the comparable figures for similar activities at its China plant were \$ [REDACTED] and \$ [REDACTED], respectively. (*Id.* at 61-63.)

Complainants also assert that Razor has met the economic prong under section 337(a)(3)(B) because it has spent significant amounts on labor and capital at its Cerritos, California plant. Applying the headcount-based allocation method, Complainants state that the portion of Razor’s labor and capital expenses for activities for Hovertrax was approximately \$ [REDACTED] between October and December 2015 and \$ [REDACTED] between January and September 2016. They note that using the sales-based allocation for Razor’s Cerritos headquarters for the same time periods yields \$ [REDACTED] between October and December 2015 and \$ [REDACTED]

between January and September 2015. Complainants state that the comparable figures for similar activities at its China plant were \$ [REDACTED] and \$ [REDACTED], respectively. (*Id.* at 64-66.)

Complainants further assert that Razor has met the economic prong under section 337(a)(3)(C) because Razor has spent significant amounts on engineering and research and development (“R&D”) to exploit the ’278 patent. Applying the headcount-based allocation method, they state that the portion of Razor’s engineering and R&D expenses to exploit the ’278 patent was approximately \$ [REDACTED] between October and December 2015 and \$ [REDACTED] between January and September 2016. (*Id.* at 66-68.) Additionally, Complainants argue that Razor is in the process of establishing a domestic industry for the [REDACTED]. They state that this process began in January 2016 and continued throughout 2016 and 2017. (*Id.* at 68-69.)

Complainants disagree with Respondents that the domestic industry products must be manufactured in the United States. They also disagree with Respondents’ assertion that Razor failed to present evidence establishing a domestic industry at the time the complaint was filed. According to Complainants, they did present evidence of Razor’s domestic investments from October 2015 through September 2016. Complainants state that, contrary to Respondents’ allegations, they used appropriate headcount-based and sales-based allocation methods. Complainants also assert that Razor’s domestic industry expenditures are not inflated due to the inclusion of expenses related to [REDACTED]. (CRB at 31-33.)

Respondents argue that Razor’s headcount-based and sales allocation methods are improper methods to determine whether the economic prong has been met. Respondents claim that Complainants’ calculation for Razor’s plant and investments are inaccurate and overstated. Respondents make similar arguments with respect to Razor’s investments in labor and capital. With respect to investments in licensing and R&D, Respondents assert that Complainants have

not shown that any R&D costs have anything to do with the asserted claims of the '278 patent. Respondents also state that Complainants' arguments as to the [REDACTED] are not supported. Accordingly, Respondents argue that Complainants have not demonstrated that Razor meets the economic prong requirements. (RIB at 63-68; RRB at 29-32.)

Staff agrees that Razor has satisfied the economic prong requirements of 19 U.S.C. § 1337(a)(3)(A), (B), and (C). (SIB at 58-65; SRB at 16-17.)

1. Allocation Methodologies

a) Headcount-Based Allocation Methodology

The record reflects that Razor does not maintain, in the ordinary course of business, expense records or employment data on a product-specific basis. (CX-0184C at Q/A 104-107; Rosolowski, Tr. 572:8-12.) However, Mr. Rosolowski, Razor's Chief Financial Officer, met with and instructed each department manager and the respective staff members to review the respective monthly activities and estimate time spent on Hovertrax production-related activities. (CX-0184C at Q/A 112-119; CX-0265C; CX-0350C; Rosolowski, Tr. 572:25-574:12.)³⁹ Mr. Rosolowski calculated a headcount percentage by dividing the number of Hovertrax FTEs for each department by the total number of employees in each department:

Figure VI.01: Headcount Percentage by Department

	Global Sourcing	Quality Control	R&D	New Brand Development	Executive Management	Admin.
Oct. 2015 – Dec. 2015	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Jan. 2016 – Sept. 2016	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

(CX-0184C at Q/A 133-138; CX-0265C; CX-0349C; CX-0350C.)

The undersigned is not persuaded by Respondents' argument that Razor's headcount-based allocation is based on employee time spent working on Hovertrax "in any capacity."

³⁹ Razor's expenditures on Hovertrax marketing, sales, finance, accounting, human resources, and legal are not included in the domestic industry analysis. (CX-0184C at Q/A 37, 137, and 145.)

Complainants have demonstrated that its calculation of the headcount-based allocation methodology is a reasonable means to allocate Razor's plant, equipment, and labor. As the evidence demonstrates, Razor's headcount-based methodology is based only on the time of individuals who perform preproduction and post-manufacturing activities related to Hovertrax. (CX-0184C at Q/A 105-107, 112.)

b) Sales-Based Allocation Methodology

With respect to the sales-based allocation methodology, the record reflects that Razor maintains sales data specific to Hovertrax in the ordinary course of business. (CX-0184C at Q/A 84-95, 98-103.) The portion of Razor's U.S. expenditures allocable to Hovertrax can be determined by comparing Razor's U.S. sales of Hovertrax to its U.S. sales across all of its products.

Figure VI.02: Sales of Hovertrax Relative to Sales of all Razor Products		
	Nov.-Dec. 2015	Jan.- Sept. 2016
Hovertrax Sales as % of Total	■	■

(CX-0184C at Q/A 88-95, 167-169; Rosolowski, Tr. 598:9-599:10; CX-0354C; CX-0353C.) The sales-based allocation methodology is a reasonable and accurate means to allocate Razor's U.S. expenses attributable to Hovertrax.⁴⁰ *Certain Ground Fault Circuit Interrupters and Prods. Containing Same*, Inv. No. 337-TA-739, Comm'n Op. (Pub. Version) at 74-75 (June 8, 2012) (Leviton's use of a sales-based methodology is an integral part of the Commission's finding of the economic prong determination in favor of Leviton).

Respondents' argument that this methodology is inappropriate because it is based on sales revenues is not persuasive. Revenue sales-based allocations are a permissible method of calculating domestic industry expenditures. *Certain Laminated Floor Panels*, Inv. No. 337-TA-

⁴⁰ See CX-0184C at Q/A 167-169.

545, Order No. 17 (Initial Determination), 2006 WL 814350, at *2 (Mar. 2, 2006).⁴¹ Respondents' argument that the headcount-based and sales-based allocation percentages do not show exactly what the percentage was as of March 23, 2016, the date of the filing of the complaint,⁴² is also not persuasive. The data used by Complainants is a reasonable estimate of the percentages as of March 23, 2016. As the Commission has stated, "[a] precise accounting is not necessary" to prove the existence of a domestic industry." *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm'n Op. at 25 (May 16, 2008).

2. Significant Investment in Plant and Equipment – 19 U.S.C. § 1337(a)(3)(A)

Razor makes significant investments in plant and equipment for activities related to Hovertrax through expenditures at its Cerritos headquarters. (CX-0184C at Q/A 34-37.) Razor rents its Cerritos headquarters and Razor's annual expenditures related to plant and equipment appear on its Income Statement Detail. (*Id.* at Q/A 26-30, 43-83; CX-0216C.) Complainants use reasonable allocation methodologies to determine the amount of plant and equipment expenses to create a Hovertrax-specific analysis to approximate Razor's domestic industry expenses and activities. (CX-0184C at Q/A 138-145; CX-0256C.)⁴³ Mr. Rosolowski coded individual general ledger accounts as plant, equipment, labor and R&D, and isolated cost codes for each department associated with Hovertrax production-related activities, and then aggregated the expenses. (*Id.*)

Razor incurs overall plant expenses such as rent, maintenance, repairs, utilities, insurance, and property tax. (CX-0184C at Q/A 60, 138-141; Rosolowski, Tr. at 605:25-607:4.) Razor's total plant expense for its Cerritos headquarters alone was approximately \$ [REDACTED]

⁴¹ The Commission determined not to review this initial determination. (*See* Notice of Commission Determination Not to Review an Initial Determination Finding that the Economic prong of the Domestic Industry Requirement is Satisfied (Apr. 7, 2006).)

⁴² *See* Cover letter to Compl. at 1.

⁴³ None of Razor's expenses for its Rialto warehouse were included in this domestic industry analysis. (CX-0184C at Q/A 621; Rosolowski, Tr. at 605:14-24; CDX-191C.)

between October and December 2015. (CX-0184C at Q/A 60, 138-141; Rosolowski, Tr. at 605:25-607:4; CX-0256C at col. 800 (aggregating plant expenses).)

Razor incurs expenses in the U.S. for equipment used to design, engineer, develop, and support the Hovertrax, including 3D printing equipment, prototyping equipment, samples, test equipment, raw material, and welding, cutting and fabrication stations, in addition to printers, computers, software, and furniture. (CX-0184C at 138-141.) Razor's total equipment expenses for its Cerritos headquarters alone was approximately \$ [REDACTED] between October and December 2015. (CX-0184C at 138-141; CX-0256C at col. 630-800 (aggregate equipment expenses).)

Applying the headcount-based allocation to Razor's Cerritos headquarters, the portion of Razor's plant and equipment expenses for production-related and support activities for Hovertrax was approximately \$ [REDACTED] between October and December 2015. (CX-0184C at Q/A 144-145; CX-0256C at col. 630-800 (aggregating plant & equipment expenses).) Applying the sales-based allocation to Razor's Cerritos headquarters for each time period, the portion of Razor's plant and equipment expenses allocable to Hovertrax was similar, approximately \$ [REDACTED] between October and December 2015. The similarity of the results of the headcount and sales allocation methodologies demonstrates their reliability:

Plant & Equipment Expense for Cerritos Headquarters Allocated to Hovertrax: Oct. – Dec. 2015	
Cerritos' Total Plant & Equipment Expenses	\$ [REDACTED]
Applying Headcount-based Allocation	\$ [REDACTED]
Applying Sales-based Allocation	\$ [REDACTED]

(CX-0184C at Q/A 138-141; CX-0256C.)

Razor China's⁴⁴ plant and equipment expenses (excluding taxes) for all activities across the [REDACTED] product models were approximately \$ [REDACTED] from October to December 2015,

⁴⁴ Razor China is Razor's foreign, in-country office responsible for [REDACTED]

(CX-0184C at Q/A 32-33, 161-163.)

showing that Razor's U.S. relevant activities are significant when compared to similar activities incurred by Razor China. (*Id.*)

Accordingly, the undersigned finds that Complainants have demonstrated that Razor meets the economic prong under section 337(a)(3)(A).

3. Significant Investment in Labor or Capital – 19 U.S.C. § 1337(a)(3)(B)

Razor has shown that approximately [REDACTED] people Razor employs at its Cerritos headquarters are involved in the Hovertrax design, R&D, quality, and testing activities previously described. (CX-0184C at Q/A 37; 107-115; CX-0256C.) These skilled personnel include product designers, product developers and testers, materials engineers, electrical engineers, industrial designers, and product managers. (CX-0184C at Q/A 50-59, 61; CX-0185C at Q/A 24-27, 117-123, 127.) The headcount-based allocation percentages were used to calculate the amount of gross pay for each employee to allocate to Hovertrax. (CX-0184C at Q/A 120-122, 125-126, 130-137; CX-0256C at "Cost Allocated to Hovertrax".) Mr. Rosolowski also isolated benefits such as 401(k) match, vacation, payroll taxes, worker's compensation, and health insurance charged to each department and applied the headcount allocation. (CX-0184C at Q/A 133; CX-0256C at "employee related cost".) According to IRS Code Section 41 regarding the R&D credit for Razor's business structure, the appropriate salary for razor's owners includes all elements of compensation including any draw, bonus or profit. (CX-0184C at Q/A 123-127; CX-0263C; CX-0355C; Rosolowski, Tr. at 599:15-600:11.)

Razor's total labor expense for the employees at its Cerritos headquarters alone was approximately \$ [REDACTED] between October through December 2015. (CX-0256C at "Total Payroll and Related Costs" (aggregating cols. 630-800 and 710).) Applying the headcount-based allocation to Razor's Cerritos headquarters, the portion of Razor's labor expenses attributable to production-related and support for Hovertrax was approximately \$ [REDACTED] from October to

December 2015. (CX-256C at “Direct and Allocated Hovertrax Cost” EMP (cols. 630-800 and 710).) Applying the sales-based allocation to Razor’s Cerritos headquarters for each time period, the portion of Razor’s labor expenses for production-related and support activities for Hovertrax was approximately \$ [REDACTED] from October to December 2015. (CX-0184C at Q/A 167-169; CX-0256C.)

Razor’s total U.S. labor expenses directed to Hovertrax exceed Razor’s total China labor expenses for all Razor products because China-based expenses are approximately \$ [REDACTED] from October to December 2015. (CX-0184C at Q/A 163-166; CX-266C; CX-256C.) Moreover, Razor’s senior executives are heavily involved in the product development of the Hovertrax. From October to December 2015, Mr. Calvin and Mr. Chen dedicated approximately [REDACTED] [REDACTED] of their time, respectively, to product development, design, and manufacturability activities related to the Hovertrax 1.0 and 2.0. (CX-0184C at Q/A 56-59; CX-0256C; Rosolowski, Tr. at 603:11-25.)

Accordingly, the undersigned finds that Complainants have demonstrated that Razor meets the economic prong under section 337(a)(3)(B).

4. Significant Investment in Exploitation, Including Engineering, Research and Development or Licensing – 19 U.S.C. § 1337(a)(3)(C)

Complainants state that Razor practices each and every claim limitation of the ’278 patent. They argue that Razor makes substantial investments specifically directed to engineering and R&D to exploit the claimed features of the ’278 patent.

The undersigned has already determined that Razor has met the economic prong under sections 337(a)(3)(A) and (B.) Accordingly, the undersigned need not decide whether Razor meets the economic prong under section 337(a)(3)(C).

5. Domestic Industry in the Process of Being Established

Complainants failed to identify any investments specific to the [REDACTED]. In addition, they presented evidence that the investments in the [REDACTED]. (Rosolowski, Tr. at 591:5-592:4.) Accordingly, the undersigned finds that Complainants have not demonstrated that Razor is in the process of establishing a domestic industry with respect to the [REDACTED].

6. Conclusion

For the reasons set forth above, Razor has satisfied the economic prong of the Domestic Industry requirement.

B. Inventist's Domestic Industry

Complainants assert that Inventist has satisfied the domestic industry requirement by virtue of its licensee Razor's investments and activities directed to the Hovertrax domestic industry products. (CIB at 69.) Staff agrees. (SIB at 65.) Respondents maintain that Inventist, like Razor, has failed to establish a protectable domestic industry. (RIB at 68-72.)

The economic prong of the domestic industry requirement can be established where a complainant bases its claim on the activities of a licensee. *See Certain Electronic Devices, Including Handheld Wireless Commc'ns Devices*, Inv. No. 337-TA-673/667, Order No. 49C (Pub. Version), Initial Determination at 5 (Nov. 16, 2009) (unreviewed); *see also Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Order No. 22 (Pub. Version) at 7 (Mar. 29, 2006) (unreviewed in relevant part) ("Indeed, the economic prong of the domestic industry requirement can be established where a complainant bases its claim exclusively on the activities of a contractor/licensee."). As discussed above in Section VI.A., Razor satisfies the domestic industry requirement under § 1337(a)(3)(A) and (B). The undersigned therefore finds that Inventist,

through the qualifying activities of its licensee Razor, also satisfies the domestic industry requirement.⁴⁵

VII. CONCLUSIONS OF LAW

1. The Commission has personal jurisdiction over the parties, and subject-matter jurisdiction over the accused products.
2. The importation or sale requirement of section 337 is satisfied as to all Respondents, except for Alibaba.
3. Alibaba is not an agent of an owner, importer, or consignee such that Alibaba's actions related to the sale of the accused products are actionable under section 337.
4. Chic, Swagway, Modell's, Newegg, Skque, Powerboard, and Jetson do not infringe claims 1-3 and 5-8 of U.S. Patent No. 8,738,278.
5. GyroGlyder.com, Soibatian Corporation d.b.a. IO Hawk and d.b.a. Smart Wheels, Shenzhen Kebe Technology Co., Ltd., PhunkeeDuck, Inc., Shenzhen Jomo Technology Co., Ltd., Shenzhen Supersun Technology Co. Ltd., a.k.a. Aottom, Twizzle Hoverboard, Uwheels, Joy Hoverboard a/k/a Huizhou Aoge Enterprize Co. Ltd., Shenzhen Chenduoxing Electronic Technology Ltd., Shareconn International, Inc., Shenzhen R.M.T. Technology Co., Cyboard LLC a/k/a Shark Empire Inc., HoverTech, Leray Group a.k.a. ShanDao Trading Co., Ltd., and Spaceboard USA infringe claims 1-3 and 5-8 of U.S. Patent No. 8,738,278.
6. The asserted claims of U.S. Patent No. 8,738,278 are not invalid under 35 U.S.C. § 112 for lack of written description.
7. The asserted claims of U.S. Patent No. 8,738,278 are not invalid under 35 U.S.C. § 112 for lack of enablement.
8. The asserted claims of U.S. Patent No. 8,738,278 are not invalid under 35 U.S.C. § 103 for obviousness.
9. The technical prong of the domestic industry requirement for U.S. Patent No. 8,738,278 has not been satisfied.
10. The economic prong of the domestic industry requirement has been satisfied.

⁴⁵ While Complainants also contend that Inventist's own investments in plants and equipment, labor and capital, and design, development and production-related activities satisfy the economic prong, the undersigned has already determined that Inventist satisfies the economic prong through the qualifying activities of its licensee Razor. Thus, the undersigned need not decide whether Inventist's own investments satisfy the economic prong under sections 337(a)(3)(A)-(C).

VIII. RECOMMENDED DETERMINATION ON REMEDY AND BOND

The Commission's Rules provide that subsequent to an initial determination on the question of violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, the administrative law judge shall issue a recommended determination concerning the appropriate remedy in the event that the Commission finds a violation of section 337, and the amount of bond to be posted by respondent during Presidential review of the Commission action under section 337(j). *See* 19 C.F.R. § 210.42(a)(1)(ii).

The Commission has broad discretion in selecting the form, scope and extent of the remedy in a section 337 proceeding. *Viscofan, S.A. v. Int'l Trade Comm'n*, 787 F.2d 544, 548 (Fed. Cir. 1986). Under Section 337(d)(1), if the Commission determines as a result of an investigation that there is a violation of section 337, the Commission is authorized to enter either a limited or a general exclusion order. 19 U.S.C. § 1337(d)(1). A limited exclusion order instructs the U.S. Customs and Border Protection ("CBP") to exclude from entry all articles that are covered by the patent at issue and that originate from a named respondent in the investigation. A general exclusion order instructs the CBP to exclude from entry all articles that are covered by the patent at issue, without regard to source. *Certain Purple Protective Gloves*, Inv. No. 337-TA-500, Comm'n. Op. at 5 (Dec. 22, 2004).

A. General Exclusion Order

Section 337(d)(2) provides that a general exclusion order ("GEO") may issue in cases where (a) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named respondents; or (b) there is a widespread pattern of violation of Section 337 and it is difficult to identify the source of infringing products. 19 U.S.C. § 1337(d)(2). The statute essentially codifies Commission practice under *Certain Airless Paint Spray Pumps and Components Thereof*, Inv. No. 337-TA-90, Comm'n Op. at 18-19, USITC Pub.

119 (Nov. 1981) (“*Spray Pumps*”). See *Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing the Same*, Inv. No. 337-TA-372 (“*Magnets*”), Comm’n Op. on Remedy, the Public Interest and Bonding at 5 (USITC Pub. 2964 (1996)) (statutory standards “do not differ significantly” from the standards set forth in *Spray Pumps*). In *Magnets*, the Commission confirmed that there are two requirements for a general exclusion order: [1] a “widespread pattern of unauthorized use;” and [2] “certain business conditions from which one might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles.” *Id.* The focus now is primarily on the statutory language itself and not an analysis of the *Spray Pump* factors. *Ground Fault Circuit Interrupters and Prods. Containing Same*, Inv. No. 337-TA-615, Comm’n Op. at 25 (Mar. 9, 2009).

Complainants assert that a general exclusion order (“GEO”) is necessary because “(A) an [limited exclusion order] would likely be circumvented and (B) there is a pattern of violation of Section 337 and sources of infringing hoverboards can be difficult to identify.” (CIB at 76.) They contend that the record supports issuing a GEO under § 1337(d)(2)(A) and (B). (*Id.* at 77-81 (discussing the factors of demand and profitability, potential market entrants, persisting sales of infringing products, well-established channels, private-labeling, deceptive practices, business conditions, supply chain and distribution relationships, and defaulting respondents).) If a violation is found only with respect to the Defaulting Respondents, Complainants maintain that a GEO is still appropriate because “there is substantial, reliable, and probative evidence” of a violation of section 337 and the requirements of section 337(d)(2) are met. (*Id.* at 77.) Staff concurs. (SIB at 70-75.)

Respondents submit that if the Commission finds a violation, the evidence shows that Complainants have failed to carry their burden of showing that a GEO is necessary. (RIB at 75-76.)

While a violation has been found as to the Defaulting Respondents, the undersigned does not agree with Complainants and Staff that a GEO should issue. To obtain a GEO, the complainant must not only prove that a violation of section 337 has occurred, but must also satisfy one of two criteria in section 337(d)(2) – it must demonstrate that either (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 evidence relied on by Complainants in support of their request predominantly relates to those Respondents *not found to infringe the '278 patent*.⁴⁶ (See, e.g., CIB at 76-81.) This is insufficient for Complainants to meet the heightened burden of showing that it is entitled to a GEO.

For the reasons stated above, the undersigned does not recommend the issuance of a general exclusion order at this stage of the proceeding.⁴⁷

B. Limited Exclusion Order

Under section 337(d), the Commission may issue a limited exclusion order directed to a respondent’s infringing products. 19 U.S.C. § 1337(d). A limited exclusion order instructs the U.S. Customs Service to exclude from entry all articles that are covered by the patent at issue that originate from a named respondent in the investigation. *Fuji Photo Film Co. Ltd. v. Int’l Trade Comm’n*, 474 F.3d 1281, 1286 (2007).

⁴⁶ Complainants cannot simply rely upon the Defaulting Respondents’ defaults to establish its case for a GEO.

⁴⁷ However, should the Commission determine that the active Respondents do infringe the '278 patent, then the undersigned believes the evidence supports issuance of a general exclusion order.

In the event a violation is found and the Commission declines to issue a general exclusion order, Complainants request that a limited exclusion order issue prohibiting Respondents from importing motorized self-balancing vehicles that infringe the '278 patent. (CIB at 82; CRB at 35.)

Respondents submit that if one or more parties are found in violation of section 337, the proper remedy would be a limited exclusion order. (RIB at 72.) They believe that any limited exclusion order should “identify and apply to (1) the specific parties who import into the U.S., sell for importation into the U.S., or sell within the U.S. the specific products and models found to infringe the asserted claims of the asserted patent; and (2) those specific products found to infringe the asserted claims of the asserted patent.” (*Id.* at 72-73.) Respondents also request that the limited exclusion order include an exception to allow for service and repair for any products already sold to consumers prior to the issuance of any order. (*Id.* at 73.)

If a violation is found, Staff believes an LEO should issue against the Respondents found to infringe the asserted claims of the '278 patent. (SIB at 75.) Staff does not believe Alibaba violates section 337 and therefore recommends that “no LEO should include Alibaba.” (*Id.* at 75.) Staff also recommends that any limited exclusion order carve out an exception for Chic’s ■ products, to the extent Chic is found in violation of section 337. (*Id.* at 77; *see also* SRB at 18 n. 8.) As to the Defaulting Respondents, Staff agrees with Complainants that a limited exclusion order is an appropriate remedy.⁴⁸ (*Id.* at 75-76.)

To the extent the Commission determines that Respondents infringe the asserted claims of the '278 patent, the undersigned recommends the issuance of a limited exclusion order. The

⁴⁸ Staff notes that “[a]ssuming a GEO is issued, the LEO against the Defaulting Respondents should be limited to the allegations in the Complaint that were subsequently withdrawn.” (SIB at 76; SRB at 18.) Staff also believes “the LEO should prohibit the importation and sale of products falsely advertised as containing Samsung or LG batteries or as being UL certified to the extent these allegations under 337(a)(1)(A) were asserted against the defaulting Respondents.” (*Id.*)

undersigned believe the limited exclusion order should specifically identify products because, as Staff correctly noted, “an exclusion order provides prospective relief and model numbers and product offerings can change over time.” (SIB at 77.) With respect to the Defaulting Respondents, the undersigned believes a limited exclusion order is the proper remedy given that the Commission presumes the facts alleged in the complaint to be true.

C. Cease and Desist Order

Under section 337(f)(1), the Commission may issue a cease and desist order in addition to, or instead of, an exclusion order. 19 U.S.C. § 1337(f)(1). The Commission generally issues a cease and desist order directed to a domestic respondent when there is a “commercially significant” amount of infringing, imported product in the United States that could be sold, thereby undercutting the remedy provided by an exclusion order. *See Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293 USITC Pub. 2391, Comm’n Op. on Remedy, the Public Interest and Bonding at 37-42 (June 1991); *Certain Condensers, Parts Thereof and Prods. Containing Same, Including Air Conditioners for Automobiles*, Inv. No. 337-TA-334 (Remand), Comm’n Op. at 26-28, 1997 WL 817767, at *11-12 (U.S.I.T.C. Sept. 10, 1997).

Complainants believe that cease and desist orders (“CDOs”) are appropriate against all Respondents. (CIB at 82.) In particular, they assert that CDOs should be directed to Chic, Swagway, Modell’s, Powerboard, Skque, Jetson, and Newegg based on “their commercially significant inventory” and “should explicitly encompass internet and sales activities.” (*Id.*) Complainants also assert that “it is reasonable to infer all the Defaulting Respondents ‘possess or control commercially significant inventory in the United States’ and CDOs should be issued as to each of them.” (*Id.* at 84 (arguing that the domestic Defaulting Respondents are presumed to have commercially significant U.S. inventory and the foreign Defaulting Respondents either ship

accused products from U.S. facilities or maintain accused products in a U.S. warehouse).) In addition, Complainants contend that a CDO as to Alibaba is necessary, even if the Commission determines that an LEO is not. (CIB at 84.) They explain that “without a CDO directed to Alibaba, the relief provided by a GEO and LEO would be seriously undermined or circumvented as Respondents and non-parties would continue to advertise, sell, and ship infringing hoverboards from U.S. warehouses using Alibaba.com.” (CIB at 84-85.)

Respondents assert that Complainants have failed to prove that a cease and desist order is a necessary and justified remedy against Alibaba and Newegg. (RIB at 76-79.) They contend neither Alibaba nor Newegg maintain commercially significant inventory. (*Id.*) The other Respondents do not dispute Complainants’ allegation that they maintain commercially significant amounts of the accused products. (*See generally* RIB at 72-79; RRB at 33-35.)

Staff believes that if a violation is found, cease and desist orders are warranted as to Chic, Swagway, Modell’s, Powerboard, Skque, Jetson, and Newegg because they have commercially significant inventory in the United States. (SIB at 78; SRB at 19.) Staff also believes cease and desist orders are appropriate against the domestic Defaulting Respondents, as well as the foreign Defaulting Respondents. (*Id.*)

The undersigned recommends that cease and desist orders issue as to those Respondents found to infringe by the Commission. The evidence adduced at the hearing shows that each Respondent maintains “commercially significant” inventory of the accused products in the United States. (*See, e.g.*, CX-0591C at .0057; CX-0590C at .0041; JX-0017C at 90:5-91:15, 129:2-130:1; CX-0223C; CX-0546C at .0021; CX-0549C at .0006-.0007; CX-0550C at .0008; JX-0022C at 152:2-17; JX-0020C at 91:12-92:2, 95:15-25, 96:4-16, 100:20-101:24; CX-1301C at .0034; CX-0454C; JX-0019C at 89:17-90:7; CX-0567C at .0012-.0013; CX-0595C at .0052;

CX-00594C at .0032; CX-0569C at .0045; CX-568C at .0024-.0025; JX-0029C at .0002; JX-0028C at .0002; CX-0587C at .0005; JX-0011C at 28:22-29:7, 44:1-45:3, 79:4-80:4.)

The undersigned also finds cease and desist orders for all sixteen Defaulting Respondents to be appropriate. Domestic defaulters CyBoard, GyroGlyder, HoverTech, Soibatian, PhunkeeDuck, Spaceboard, Twizzle, and Uwheels are presumed to have commercially significant U.S. inventory. *See Certain Electric Skin Care Devices, Brushes and Chargers Therefor, and Kits Containing Same*, Inv. No. 337-TA-959, Comm'n Op. at 28-29 (Feb. 13, 2017) (“[I]n cases where the respondent is located in the United States and defaulted under Section 337(g)(1), the Commission has consistently inferred the presence of commercially significant inventories in the United States based on the facts of record.”). Although the foreign defaulters are based in China, the evidence shows that at least Kebe, Leray, Shareconn, RMT, and Supersun shipped Accused Products from U.S. facilities, and that Jomo maintains accused products “in [its] USA warehouse.” (Compl. Ex. 17 at ¶¶ 14-20, 27-29, 41-44; Compl. Ex. 181 at ¶¶ 2-3, 9.) The undersigned therefore agrees with Complainants that it is reasonable to infer that all of the Defaulting Respondents “possess or control commercially significant inventory in the United States.” *Certain Skin Care Devices*, Inv. No. 337-TA-959, Comm'n Op. at 33.

D. Bond During Presidential Review Period

Pursuant to section 337(j)(3), the Administrative Law Judge and the Commission must determine the amount of bond to be required of a respondent during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to issue a remedy. 19 U.S.C. § 1337(j)(3). The purpose of the bond is to protect the complainant from any injury. 19 C.F.R. § 210.42(a)(1)(ii), § 210.50(a)(3).

When reliable price information is available, the Commission has often set the bond by eliminating the differential between the domestic product and the imported, infringing product. See *Microsphere Adhesives, Processes for Making Same, and Prods. Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. 2949, Comm'n Op. at 24 (Dec. 8, 1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. See, e.g., *Certain Integrated Circuit Telecomm. Chips and Prods. Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm'n Op. at 41, 1993 WL 13033517, at *24 (U.S.I.T.C. June 22, 1993). A 100 percent bond has been required when no effective alternative existed. See, e.g., *Certain Flash Memory Circuits and Prods. Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 26-27 (July 1997) (imposing a 100% bond when price comparison was not practical because the parties sold products at different levels of commerce, and the proposed royalty rate appeared to be *de minimus* and without adequate support in the record).

Complainants assert that “[b]ecause Respondents’ infringing hoverboards are lower-priced, a bond is appropriate to protect Complainants from injury due to lost revenue.” (CRB at 35.) They submit that price differentials are the most appropriate basis to calculate bond and request that bond be set as follows:

Respondent	Product(s) and Pricing	Price Difference	Bond ⁴⁹
Chic	\$ [redacted] average price for Smart C and S. CX-560C at .03.	\$ [redacted]	[redacted]
	\$ [redacted] average price for Smart F and B. CX-560C at .03.	\$ [redacted]	[redacted]
Swagway	\$399.99. CX-594C at .34.	\$150	37.5%
Modell’s	\$399.99. CX-568C at .27.	\$150	37.5%
Jetson	[redacted]	\$ [redacted]	[redacted]

⁴⁹ Complainants’ proposed bond is based on the difference between the average price of \$550 for the Razor Hovertrax 2.0 and DLX 2.0 and the products sold by Chic, Swagway, Modell’s, Jetson, Powerboard, Skque, and Newegg. (CIB at 85.)

Respondent	Product(s) and Pricing	Price Difference	Bond ⁴⁹
Powerboard	[REDACTED]	\$ [REDACTED] (conservative)	[REDACTED]
Skque	[REDACTED]	\$ [REDACTED]	[REDACTED]
Newegg	Average invoice price of \$251.72. CX-1221C.	\$298.28	118%

(CIB at 85; CRB at 35.) Complainants also request a 100% bond for the Defaulting Respondents.

(*Id.*)

Respondents assert that no bond is necessary in this case. (RIB at 73.) They contend that Complainants have “failed to establish any evidence of injury that [they] will incur by reason of Respondents’ activities during any Presidential review period.” (*Id.*) To the extent bond is entered, Respondents propose a [REDACTED] bond rate, which they allege is the [REDACTED]

[REDACTED]. (*Id.* at 74.)

Staff mostly agrees with the bonds proposed by Complainants for each Respondent found in violation. (SIB at 79.) For Chic, however, Staff recommends a \$126 bond, per vehicle unit. (*Id.*) Staff explains that its \$126 proposal is the average of \$ [REDACTED] for Smart C and Smart S products and \$ [REDACTED] for Smart F and Smart B products. (*Id.* at n. 107.)

The undersigned finds that a bond based on price differential is appropriate. The evidence supports the bond proposed by Complainants and Staff, with one exception. The undersigned therefore recommends that bond be set as follows:

RESPONDENT	ACCUSED PRODUCT(S) AND PRICING	PRICE DIFFERENCE	BOND, PER VEHICLE UNIT
Chic	\$ [REDACTED] average price for Smart C and S.	\$ [REDACTED]	[REDACTED]
	\$ [REDACTED] average price for Smart F and B.	\$ [REDACTED]	[REDACTED]
Swagway	\$399.99.	\$150	37.5%
Modell’s	\$399.99.	\$150	37.5%
Jetson	[REDACTED]	\$ [REDACTED]	[REDACTED]
Powerboard	[REDACTED]	\$ [REDACTED]	[REDACTED]

RESPONDENT	ACCUSED PRODUCT(S) AND PRICING	PRICE DIFFERENCE	BOND, PER VEHICLE UNIT
Skque	[REDACTED]	\$ [REDACTED]	[REDACTED]

(CX-0186C at Q/A 49-50; CX-0241C; CX-0560C at .03; CX-0594C at .0034; CX-0568C at .0027; CX-0567C at .0014; CX-0591C at .0017; JX-0017C at 170:9-11; CX-1301C at .0035.) As for Newegg, the undersigned recommends no bond be set during the Presidential review period. Complainants have not introduced any evidence regarding the price of the Swagway products sold by Newegg.⁵⁰ Without such information, it is impossible to determine the price differential between the Newegg accused product and Complainants' products.

1. Defaulting Respondents

The undersigned finds that it is appropriate to recommend a bond of 100% of entered value for the Defaulting Respondents. *Certain Video Game Systems, Accessories, & Components Thereof*, Inv. No. 337-TA-473, Comm'n Op. at 5 (Dec. 24, 2002.) Accordingly, the undersigned recommends that bond be set in the amount of 100% per vehicle unit for the Defaulting Respondents' accused products during the Presidential review period.

⁵⁰ Both Complainants and Staff cite to CX-1221C in their post-hearing briefs, yet CX-1221C was withdrawn and thus, is not in evidence.

IX. INITIAL DETERMINATION

Based on the foregoing, it is the Initial Determination of the undersigned that only the Defaulting Respondents infringe the asserted claims of U.S. Patent No. 8,738,278. The undersigned further determines that the asserted patent is not invalid and that the domestic industry requirement has not been satisfied.⁵¹

The undersigned hereby CERTIFIES to the Commission this Initial Determination and the Recommended Determination. The parties' briefs, which include the final exhibits lists, are not certified as they are already in the Commission's possession in accordance with Commission rules. 19 C.F.R. § 210.38(a).

The Secretary shall serve the confidential version of this Initial Determination upon counsel who are signatories to the Protective Order (Order No. 1) issued in this Investigation. A public version will be served at a later date upon all parties of record.

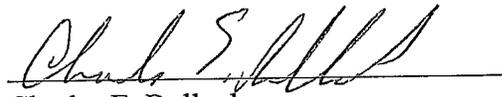
Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review pursuant to 19 C.F.R. § 210.43(a) or the Commission, pursuant to 19 C.F.R. § 210.44, orders on its own motion a review of the Initial Determination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

Within ten days of the date of this document, the parties shall submit to the Office of Administrative Law Judges a joint statement regarding whether or not they seek to have any portion of this document deleted from the public version. The parties' submission shall be made by hard copy and must include a copy of this Initial Determination with red brackets indicating any portion asserted to contain confidential business information to be deleted from the public

⁵¹ Any arguments from the parties' pre-hearing briefs incorporated by reference into the parties' post-hearing briefs are stricken, unless otherwise discussed herein, as an improper attempt to circumvent the page limits imposed for post-hearing briefing.

version.⁵² The parties' submission shall include an index identifying the pages of this document where proposed redactions are located. The parties' submission concerning the public version of this document need not be filed with the Commission Secretary.

SO ORDERED.


Charles E. Bullock
Chief Administrative Law Judge

⁵² If the parties submit excessive redactions, they may be required to provide an additional written statement, supported by declarations from individuals with personal knowledge, justifying each proposed redaction and specifically explaining why the information sought to be redacted meets the definition for confidential business information set forth in Commission Rule 201.6(a). 19 C.F.R. § 201.6(a).

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC VERSION INITIAL DETERMINATION ON VIOLATION OF SECTION 337 AND RECOMMENDED DETERMINATION ON REMEDY AND BOND** has been served by hand upon the Commission Investigative Attorney, **Paul A. Gennari** and the following parties as indicated, on 6/9/2017.



 Lisa R. Barton, Secretary
 U.S. International Trade Commission
 500 E Street SW, Room 112
 Washington, DC 20436

On Behalf of Complainants Razor USA LLC, Inventist, Inc., and Shane Chen:

Jonathan J. Engler, Esq.
ADDUCI, MASTRIANI & SCHAUMBERG, L.L.P.
 1133 Connecticut Avenue, NW
 Washington, DC 20036

- Via Hand Delivery
 Via Express Delivery
 Via First Class Mail
 Other: _____

On Behalf of Respondent Hangzhou Chic Intelligent Technology Co., Ltd.:

Qingyu Yin, Esq.
**FINNEGAN, HENDERSON, FARABOW,
 GARRETT & DUNNER, LLP**
 901 New York Avenue, NW
 Washington, DC 20001-4413

- Via Hand Delivery
 Via Express Delivery
 Via First Class Mail
 Other: _____

On Behalf of Respondent Swagway, LLC and Modell's Sporting Goods, Inc.:

Lei Mei
MEI & MARK LLP
 818 18th Street, NW, Suite 410
 Washington, DC 20006

- Via Hand Delivery
 Via Express Delivery
 Via First Class Mail
 Other: _____

On Behalf of Respondent Powerboard a.k.a. Optimum Trading Co.:

L. Peter Farkas
FARKAS + TOIKKA, LLP
 1101 30th Street, NW, Suite 500
 Washington, DC 20007

- Via Hand Delivery
 Via Express Delivery
 Via First Class Mail

Certificate of Service – Page 2

On Behalf of Respondent Newegg Inc.:

Kent E. Baldauf, Jr.
THE WEBB LAW FIRM
One Gateway Center
420 Ft. Duquesne Blvd, Suite 1200
Pittsburgh, PA 15222

Other: _____

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

**On Behalf of Respondents Alibaba Group Holding Ltd. c/o
Alibaba Group Services Limited & Alibaba.com Ltd.:**

Michael R. Franzinger
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

On Behalf of Jetson Electric Bikes LLC:

Ezra Sutton
EZRA SUTTON, P.A.
900 Route 9 North, Suite 201
Woodbridge, NJ 07095

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

**On Behalf of Respondent United Integral dba Skque
Products:**

Jason Chuan
THE LAW OFFICE OF MARY SUN
317 E. Foothill Blvd., Ste. 203
Arcadia, CA 91006

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN MOTORIZED
SELF-BALANCING VEHICLES**

Investigation No. 337-TA-1000

**NOTICE OF A COMMISSION DETERMINATION NOT TO REVIEW AN INITIAL
DETERMINATION FINDING THREE RESPONDENTS IN DEFAULT**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination ("ID") (Order No. 26) of the presiding administrative law judge ("ALJ") finding respondents HoverTech of Hebron, Kentucky; Leray Group a/k/a ShanDao Trading Co., Ltd. ("Leray") of Beijing, China; and Spaceboard USA ("Spaceboard") of Norcross, Georgia in default.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, D.C. 20436, telephone (202) 708-2310. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on May 26, 2016, based on a complaint filed on behalf of Razor USA LLC of Cerritos, California; and Inventist, Inc. and Shane Chen, both of Camas, Washington. 81 FR 33548-50. The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, by reason of infringement of certain claims of U.S. Patent No. 8,738,278. The complaint further alleges violations of section 337 based upon false advertising, misrepresentation, and unfair competition, the threat or effect of which is to destroy or substantially injure an industry in the United States or to prevent the establishment of such an industry. The Commission's notice of investigation named several respondents including HoverTech, Leray, and Spaceboard (collectively, "the non-responding respondents"). The Office of Unfair Import Investigations ("OUII") is also a party to the investigation. The complaint and notice of investigation were served on HoverTech

and Spaceboard, and Leray has refused service of these documents. *See* Order No. 24 at 2-3. These non-responding respondents failed to respond to the complaint and notice of investigation.

On October 11, 2016, complainants filed a motion, pursuant to 19 CFR 210.16, for the following: (1) an order directing respondents HoverTech, Leray, and Spaceboard to show cause why they should not be found in default for failure to respond to the complaint and notice of investigation as required by 19 CFR 210.13; and (2) the issuance of an ID finding these three respondents in default upon their failure to show cause. The non-responding respondents did not respond to the motion and OUII supported the motion.

On October 27, 2016, the ALJ issued Order No. 24 which required the non-responding respondents to show cause no later than November 18, 2016, as to why they should not be held in default and have judgment rendered against them pursuant to 19 CFR part 210.16. No responses were received from these respondents.

The ALJ issued the subject ID on November 21, 2016, finding the non-responding respondents in default, pursuant to 19 CFR 210.16, because these three respondents did not respond to the complaint and notice of investigation and Order No. 24. No party petitioned for review.

The Commission has determined not to review the subject ID. Accordingly, HoverTech, Leray, and Spaceboard have been found in default.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in Part 210 of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: December 13, 2016

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, **Paul A. Gennari**, and the following parties as indicated, on **December 13, 2016**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

**On Behalf of Complainants Razor USA LLC, Investist, Inc.,
and Shane Chen:**

Jonathan J. Engler, Esq
ADDUCI, MASTRIANI & SCHAUMBERG, L.L.P.
1133 Connecticut Avenue, N.W.
Washington, DC 20036

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

**On Behalf of Respondent Hangzhou Chic Intelligent
Technology Co., Ltd.:**

Qingyu Yin, Esq.
**FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, LLP**
901 New York Avenue, N.W.
Washington, D.C. 20001-4413

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

**On Behalf of Respondents Swagway, LLC and Modell's
Sporting Goods, Inc.:**

Lei Mei
MEI & MARK LLP
818 18th Street NW, Suite 410
Washington, DC 20006

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Certificate of Service – Page 2

On Behalf of Respondent Powerboard a.k.a. Optimum Trading Co.:

L. Peter Farkas, Esq.
FARKAS + TOIKKA, LLP
1101 30th Street NW, Suite 500
Washington, D.C. 20007

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

On Behalf of Respondent Newegg.com Inc.

Kent E. Baldauf, Jr.
THE WEBB LAW FIRM
One Gateway Center
420 Ft. Duquesne Boulevard, Suite 1200
Pittsburgh, PA 15222

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

On Behalf of Respondents Alibaba Group Holding Ltd. and Alibaba.com Ltd.:

Michael R. Franzinger
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

On Behalf of Respondents Jetson Electric Bikes LLC:

Ezra Sutton
EZRA SUTTON, P.A.
900 Route 9 North, Suite 201
Woodbridge, NJ 07095

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

On Behalf of Respondents United Integral, Inc. dba Skque Products:

Jason Chuan
THE LAW OFFICE OF MARY SUN
317 E. Foothill Blvd., Ste 203
Arcadia, CA 91006

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Certificate of Service – Page 3

Respondents:

Genius Technologies a.k.a. Prime Capital
755 East 31st Street
Hastings, MN 55033

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

HoverTech
1600 Worldwide Blvd.
Hebron, KY 41048

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Leray Group
3/F., HiChina Mansion
No.27 Gulouwai Avenue, Dongcheng District
Beijing 100120 China

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Spaceboard USA
604 Oakmont Lane
Norcross, GA 30093

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN MOTORIZED
SELF-BALANCING VEHICLES**

Investigation No. 337-TA-1000

**NOTICE OF A COMMISSION DETERMINATION NOT TO REVIEW AN INITIAL
DETERMINATION FINDING FIVE RESPONDENTS IN DEFAULT**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (“ID”) (Order No. 18) of the presiding administrative law judge (“ALJ”) finding respondents Joy Hoverboard a/k/a Huizhou Aoge Enterprise Co. Ltd (“Joy Hoverboard”) of Huizhou, China; Shenzhen Chenduoxing Electronic Technology Ltd. (“Chenduoxing”), Shareconn International, Inc. (“Shareconn”), and Shenzhen R.M.T. Technology Co., Ltd. (“RMT”); all of Guangdong, China; and Cyboard LLC a/k/a Shark Empire Inc. (“Cyboard”) of Glendale, California in default.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2310. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on May 26, 2016, based on a complaint filed on behalf of Razor USA LLC of Cerritos, California; and Inventist, Inc. and Shane Chen, both of Camas, Washington. 81 *Fed. Reg.* 33548-49. The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, by reason of infringement of certain claims of U.S. Patent No. 8,738,278. The complaint further alleges violations of section 337 based upon false advertising, misrepresentation, and unfair competition, the threat or effect of which is to destroy or substantially injure an industry in the United States or to prevent the establishment of such an industry. The Commission's notice of investigation named several respondents including Joy Hoverboard, Chenduoxing, Shareconn,

RMT, and Cyboard (collectively, “the Non-Responding respondents”). The Office of Unfair Import Investigations (“OUII”) is also a party to the investigation. The complaint and notice of investigation were served on the Non-Responding respondents on May 20, 2016. See Order No. 15 at 2. These Non-Responding respondents failed to respond to the complaint and notice of investigation.

On July 29, 2016, complainants filed a motion, pursuant to 19 C.F.R. ' 210.16, for the following: (1) an order directing respondents Joy Hoverboard, Chenduoxing, Shareconn, RMT, and Cyboard to show cause why they should not be found in default for failure to respond to the complaint and notice of investigation as required by 19 C.F.R. ' 210.13; and (2) the issuance of an ID finding these five respondents in default upon their failure to show cause. The Non-Responding respondents did not respond to the motion and OUII supported the motion.

On August 11, 2016, the ALJ issued Order No. 15 which required the Non-Responding respondents to show cause no later than September 6, 2016, as to why they should not be held in default and have judgment rendered against them pursuant to 19 C.F.R. ' 210.16. No responses were received from these respondents.

The ALJ issued the subject ID on September 8, 2016, finding the Non-Responding respondents in default, pursuant to 19 C.F.R. ' 210.16, because these five respondents did not respond to the complaint and notice of investigation and Order No, 15. No party petitioned for review.

The Commission has determined not to review the subject ID. Accordingly, Joy Hoverboard, Chenduoxing, Shareconn, RMT, and Cyboard have been found in default.

The authority for the Commission’s determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, and in Part 210 of the Commission’s Rules of Practice and Procedure, 19 C.F.R. Part 210.

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: October 11, 2016

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, Brian Koo, Esq., and the following parties as indicated, on **October 12, 2016**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainants:

Jonathan J. Engler, Esq
ADDUCI, MASTRIANI & SCHAUMBERG, L.L.P.
1133 Connecticut Avenue, N.W.
Washington, DC 20036

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

On Behalf of Respondent Hangzhou Chic Intelligent Technology Co., Ltd.:

Qingyu Yin, Esq.
**FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, LLP**
901 New York Avenue, N.W.
Washington, D.C. 20001-4413

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

On Behalf of Respondents Swagway, LLC and Modell's Sporting Goods, Inc.:

Lei Mei
MEI & MARK LLP
818 18th Street NW, Suite 410
Washington, DC 20006

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

On Behalf of Respondent Powerboard a.k.a. Optimum Trading Co.:

L. Peter Farkas, Esq.
FARKAS + TOIKKA, LLP
1101 30th Street N.W., Suite 500
Washington, D.C. 20007

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Certificate of Service – Page 2

On Behalf of Respondent Newegg.com Inc.

Kent E. Baldauf, Jr.
THE WEBB LAW FIRM
One Gateway Center
420 Ft. Duquesne Boulevard, Suite 1200
Pittsburgh, PA 15222

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

On Behalf of Respondents Alibaba Group Holding Ltd. and Alibaba.com Ltd.:

Michael R. Franzinger
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

On Behalf of Respondents Jetson Electric Bikes LLC:

Ezra Sutton
EZRA SUTTON, P.A.
900 Route 9 North, Suite 201
Woodbridge, NJ 07095

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

On Behalf of Respondents United Integral, Inc. dba Skque Products:

Jason Chuan
THE LAW OFFICE OF MARY SUN
317 E. Foothill Blvd., Ste 203
Arcadia, CA 91006

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Respondents:

CyBoard LLC a.k.a. Shark Empire Inc.
675 W. Broadway
Glendale, CA 91204

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Genius Technologies a.k.a. Prime Capital
755 East 31st Street
Hastings, MN 55033

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

CERTAIN MOTORIZED SELF-BALANCING VEHICLES

Inv. No. 337-TA-1000

Certificate of Service – Page 3

HoverTech
1600 Worldwide Blvd.
Hebron, KY 41048

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

InMotion Entertainment Group LLC
4801 Executive Park Court, Suite 100
Jacksonville, FL 32216

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Joy Hoverboard, a.k.a Huizhou Aoge Enterprize Co. Ltd.
Huizhou City, wit its Pliasant Factory
Shuikou Subdistrict Office
Huizhou, 516005 China

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Leray Group
3/F., HiChina Mansion
No.27 Gulouwai Avenue, Dongcheng District
Beijing 100120 China

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Shareconn International, Inc.
9A Unit Q 32 Dong Kang Qia Zi Jun
Buji Town, Shenzhen, Guangdong,
China 518112

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Shenzhen Chenduoxing Electronic Technology Ltd.
4/F, Block C11, Fuyuan Industrial City,
Jiuwei Xixiang, Bao'an Area, Shenzhen,
Guangdong, China 518126

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Shenzhen R.M.T. Technology Co., Ltd.
Rm. 711, Shangcheng Business Mansion, No. 73-1,
Changjiangpu Road, He'ao, Henggang Street, Longgang District
Shenzhen, Guangdong, China, 518115

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Spaceboard USA
604 Oakmont Lane
Norcross, GA 30093

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN MOTORIZED
SELF-BALANCING VEHICLES**

Investigation No. 337-TA-1000

**NOTICE OF A COMMISSION DETERMINATION NOT TO REVIEW AN INITIAL
DETERMINATION FINDING EIGHT RESPONDENTS IN DEFAULT**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination ("ID") (Order No. 14) of the presiding administrative law judge ("ALJ") finding respondents GyroGlyder.com ("GyroGlyder") of Stockton, California; Soibatian Corporation d.b.a. IO Hawk and d.b.a. Smart Wheels ("Soibatian") of Glendale, California; PhunkeeDuck, Inc. ("PhunkeeDuck") of Floral Park, New York; Shenzhen Jomo Technology Co., Ltd. ("Jomo") of Shenzhen City, China; Shenzhen Kebe Technology Co., Ltd. ("Kebe") and Shenzhen Supersun Technology Co. Ltd., a.k.a. Aottom ("Supersun"), both of Shenzhen, China; Twizzle Hoverboard ("Twizzle") of La Puente, California; and Uwheels of Santa Ana, California in default.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2310. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on May 26, 2016, based on a complaint filed on behalf of Razor USA LLC of Cerritos, California; and Inventist, Inc. and Shane Chen, both of Camas, Washington. 81 *Fed. Reg.* 33548-49. The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, by reason of infringement of certain claims of U.S. Patent No. 8,738,278. The complaint further alleges violations of section 337 based upon false advertising, misrepresentation, and unfair competition, the threat or effect of which is to destroy or substantially injure an industry in

the United States or to prevent the establishment of such an industry. The Commission's notice of investigation named several respondents including GyroGlyder, Soibatian, PhunkeeDuck, Jomo, Kebe, Supersun, Twizzle, and Uwheels (collectively, "the Non-Responding respondents"). The Office of Unfair Import Investigations ("OUII") is also a party to the investigation. The complaint and notice of investigation were served on the Non-Responding respondents on May 20, 2016. These Non-Responding respondents failed to respond to the complaint and notice of investigation.

On July 6, 2016, complainants filed a motion, pursuant to 19 C.F.R. § 210.16, for the following: (1) an order directing several respondents including GyroGlyder, Soibatian, PhunkeeDuck, Jomo, Kebe, Supersun, Twizzle, and Uwheels to show cause why they should not be found in default for failure to respond to the complaint and notice of investigation as required by 19 C.F.R. § 210.13; and (2) the issuance of an ID finding these respondents in default upon their failure to show cause. The Non-Responding respondents did not respond to the motion and OUII supported the motion as to these respondents.

On July 19, 2016, the ALJ issued Order No. 12 which required the Non-Responding respondents to show cause no later than August 5, 2016, as to why they should not be held in default and have judgment rendered against them pursuant to 19 C.F.R. § 210.16. No responses were received from these respondents.

The ALJ issued the subject ID on August 9, 2016, finding the Non-Responding respondents in default, pursuant to 19 C.F.R. § 210.16, because these respondents did not respond to the complaint and notice of investigation and Order No. 12. No party petitioned for review.

The Commission has determined not to review the subject ID. Accordingly, GyroGlyder, Soibatian, PhunkeeDuck, Jomo, Kebe, Supersun, Twizzle, and Uwheels have been found in default.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, and in Part 210 of the Commission's Rules of Practice and Procedure, 19 C.F.R. Part 210.

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: September 7, 2016

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, Brian Koo, Esq., and the following parties as indicated, on **September 7, 2016**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainants:

Jonathan J. Engler, Esq.
ADDUCI, MASTRIANI & SCHAUMBERG, L.L.P.
1133 Connecticut Avenue, N.W.
Washington, DC 20036

- Via Hand Delivery
 Via Express Delivery
 Via First Class Mail
 Other: _____

On Behalf of Respondent Hangzhou Chic Intelligent Technology Co., Ltd.:

Qingyu Yin, Esq.
**FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, LLP**
901 New York Avenue, N.W.
Washington, D.C. 20001-4413

- Via Hand Delivery
 Via Express Delivery
 Via First Class Mail
 Other: _____

On Behalf of Respondents Swagway, LLC and Modell's Sporting Goods, Inc.:

Lei Mei
MEI & MARK LLP
818 18th Street NW, Suite 410
Washington, DC 20006

- Via Hand Delivery
 Via Express Delivery
 Via First Class Mail
 Other: _____

On Behalf of Respondent Powerboard a.k.a. Optimum Trading Co.:

L. Peter Farkas, Esq.
FARKAS + TOIKKA, LLP
1101 30th Street N.W., Suite 500
Washington, D.C. 20007

- Via Hand Delivery
 Via Express Delivery
 Via First Class Mail
 Other: _____

Certificate of Service – Page 2

On Behalf of Respondent Newegg.com Inc.

Kent E. Baldauf, Jr.
THE WEBB LAW FIRM
One Gateway Center
420 Ft. Duquesne Boulevard, Suite 1200
Pittsburgh, PA 15222

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

On Behalf of Respondents Alibaba Group Holding Ltd. and Alibaba.com Ltd.:

Michael R. Franzinger
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

On Behalf of Respondents Jetson Electric Bikes LLC:

Ezra Sutton
EZRA SUTTON, P.A.
900 Route 9 North, Suite 201
Woodbridge, NJ 07095

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

On Behalf of Respondents United Integral, Inc. dba Skque Products:

Jason Chuan
THE LAW OFFICE OF MARY SUN
317 E. Foothill Blvd., Ste 203
Arcadia, CA 91006

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Respondents:

CyBoard LLC a.k.a. Shark Empire Inc.
675 W. Broadway
Glendale, CA 91204

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Genius Technologies a.k.a. Prime Capital
755 East 31st Street
Hastings, MN 55033

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

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GyroGlyder.com
1988 E. Alpine Ave.
Stockton, CA 95205

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

HoverTech
1600 Worldwide Blvd.
Hebron, KY 41048

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

InMotion Entertainment Group LLC
4801 Executive Park Court, Suite 100
Jacksonville, FL 32216

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Soibatian Corporation dba IO Hawk and dba Smart Wheels
1125 E. Broadway #317
Glendale, CA 91205

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Joy Hoverboard, a.k.a Huizhou Aoge Enterprize Co. Ltd.
Huizhou City, wit its Pliasant Factory
Shuikou Subdistrict Office
Huizhou, 516005 China

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Shenzhen Kebe Technology Co., ltd.
4th Floor, Building C, Honglianying T & S
Zone, Sili Road 286, Longhua District
Shenzhen, China 518110

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Leray Group
3/F., HiChina Mansion
No.27 Gulouwai Avenue, Dongcheng District
Beijing 100120 China

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

PhunkeeDuck, Inc.
250 Jericho Turnpike
Floral Park, NY 11001

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

CERTAIN MOTORIZED SELF-BALANCING VEHICLES

Inv. No. 337-TA-1000

Certificate of Service – Page 4

Shareconn International, Inc.
9A Unit Q 32 Dong Kang Qia Zi Jun
Buji Town, Shenzhen, Guangdong,
China 518112

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Shenzhen Chenduoxing Electronic Technology Ltd.
4/F, Block C11, Fuyuan Industrial City,
Jiuwei Xixiang, Bao'an Area, Shenzhen,
Guangdong, China 518126

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Shenzhen Jomo Technology Co., Ltd.
Floor 4th and 7th, Caiyue Bldg., Meilong Road
Bao'an District, Shenzhen City, 518112
China

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Shenzhen R.M.T. Technology Co., Ltd.
Rm. 711, Shangcheng Business Mansion, No. 73-1,
Changjiangpu Road, He'ao, Henggang Street, Longgang District
Shenzhen, Guangdong, China, 518115

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Shenzhen Supersun Technology Co. Ltd., a.k.a. Aottom
Rm. 2308A, 2308B, International Cultural Building,
Futian Road, Futian District, Shenzhen, Guangdong,
China 518033

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Spaceboard USA
604 Oakmont Lane
Norcross, GA 30093

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Twizzle Hoverboard
18193 Valley Blvd.
La Puente, CA 91744

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Uwhells
3007 N. Main St.
Santa Ana, CA 92705

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____