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In the Matter of
ALTERNATING PRESSURE PADS

Investigation No. 337-TA-48

NOTICE OF TERMINATION

Background

The United States International Trade Commission, acting under the authority of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), instituted this investigation on February 17, 1978, on the basis of a complaint filed by Gaymar Industries, Inc., and Medisearch PR, Inc. (complainants). Named as respondents in the Commission's notice of investigation were Flowtron Aire, Ltd., and the Huntleigh Group, Inc. (respondents). The notice of investigation listed the unfair practice allegedly engaged in by respondents as (1) the importation of alternating pressure pads which were allegedly covered by claims 1 and 3-6 of U.S. Letters Patent 3,701,173 (the '173 patent) and (2) the alleged unfair use of promotional and advertising material pertaining to alternating pressure pads (43 F.R. 7483, Feb. 23, 1978).

On August 7, 1978, complainants filed, pursuant to section 210.51 of the Commission's Rules of Practice and Procedure (19 CFR 210.51), a motion to terminate this investigation as to all issues and with respect to all respondents.

The motion to terminate is based on the discovery by respondents of a prior West German patent reference, which was previously unknown to the parties. Complainants stated that this prior art was not before the patent examiner while the above patent was pending, and that the discovery of the West German patent reference places in question the validity of one or more of the claims in the patent. Complainants also stated in their motion to terminate that respondents have withdrawn the promotional literature from circulation and that prior activities connected therewith were de minimis. Complainants indicated an intention to surrender the patent and to file a reissue application with the Patent and Trademark Office, which complainants subsequently did. On August 18, 1978, complainants filed a supplemental memorandum containing a settlement agreement whereby complainants agreed not to assert the patent claims against respondents or those in privity with respondents (settlement agreement).

The presiding officer, acting in accordance with sections 210.51(c) and 210.53 of the Commission Rules (19 CFR 210.51(c) and 210.53), concluded that (1) the issue of the promotional literature published by respondents is now moot owing to respondents' discontinuing distribution of such literature, and

(2) because complainants have voluntarily moved to terminate the investigation and have entered into a settlement agreement with respondents, there is no present violation of section 337. The presiding officer recommended that the Commission (1) determine that there is no present violation of section 337 in the importation or sale of alternating pressure pads, and (2) terminate the investigation as to all issues and parties, contingent upon complainants' filing with the Commission a copy of their reissue application with proof of filing with the Patent and Trademark Office. The copy of the reissue application with proof of filing has been properly filed with the Commission. Copies of the presiding officer's recommended determination may be obtained by contacting the Office of the Secretary to the Commission, 701 E Street N.W., Washington, D.C. 20436, telephone (202) 523-0161.

The Commission, in considering the recommended determination, invited public comment on whether there are any potential adverse effects of this settlement agreement on the public interest, and more specifically, whether the agreement is anticompetitive (44 FR 3790, January 18, 1979). The presently active parties to the investigation, including the investigative attorney, submitted comments to the effect that the settlement agreement is not anticompetitive and that it will have no adverse effect on the public interest. No other comments were received.

Having considered complainants' motion to terminate this investigation, the recommended determination of the presiding officer, the subsequent submissions related to the public interest, and the entire administrative record, the Commission grants complainants' motion to terminate and hereby terminates this investigation. The Commission terminates this investigation since the respondents have ceased distributing allegedly unfair promotional

1/ Commissioner Moore in voting to terminate this investigation determines that there is no violation of Section 337 of the Tariff Act of 1930, as amended. In this case, he observes that the complainants moved to terminate after respondents submitted information relating to a prior patent which placed the validity of complainants' patent in question and that it is doubtful whether the so-called settlement agreement is binding on the parties.

Commissioner Moore agrees with the recommendation of the Presiding Officer that (1) there is no present violation of Section 337 in connection with the importation of alternating pressure pads or in their sale in the United States and (2) the investigation should be terminated. (See footnote 3, page 5, quoting an opinion in a case similar to this which the CCPA affirmed in *Rohm & Haas Co. v. International Trade Commission*, 554 F.2d 462).

It is Commissioner Moore's view that the Commission's statutory obligations, and particularly the public interest requirements set forth in Subsection (b)(2) of Section 337 of the Tariff Act of 1930 outweigh any blind adherence to the Administrative Procedure Act which is a procedural law designed to make certain that parties to an administrative proceeding have their rights protected.

Since this document is a Commission notice in a specific case, Commissioner Moore believes it may not be the proper place to develop each and every reason why conforming to the Administrative Procedure Act requires the Commission to ignore the clear mandate of Section 337 that: "The Commission shall determine with respect to each investigation conducted by it under this section, whether or not there is a violation of this section".

However, Commissioner Moore takes particular exception to the charge by the majority that such compliance with Section 337 in settlement cases will cause more expense to the government and to the parties.

Further, Commissioner Moore observes that only in rare instances since its enactment has the Commission failed to make a determination on the issue of violation in Section 337 cases and that neither the language of Section 337(c) nor Commission's Rule 210.53 admonishes the Commission not to do so. Therefore, he suggests if the majority wishes to distort the clear intent of the Congress in terms of a general rule, as expressed in this case, that it do so specifically by incorporating such language into the Commission's Rules of Practice and Procedure.

and advertising material, and the complainant has agreed not to assert the claims of the '173 patent against the respondents. It is further ordered that the Secretary to the Commission file a copy of this notice with the Patent and Trademark Office.

Discussion

It has been Commission practice in investigations under section 337 of the Tariff Act of 1930, when settlement agreements or other agreements are entered into among the parties, to make a determination of no present violation in light of the language of section 337(c) and Commission rule 210.53. 2/ This practice has been adopted by the Commission because section 337(c) provides that the Commission is to determine in each investigation whether there is or is not a violation of section 337. 3/

We are of the opinion now, however, that a distinction should be drawn between settlements entered into by the parties and other kinds of termination prior to a hearing, so that in the case of settlements, only an order of termination is required, and no finding as to the issue of violation is necessary.

The Administrative Procedure Act, which is incorporated in section 337(c) of the Tariff Act of 1930, as amended, provides in subsection 5 that agencies

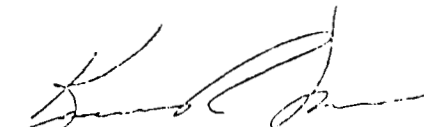
2/ Dot Matrix Impact Printers, Investigation No. 337-TA-32, decided December 8, 1977, Certain Numerically Controlled Machining Centers and Components Thereof, Investigation No. 337-TA-34, decided February 6, 1978.

3/ In Bismuth Molybdate Catalysts, Investigation No. 337-TA-20 (Notice of Termination, Oct. 15, 1976), Commissioners Moore and Bedell held that a determination was required in that case where complainant had filed a motion to dismiss the complaint. Chairman (then Commissioner) Parker held that no determination of violation is required where a complainant voluntarily moves to dismiss its own complaint.

must "give all interested parties opportunity" to settle cases. ^{4/} The provision relating to a determination on the issue of violation contained in section 337(c) is not intended to and in our opinion does not negate the provisions of the Administrative Procedure Act allowing for settlement of agency cases.

A finding respecting violation is, in our view, inconsistent with a settlement of a case, since settlement is a means plainly designed to avoid the necessity (and expense to the government and parties) of a determination on matters no longer in issue before the agency. Therefore a determination on the issue of violation is not necessary in this case where the parties have entered into a settlement agreement.

By order of the Commission.


Kenneth R. Mason
Secretary

Issued: February 23, 1979

^{4/} Section 554(c) of the Administrative Procedure Act (5 U.S.C. 554(d)) provides, in part:

The agency shall give all interested parties opportunity for --
(1) the submission and consideration of . . . offers of settlement . . . when time, the nature of the proceeding, and the public interest permit; . . .