



337 Reporter Monthly Round-Up

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SEPTEMBER – NOVEMBER AT THE COMMISSION:

New Investigations or Ancillaries: 10

Terminations

Cases Terminated: 12

Motions to Terminate ruled on: 20

Initial Determinations Issued: 5

Complaints Pending Institution: 6

Initial Determinations: 5

Commission Opinions: 8

Total New Investigations for 2024: 45



p2 CALJ Cheney Imposes Monetary Sanctions on Respondent and its Counsel for Discovery Violations, and Recommends a 7-year Limited Exclusion Order

CALJ Cheney finds a violation of Section 337 based on trade secret misappropriation, imposes both monetary and non-monetary sanctions on the Respondent and its counsel for multiple discovery violations, and recommends a 7-year LEO to address the specific injury experienced by the Complainant.

(Prepared by Adam R. Hess, Partner, and Anna E. Fraser, Associate, Squire Patton Boggs)

p3 The Commission Finds General Exclusion Order Is an Appropriate Remedy After Showing of a High Likelihood of Circumvention of a Limited Exclusion Order

The Commission determined not to review an Initial Determination granting Summary Determination of a violation issued by ALJ Bhattacharyya. Accordingly, the Commission has determined that there has been a violation as to the asserted patents and that the appropriate remedy is the issuance of a general exclusion order and the issuance of cease and desist orders against the Defaulting Respondents with U.S. presence.

(Prepared by Eda Stark, Associate, Blank Rome LLP)

p4 The Commission Reiterates that Its Investigative Authority is Statutory Not Jurisdictional

The Commission issued an Opinion wherein it reviewed the FID's findings of subject matter jurisdiction, personal jurisdiction, and in rem jurisdiction. In its Opinion, the Commission reaffirmed its position that these kinds of jurisdiction are not applicable to the Commission. Instead finding that the Commission's jurisdiction is solely statutory.

(Prepared by Libbie DiMarco, Shareholder, Wolf Greenfield)

p5 Commission Issues GEO, LEOs, and CDOs to Defaulting Respondents with Split on Whether CDOs Should Issue as to Certain Defaulting Respondents

The Commission issued a GEO, LEOs, and CDOs. However, the Commission split evenly on whether CDOs must issue as to seven of the defaulting respondents. Due to the even split (and lack of a majority), no CDO issued as to those seven respondents. The disagreement among the Commissioners related to whether a CDO automatically should issue when the statutory requirements under subsections 337(g)(1)(A)-(E) are satisfied. Or, alternatively, two Commissioners reasoned that in addition to those subsections, each respondent also must separately satisfy the "so as not to undercut the relief provided by the exclusion order" requirement typically applied under subsection 337(f)(1).

(Prepared by Tommy Martin, Partner, Baker Botts LLP)

p6 ALJ Bhattacharyya Finds Alternative Designs Should be Adjudicated and Invalidity Expert is not a Person of Skill in the Art

ALJ Bhattacharyya issued a final initial determination finding Respondents' alternative designs should be adjudicated and were non-infringing and that Respondents' invalidity expert was not a person of skill in the art, meaning his opinions could not be considered.

(Prepared by Samantha Sweet, Associate, Husch Blackwell LLP)



CALJ Cheney Imposes Monetary Sanctions on Respondent and its Counsel for Discovery Violations, and Recommends a 7-year Limited Exclusion Order

In the Matter of CERTAIN SELECTIVE THYROID HORMONE RECEPTOR-BETA AGONISTS, PROCESSES FOR MANUFACTURING OR RELATING TO SAME, AND PRODUCTS CONTAINING SAME, Inv. No. 337-TA-1352, Initial Determination and Recommendation on Remedy and Bond

Before CALJ Cheney

Summary: On October 3, 2024, CALJ Cheney issued his Initial Determination (“ID”) and Recommendation on Remedy and Bond (“RD”) involving Viking and five related respondents collectively referred to as “Asclētis.” He found that Asclētis violated Section 337 by misappropriating trade secrets that Viking shared with Asclētis as part of a confidential agreement to explore business opportunities related to pharmaceuticals for the treatment of non-alcoholic steatohepatitis in humans. CALJ Cheney also confirmed that activities related to seeking FDA approval of a drug may constitute a domestic industry and that interference with drug testing, clinical trials, and the FDA approval process may constitute injury to a domestic industry.

The ID focused on sanctions against both Asclētis and its counsel for making misrepresentations and for failing to comply with three discovery orders. Asclētis’s sanctionable conduct initially related to the production of emails relevant to issues designated by the Commission for a 100-Day Proceeding. At a case management conference, Asclētis’s counsel stated that their document production was “substantially complete,” even though they had not started searching emails. Soon thereafter, Asclētis’s counsel sent an email to Viking’s counsel, falsely representing that agreed-upon search terms had been applied to custodian emails and, on the date for mutual email production, sent another email stating that “Respondents will not be producing email at this time” although Viking timely produced its emails.

CALJ Cheney subsequently issued multiple discovery orders compelling Asclētis to, *inter alia*, produce the requested emails. Asclētis’s initial production, however, only provided partial emails from three of the five email custodians. Asclētis produced some responsive emails thereafter, but over 300 emails included encrypted documents that the discovery vendor could not open. CALJ Cheney faulted Asclētis’s counsel for knowing about the encryption issue and instructing the vendor to produce the documents “as is.” Asclētis was also reprimanded for its false and inconsistent statements in sworn testimony and sworn interrogatory responses, its untimely production of voluminous responsive emails two days before the 100-Day Hearing, and its resistance to the court-ordered forensic examination of its email systems.

CALJ Cheney imposed both monetary and non-

monetary sanctions as relief for Asclētis’s “extensive pattern of inappropriate conduct throughout discovery,” which he found “resulted at least in part from counsel’s incompetence in managing discovery.” The monetary sanctions totaled \$567,059.85. Although several law firms represented Asclētis at different times in the investigation, only one firm committed sanctionable conduct and was held jointly and severally liable for \$122,510.25 of the total amount. For non-monetary relief, he found six adverse inferences against Asclētis appropriate. The adverse inferences included that, if Asclētis received FDA approval, it would: continue to commercialize the Accused Products in the United States; perform clinical trials in the United States; and continue to have discussions with potential partners regarding partnerships for potential future importation and sale of the Accused Products in the United States, including potential partners that also explored collaboration with Viking. CALJ Cheney, however, rejected Viking’s request for default as a remedy because the record did not show any evidence was deliberately destroyed or spoliated.

The RD noted the Commission’s broad discretion in crafting a remedy and recommended a 7-year LEO, focusing on the specific injury experienced by Viking, namely, Asclētis’s interference with Viking’s ability to partner with a large pharmaceutical company and Viking’s ability to enjoy exclusive use of its trade secrets. The RD considered the length of time it would have taken Asclētis to independently develop the trade secrets and Viking’s argument based on the length of time needed to independently develop the *accused product*. However, the RD concluded that Viking’s 12-year length of time overstated the actual injury experienced by Viking.

(Prepared by Adam R. Hess, Partner, and Anna E. Fraser, Associate, Squire Patton Boggs)



The Commission Finds General Exclusion Order Is an Appropriate Remedy After Showing of a High Likelihood of Circumvention of a Limited Exclusion Order

In the Matter of CERTAIN PICK-UP TRUCK FOLDING BED COVER SYSTEMS AND COMPONENTS THEREOF (III), Inv. No. 337-TA-1353, Commission Opinion

Before the Commission

Summary: On June 7, 2024, the Commission declined to review an Initial Determination issued by ALJ Bhattacharyya granting Summary Determination of a violation, and sought briefing regarding ALJ's recommendation of the issuance of a general exclusion order, the issuance of cease and desist orders against the Defaulting Respondents, and the imposition of a bond rate of 100 percent during the period of Presidential review, as well as briefing on the public interest. In addition to responses from Complainants and OUII, the Commission also received a submission from a Non-party, Rough Country LLC ("Rough Country").

Complainants and OUII agreed with the ALJ's recommendation to issue a general exclusion order. Non-party Rough Country argued that a general exclusion order is not warranted because the proposed general exclusion order does not provide sufficient guidance as to infringing and non-infringing products. Rough Country further argued that, if a general exclusion order does issue, it should include language exempting Rough Country. Complainants and OUII responded that, if Rough Country does not infringe, then it would not be covered by the general exclusion order. Both, however, argued that there is no basis to simply exempt Rough Country from the general exclusion order.

In determining that a general exclusion order is the appropriate remedy, the Commission

found that various practices such as facilitating circumvention through Internet operations, masking of identities and product sources, and use of unmarked, generic, and/or reseller-branded packaging show a high likelihood of circumvention of a limited exclusion order. Specifically, the Commission found that the evidence showed that many of the Respondents in this Investigation use multiple aliases on multiple platforms and that respondents sell in unmarked or reseller-branded packaging. The Commission found no basis to exempt Rough Country from the general exclusion order.

(Prepared by Eda Stark, Associate, Blank Rome LLP)



The Commission Reiterates that Its Investigative Authority is Statutory Not Jurisdictional

In the Matter of CERTAIN PORTABLE BATTERY JUMP STARTERS AND COMPONENTS THEREOF (II), Inv. No. 337-TA-1359, Commission Opinion (Oct. 22, 2024)

Before the Commission

Summary: On July 5, 2024, ALJ Bhattacharyya issued an FID finding no violation of section 337 with respect to any of the four remaining asserted patents. The FID included findings of non-infringement as to two of the asserted patents and determined that all asserted claims of the four remaining asserted patents were invalid as obvious under 35 U.S.C. § 103. The Commission determined to review in part the FID. On October 22, 2024, the Commission issued its Commission Opinion determining that there had been no violation of section 337 with respect to any patent remaining in the investigation.

The FID included a jurisdictional analysis finding personal jurisdiction over all Respondents and *in rem* jurisdiction over the accused products. The Commission determined to review the FID's findings on jurisdiction and clarified that "the Commission's investigative authority is statutory" rather than jurisdictional. The Commission noted that it had recently clarified this statutory authority in other recent opinions (e.g., the July 26, 2024, Commission Opinion in Inv. No. 337-TA-1362).

The Commission further explained that "the terms 'subject matter jurisdiction,' 'personal jurisdiction,' and 'in rem jurisdiction' are not necessarily applicable to the Commission's investigative authority under section 337." Instead, "[t]he Commission is a creature of

statute" and section 337 gives the Commission the "statutory authority to investigate an alleged violation of section 337 where a complaint alleges that the named respondents have imported, sold for importation, or sold after importation articles that, inter alia, infringe a valid and enforceable U.S. patent."

The Commission separately determined to review and affirm with supplemental analysis the FID's findings that the asserted claims of two asserted patents are invalid under 35 U.S.C. § 103. In its analysis, the Commission affirmed that Respondents had introduced evidence which, "as a whole" clearly and convincingly showing that certain prior art products were on sale prior to the relevant priority date. That evidence included dated schematics, sales records, a physical exhibit, communications, source code, and a product catalog description.

(Prepared by Libbie DiMarco, Shareholder, Wolf Greenfield)



Commission Issues GEO, LEOs, and CDOs to Defaulting Respondents with Split on Whether CDOs Should Issue as to Certain Defaulting Respondents

In the Matter of CERTAIN BLOOD FLOW RESTRICTION DEVICES WITH ROTATABLE WINDLASSES AND COMPONENTS THEREOF (II), Inv. No. 337-TA-1364, Commission Opinion (October 23, 2024)

Before the Commission

Summary: On October 23, 2024, the Commission issued its opinion in this investigation between Complainants Composite Resources, Inc. and North American Rescue, LLC (collectively, “Complainants”) and sixteen respondents. Fourteen other respondents were terminated from the investigation prior to the Commission’s opinion; twelve were withdrawn from the complaint after Complainants were unable to serve them with copies of the complaint and NOI, while two were terminated from the investigation pursuant to consent orders. The sixteen remaining respondents (“Respondents”) defaulted.

Complainants filed a motion for summary determination that Respondents violated section 337 by infringing two patents, two trademarks, and trade dress belonging to Complainants. But when the ALJ granted the motion as to fifteen Respondents (the ALJ found lack of importation by the sixteenth) based solely on infringement of a single patent and ordered an evidentiary hearing on the remaining issues, Complainants withdrew those remaining issues from the investigation. The ALJ granted the requested withdrawal and recommended that a GEO issue, and that an LEO and CDO issue against each of the fifteen Respondents found to infringe.

The Commission reversed the ALJ’s finding that Complainant failed to establish that the sixteenth Respondent imported its accused product after determining that “the allegations in the complaint” (which are assumed true on default) were sufficient. The Commission then adopted the ALJ’s recommendation to issue a GEO, LEOs, and CDOs.

The Commissioners notably split (2-2) on whether CDOs should issue as to every Respondent. Chair Karpel and Commissioner Schmidlein took the position that subsections 337(g)(1)(A)-(E) were satisfied by virtue of Respondents’ default and, therefore, CDOs must issue

as to all Respondents. Commissioners Johanson and Kearns, on the other hand, performed a respondent-by-respondent analysis under subsection 337(f)(1) and determined that CDOs should issue as to only nine Respondents.

In applying the more stringent CDO analysis, Commissioners Johanson and Kearns took the position that the requisite facts for issuing a CDO should be inferred for defaulting parties that are domestic entities, are related to domestic entities, or that ship infringing products from a domestic location, such as an Amazon fulfillment center. They found this to be the case for nine Respondents. For the remaining Respondents, Commissioners Johanson and Kearns determined there were no analogous facts from which the inference could be drawn because the shipping labels for those Respondents’ products indicated they were shipped direct from abroad. Without the inference related to domestic affiliations, Commissioners Johanson and Kearns both determined CDOs were improper as to the remaining respondents. Because there was no majority on the remaining Respondents, the Commission declined to issue CDOs as to those Respondents.

(Prepared Tommy Martin, Partner, Baker Botts LLP)



ALJ Bhattacharyya Finds Alternative Designs Should be Adjudicated and Invalidity Expert is not a Person of Skill in the Art

In the Matter of CERTAIN PHOTOVOLTAIC CONNECTORS AND COMPONENTS THEREOF, Inv. No. 337-TA-1365, Final Initial Determination on Violation of Section 337 (August 30, 2024)

Before ALJ Bhattacharyya

Summary: On August 30, 2024, ALJ Bhattacharyya issued her Final Initial Determination finding a violation of Section 337 by direct infringement of certain claims of the '153 patent, but finding Complainant's indirect infringement arguments waived. Notably, ALJ Bhattacharyya found that Respondents' alternative designs should be adjudicated and did not infringe the patent. She also found Respondents' invalidity expert was not a person of ordinary skill in the art ("POSA").

First, the Complainant filed a motion to strike, arguing one of Respondents' alternative design configurations was not included in Respondents' prehearing brief. The ALJ denied the motion, finding Respondents' prehearing brief fairly identified the configuration by including photographs and citations to exhibits that showed alternative designs incorporating that modification.

Regarding the *Oligosaccharides* factors, the parties disputed whether the alternative designs were sufficiently fixed in design and sufficiently disclosed during discovery. The Complainant argued there was a mismatch between the physical products and the engineering drawings, that the design was flawed and required further development before commercialization, and that the design would not pass UL certification. The ALJ found the *Oligosaccharides* factors weighed in favor of adjudication. Respondents had disclosed alternative designs in interrogatory responses, product and mold drawings, photographs, and physical samples during fact discovery. Complainant had the opportunity to question Respondents' fact witness in deposition and at trial about the alternative designs. Both parties' experts examined the physical samples and testified about them at the evidentiary hearing. Complainant was able to assert infringement contentions against the alternative designs, and its expert offered opinions on them. The ALJ also noted that Complainant could have sought additional discovery if necessary.

ALJ Bhattacharyya found Respondents were entitled to a finding of non-infringement for the alternative designs. Complainant did not accuse the alternative designs of direct infringement in post-hearing briefing. The ALJ also found Complainant failed to show the alternative designs could meet the claim requirements for indirect infringement.

Concerning Respondents' invalidity expert Dr. Kenny, the ALJ held he was not a POSA, and his testimony could not be considered. The *Markman* Order required a POSA to have at least two years of experience working with photovoltaic systems and electrical wiring, among other qualifications. The parties disputed whether experience with electrical wiring in solar installations was required of a POSA. The ALJ found the patent included specific practical issues related to solar installations and sought to solve a problem pertaining to such installations. Therefore, significant experience with electrical wiring in photovoltaic systems was required. Dr. Kenny lacked experience with photovoltaic systems, and the ALJ held his experience with electrical wiring and the underlying physics of photovoltaic systems could not substitute for significant experience in the field of solar installations.

(Prepared by Samantha Sweet, Associate, Husch Blackwell LLP)



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