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**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C. 20436**

In the Matter of

**CERTAIN EARPIECE DEVICES AND
COMPONENTS THEREOF**

Inv. No. 337-TA-1121

Order No. 16

INITIAL DETERMINATION

Granting in Part Complainants' Motion for Summary Determination of Violation

And

RECOMMENDED DETERMINATION

On Remedy and Bonding

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I. Background

A. Institution of the Investigation; Procedural History

By publication of a notice in the *Federal Register* on June 29, 2018, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, the Commission instituted this investigation to determine:

[W]hether 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 products identified in paragraph (2) by reason of infringement of one or more of claims 1, 5, 7, 9, and 14 of the '852 patent [U.S. Patent No. 9,036,852]; claims 1–3, 6, 8, 10, and 11 of the '853 patent [U.S. Patent No. 9,036,853]; claims 1, 3, 4, 6, 7, and 10 of the '590 patent [U.S. Patent No. 9,042,590]; claims 1, 3, 4, and 6 of the '253 patent [U.S. Patent No. 8,311,253]; claims 1 and 6–8 of the '287 patent [U.S. Patent No. 8,249,287]; and claims 1, 2, 5, 8, 11, and 16 of the '364 patent [U.S. Patent No. 9,398,364]; and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

83 Fed. Reg. 30776 (June 29, 2018).

The complainant is Bose Corporation of Framingham, Massachusetts. The named respondents are:

1. IMORE USA, Inc. of San Diego, California;
2. APSkins of Seattle, Washington;
3. Beebo Online Limited of North Las Vegas, Nevada;
4. iHip of Edison, New Jersey;
5. LMZT LLC of Brooklyn, New York;
6. Misodiko of ShenZhen, GuangDong, China;
7. Phaiser LLC of Houston, Texas;
8. Phonete of Shenzhen, China;
9. REVJAMS of New York, New York;
10. SMARTOMI Products, Inc. of Ontario, California;

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11. Spigen, Inc. of Irvine, California;
12. Sudio AB of Stockholm, Sweden;
13. Sunvalley Tek International, Inc. of Fremont, California; and
14. TomRich of Shenzhen, China.

The Office of Unfair Import Investigations (“OUII” or “Staff”) is a party to this investigation. *Id.*

The target date for completion of this investigation was set at sixteen months, *i.e.*, October 29, 2019. *See* Order No. 3 at 2 (July 3, 2018). Accordingly, the initial determination on alleged violation of section 337 is due on June 28, 2019.

Only two respondents, *i.e.*, Spigen, Inc. (“Spigen”) and Sunvalley Tek International, Inc. (“Sunvalley Tek”), have entered appearances and responded to the complaint and notice of investigation. *See* Spigen Notice of Appearance (EDIS Doc. ID No. 650456); Spigen Answer (EDIS Doc. ID No. 654757); Sunvalley Tek Appearance (EDIS Doc. ID No. 650254); Sunvalley Tek Answer (EDIS Doc. ID No. 650523).

On October 4, 2018, Bose moved to amend the notice of investigation and for leave to file an amended complaint in order, among other things, (i) to correct the name of respondent iHip to Zeikos, Inc.; and (ii) to correct the name and address of respondent Smartomi Products, Inc. to V4ink, Inc. Motion Docket No. 1121-13. The administrative law judge granted the motion, Order No. 10 (Oct. 29, 2018), and the Commission determined not to review the initial determination. *See* 83 Fed. Reg. 61168 (Nov. 28, 2018); correction at 83 Fed. Reg. 62900 (Dec. 6, 2018). On February 21, 2019, Bose filed its amended complaint and served it on all respondents. *See* First Am. Compl., (EDIS Doc. ID No. 667789).

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During the course of the investigation, Bose settled with the following six respondents:

- APSkins
- Zeikos, Inc.
- LMZT LLC
- Spigen
- Sudio AB
- Sunvalley Tek

The investigation has been terminated as to these respondents. *See* Commission Notices (EDIS Doc. ID Nos. 664652, 662643, 661554, 669160).

Defaulting (or Non-Participating) Respondents

As to the eight remaining respondents, five have been found in default.

Specifically, on September 4, 2018, Bose moved for an order to show cause why (i) Beebo Online Limited, (ii) Misodiko, (iii) Phaiser LLC, (iv) SMARTOMI Products, Inc., (*i.e.*, V4ink, Inc.), and (v) TomRich should not be found in default for failing to respond to the complaint and notice of investigation. Motion Docket No. 1121-9. The administrative law judge granted the motion and issued an order to show cause. *See* Order No. 7 (Sept. 20, 2018). On December 11, 2018, the administrative law judge found these five respondents in default (Order No. 13 (Dec. 11, 2018)), and the Commission determined not to review the initial determination. *See* Notice of Comm'n Determination Not to Review an Initial Determination Finding Certain Respondents in Default (EDIS Doc. ID No. 664971) (Dec. 21, 2019).

As to the three other respondents—(i) 1MORE USA, Inc., (ii) Phonete, and (iii) REVJAMS—Bose moved, to the extent necessary, in the pending motion for a finding of default. *See* Mem. at 3 n.3.

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Although the Commission was unable to serve the complaint and notice of investigation on 1MORE USA, Inc. and Phonete (returned from 1MORE USA, Inc. (EDIS DOC ID No. 650945); returned from Phonete (EDIS Doc. ID No. 650270), Bose apparently served the amended complaint on 1MORE USA, Inc. and Phonete. *See* Mem. Exs. A, B. As to REVJAMS, the Commission served the complaint and notice of investigation on the respondent. However, Order Nos. 8-11 were returned to the Commission with the comment: “Company or Person Unknown.” *See* Order Nos. 8-11 Returned from REVJAMS (EDIS Doc. ID No. 661320).

On December 7, 2018, Bose moved to suspend the procedural schedule and represented that “Bose is in the process of preparing a motion for summary determination that will conclude this investigation.” Motion Docket No. 1121-16 at 1. In an e-mail on December 10, 2018, the administrative law judge granted the motion.

Despite being served with the complaint or amended complaint, and the redacted corrected motion for summary determination, respondents (i) 1MORE USA, Inc., (ii) Phonete, and (iii) REVJAMS have not submitted any response, appeared, or otherwise participated in the investigation. These three non-participating respondents and the five respondents found in default are the subject of Bose’s pending motion for summary determination seeking a finding of a violation of section 337 and requesting entry of a general exclusion order (“GEO”) and cease and desist orders (“CDOs”) directed at all defaulting (or non-participating) respondents. Mot. at 1-2.

Corrected Motion for Summary Determination

On February 8, 2019, pursuant to Commission Rule 210.18, Bose Corporation (“Bose”) filed a motion for summary determination of violations by certain respondents

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who are in default, and for a recommended determination on remedy and bonding. Motion Docket No. 1121-20. As noted above, the defaulting (or non-participating) respondents are 1MORE USA, Inc., Beebo Online Limited, Misodiko, Phaiser LLC, Phonete, REVJAMS, TomRich, and V4Ink, Inc. (d/b/a SMARTOMI Products, Inc.). On March 1, 2019, Bose filed a corrected motion. On March 12, 2019, Bose filed a replacement Exhibits E to the corrected motion for summary determination. *See* EDIS Doc. ID No. 669857 (Replacement Exhibit E to Bose Corrected Motion for Summary Determination).

On June 27, 2019, Bose filed a “Supplement to Complainant Bose Corporation’s Corrected Motion for Summary Determination” which includes an “Index of Bose MSD filings.” *See* EDIS Doc. ID No. 679576. The index provides descriptive titles of all of the exhibits attached to (1) the original motion filed on February 8, 2019; (2) the corrected motion filed on March 1, 2019; and (3) the Replacement Exhibit E filed on March 12, 2019. Additionally, on June 27, 2019, Bose filed “replacement Exhibits for Schuler Declaration (Exs. E-36 and E-37).” *See* EDIS Doc. ID No. 679568 (Letter to Secretary Barton enclosing replacement Exhibits for Schuler Declaration (Exs. E-36 and E-37)).

Bose argues that substantial, reliable, and probative evidence supports the following requested relief:

1. An initial determination that the defaulting respondents have violated section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. §1337, through their importation into the United States, sale for importation into the United States, and/or sale within the United States after importation of earpiece devices that infringe claims 1 and 7 of U.S. Patent No. 9,036,852; claims 1 and 8 of U.S. Patent No. 9,036,853; claims 1 and 6 of U.S. Patent No. 9,042,590; claim 1 of U.S. Patent

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No. 8,311,253; claims 1, 7, and 8 of U.S. Patent No. 8,249,287; and claims 1 and 11 of U.S. Patent No. 9,398,364;

2. An initial determination that complainant has satisfied the domestic industry requirement; and
3. A recommended determination that the Commission (a) issue a general exclusion order pursuant to 19 U.S.C. §1337(d)(2) covering earpiece devices that infringe claims 1 and 7 of U.S. Patent No. 9,036,852; claims 1 and 8 of U.S. Patent No. 9,036,853; claims 1 and 6 of U.S. Patent No. 9,042,590; claim 1 of U.S. Patent No. 8,311,253; claims 1, 7, and 8 of U.S. Patent No. 8,249,287; and claims 1 and 11 of U.S. Patent No. 9,398,364; (b) issue cease and desist orders against the defaulting respondents; and (c) set the bond for the Presidential Review period at 100% of the entered value of the infringing earpiece devices.

Mot. at 1-2.

On March 22, 2019, the Staff filed a response supporting the motion in substantial part, and supporting the requested remedy of a general exclusion order. *See* EDIS Doc.

ID No. 671068 (Staff's Response to Bose's Corrected Motion for Summary

Determination of No Violation and for Recommend Determination on Remedy and Bonding). The Staff argues:

The Staff supports the motion for a summary determination of violation. In short, there is no genuine issue as to any material fact that there has been a violation of Section 337 as to the six patents at issue. In the event that a violation is found, the evidence also supports the issuance of a general exclusion order ("GEO") directed to five of the six patents and cease and desist orders ("CDOs") directed to domestic defaulting respondents.

Staff Resp. at 1.

B. The Parties

1. Complainant

Complainant Bose is a corporation organized and existing under the laws of the state of Delaware with a principal place of business at 100 The Mountain Road,

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Framingham, Massachusetts 01701. Since its founding in 1964, Bose has designed and developed unique sound solutions for a host of audio applications, including home entertainment and home audio, portable audio such as headphones, aviation and automotive industries, and the military. Bose also designs professional sound systems for many applications, including stadiums and auditoriums, houses of worship, retail businesses, department stores and restaurants. Bose designs, develops, manufactures, and supports a wide range of products including: automotive music systems; professional audio systems; and home audio equipment, such as stereos, speakers, headphones, headsets, tabletop, and home theater systems. Bose's product offerings also extend to conversation-enhancing headphones, noise-masking sleep earbuds, and audio eyeglasses. *See Mem. at 3-4.*

2. Respondents

As noted above, fourteen respondents were originally named in this investigation.

The named respondents are:

1. 1MORE USA, Inc. of San Diego, California;
2. APSkins of Seattle, Washington;
3. Beeebo Online Limited of North Las Vegas, Nevada;
4. iHip of Edison, New Jersey;
5. LMZT LLC of Brooklyn, New York;
6. Misodiko of ShenZhen, GuangDong, China;
7. Phaiser LLC of Houston, Texas;
8. Phonete of Shenzhen, China;
9. REVJAMS of New York, New York;
10. SMARTOMI Products, Inc. of Ontario, California;
11. Spigen, Inc. of Irvine, California;
12. Sudio AB of Stockholm, Sweden;

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13. Sunvalley Tek International, Inc. of Fremont, California; and
14. TomRich of Shenzhen, China.

83 Fed. Reg. 30776 (June 29, 2018).

Defaulting (or Non-Participating) Respondents

As discussed above, the defaulting (or non-participating) respondents (1MORE, Beebo, Misodiko, Phaiser, Phonete, REVJAMS, V4Ink, and TomRich) failed to respond to Bose's complaint or the notice of investigation. These respondents are companies based in the United States, China, and Canada that manufacture, offer for sale, and sell earpiece devices through Internet sites like Amazon.com, eBay, and Alibaba. *See* Mem. Ex. E (Schuler 1st Decl.), ¶ 11; *see also e.g.*, Mem. Ex. F, ¶ 8; Mem. Ex. G at App. C-1; Mem. Ex. H, ¶ 10; Mem. Ex. I, ¶ 10; Mem. Ex. J, ¶ 7. The evidence demonstrates that these respondents use well-known shipping companies like DHL and FedEx to import their products directly to consumers in the United States, often in small quantities. *See* Mem. Ex. E (Schuler 1st Decl.), ¶ 12; *see also e.g.*, Mem. Ex. I, ¶ 6. These respondents are not licensed to use the asserted patents. Mem. Ex. E (Schuler 1st Decl.), ¶ 13.

As noted above, despite being served with the complaint or amended complaint, and the redacted corrected motion for summary determination, respondents (i) 1MORE USA, Inc., (ii) Phonete, and (iii) REVJAMS have not submitted any response, appeared, or otherwise participated in the investigation. These three non-participating respondents and the five respondents found in default are the subject of Bose's pending motion for summary determination seeking a finding of a violation of section 337 and requesting entry of a GEO and CDOs directed at all defaulting (or non-participating) respondents. Mot. at 1-2.

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The Terminated Respondents

As noted above, Bose settled with the following six respondents:

- APSkins
- Zeikos, Inc.
- LMZT LLC
- Spigen
- Sudio AB
- Sunvalley Tek

The investigation has been terminated as to these respondents. *See Commission Notices* (EDIS Doc. ID Nos. 664652, 662643, 661554, 669160).

The status of each respondent is summarized below:

Respondent	Status
1MORE USA, Inc.	Failed to respond or appear
Beebo Online Limited	Found in default
APSKins	Terminated
Zeikos, Inc.	Terminated
LMZT LLC	Terminated
Misodiko	Found in default
Phaiser LLC	Found in default
Phonete	Failed to respond or appear
REVJAMS	Failed to respond or appear
V4Ink, Inc.	Found in default
Spigen, Inc.	Terminated
Sudio AB	Terminated
Sunvalley Tek	Terminated
TomRich	Found in default

C. Technological Background

The ‘852, ‘853, ‘590, ‘253, and ‘287 StayHear® Patents

The ‘852, ‘853, ‘590, ‘253, and ‘287 patents (Mem. Exs. K-O, respectively) each describes the novel aspects of the Bose StayHear® tips and share substantially similar specifications. Bose refers to these patents as the “StayHear® Patents.” *See* Mem. at 6. The StayHear® Patents generally describe an earpiece comprising an acoustic driver, a housing, and an ear interface having a body and a positioning and retaining structure. *See* Mem. Ex. N (‘253 Patent) at 11:10-31.¹ The patents describe the desirability of placing the earpiece in the user’s ear such that it is oriented properly, it is stable, and it is comfortable to the user. *Id.* at 4:63-65. In one aspect, the positioning and retaining structure, together with the body, holds the earpiece in position without the use of ear hooks or “twist lock” tips, which may be unstable, uncomfortable, or ill-fitting. *Id.* at 5:23-29.

¹ All citations for the StayHear® Patents are to the ‘253 patent. Similar disclosures can be found in each of the asserted patents. *See* Mem. at 7 n.4.

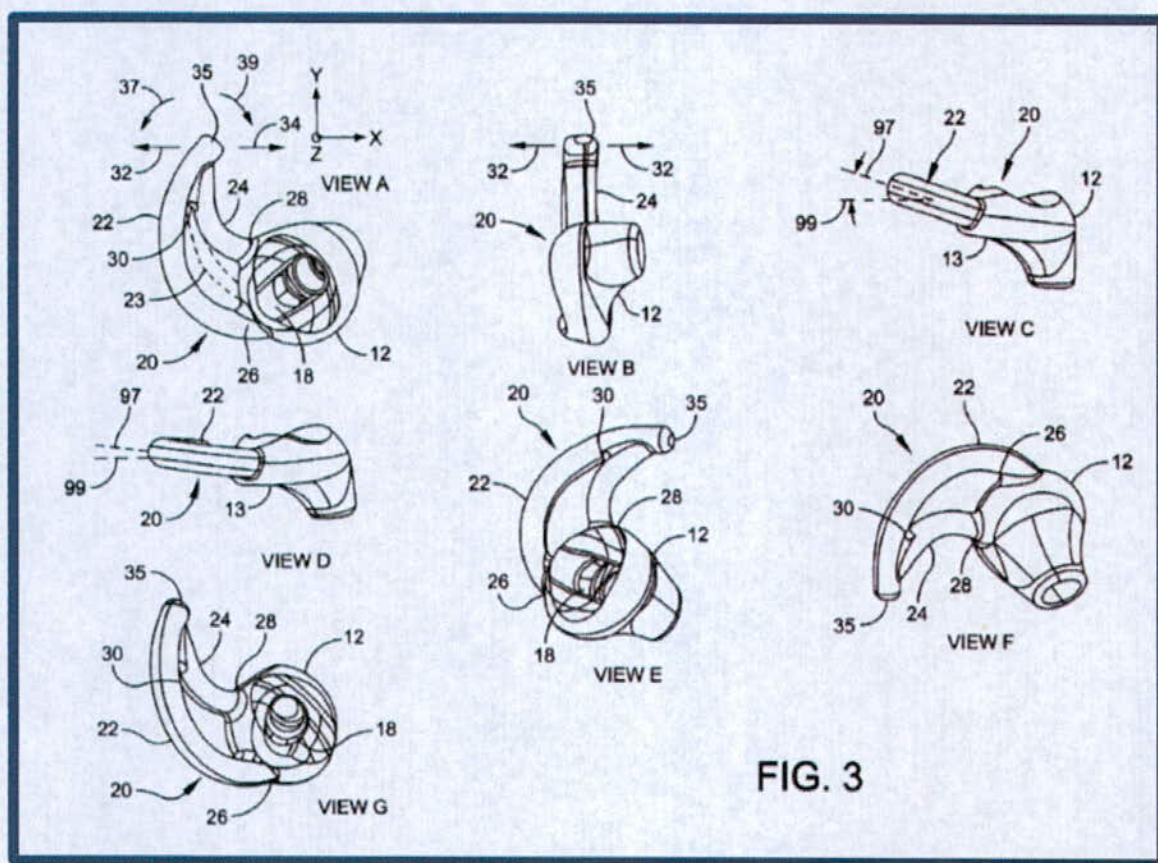


FIG. 3

Previous in-ear earpiece designs were uncomfortable, unstable, and difficult to insert in the user's ear. Other in-ear earpiece designs provide too much sealing, reducing ambient noise but also reducing the user's ambient awareness. *See* Mem. at 7. Bose designed the StayHear® earpiece to fit the shape of the concha and ear canal entrance while not exerting pressure on ear canal walls. The retaining structure stabilizes and secures the earphone in the user's ear. The overall design facilitates comfort and stability without the need for a very tight, highly attenuating seal in the ear canal.

U.S. Patent No. 9,036,852

The '852 patent, entitled "Earpiece Positioning and Retaining," issued on May 19, 2015, to named inventors Ryan C. Silvestri, Eric M. Wallace, Kevin P. Annunziato, Ian M. Collier, and Michael Monahan. *See* Mem. Ex. K ('852 Patent). It is assigned to Bose.

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See First Am. Compl., ¶ 49; Ex. 2. The ‘852 patent generally discloses a positioning and retaining structure for an in-ear earpiece. *See* Mem. Ex. K (‘852 Patent) at Abstract.

U.S. Patent No. 9,036,853

The ‘853 patent, entitled “Earpiece Positioning and Retaining,” issued on May 19, 2015, to named inventors Ryan C. Silvestri, Eric M. Wallace, Kevin P. Annunziato, Ian M. Collier, and Michael Monahan. *See* Mem. Ex. L (‘853 Patent). It is assigned to Bose. *See* First Am. Compl., ¶ 52; Ex. 5. The ‘853 patent generally discloses a positioning and retaining structure for an in-ear earpiece. *See* Mem. Ex. L (‘853 Patent) at Abstract.

U.S. Patent No. 9,042,590

The ‘590 patent, entitled “Earpiece Positioning and Retaining,” issued on May 26, 2015, to named inventors Ryan C. Silvestri, Eric M. Wallace, Kevin P. Annunziato, Ian M. Collier, and Michael Monahan. *See* Mem. Ex. M (‘590 Patent). It is assigned to Bose. *See* First Am. Compl., ¶ 55; Ex. 8. The ‘590 patent generally discloses a positioning and retaining structure for an in-ear earpiece. *See* Mem. Ex. M (‘590 Patent) at Abstract.

U.S. Patent No. 8,311,253

The ‘253 patent, entitled “Earpiece Positioning and Retaining,” issued on November 13, 2012, to named inventors Ryan C. Silvestri, Eric M. Wallace, Kevin P. Annunziato, Ian M. Collier, and Michael Monahan. *See* Mem. Ex. N (‘253 Patent). It is assigned to Bose. *See* First Am. Compl., ¶ 58; Ex. 11. The ‘253 patent generally discloses an earpiece that fits into the right ear. *See* Mem. Ex. N (‘253 Patent) at 4:36-37.

U.S. Patent No. 8,249,287

The ‘287 patent, entitled “Earpiece Positioning and Retaining,” issued on August

21, 2012, to named inventors Ryan C. Silvestri, Eric M. Wallace, Kevin P. Annunziato, Ian M. Collier, and Michael Monahan. *See* Mem. Ex. O ('287 Patent). It is assigned to Bose. *See* First Am. Compl., ¶ 61; Ex. 14. The '287 patent generally discloses a positioning and retaining structure for an in-ear earpiece. *See* Mem. Ex. O ('287 Patent) at Abstract.

The '364 StayHear®+ Patent

The '364 patent, entitled "Earpiece Passive Noise Attenuating," issued on July 19, 2016, to named inventors Michael Monahan, Ryan C. Silvestri, Eric M. Wallace, and Kevin P. Annunziato. *See* Mem. Ex. P ('364 Patent). It is assigned to Bose. *See* First Am. Compl., ¶ 64; Ex. 17. Bose refers to the '364 patent as the StayHear®+ Patent. *See* Mem. at 8. The '364 patent generally discloses a structure for providing passive noise attenuation by an in-ear earpiece and for positioning and retaining the earpiece in the ear. *See* Mem. Ex. P ('364 Patent) at 1:12–14. The '364 patent generally describes an ear tip for an in-ear earpiece comprising a positioning and retaining structure, a passageway, and a sealing structure. *See* Mem. Ex. P at 5:53-55. The patent describes the desirability of placing the earpiece in the user's ear such that it is properly oriented and stable: in this position, the ear tip provides significant passive attenuation of ambient noise without causing discomfort in the user's ear. *Id.* at 4:12-15. The '364 patent also includes a sealing structure or flap, which may be frusto-conically shaped. The flap is designed such that the smaller end of the tip fits inside the ear canal entrance and contacts the entrance of the ear canal but not the inside of the ear canal, thereby improving comfort. *Id.* at 5:66-67; 6:1-4. The ear tip of the '364 patent provides orientation, stability, and good sealing to the entrance of the ear canal without excessive radial pressure and

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without inward clamping pressure. *Id.* at 4:47-51; 5:29-33; *see also* Figures 5A-5D, below. The sealing structure provides an optimal combination of comfort, stability and fit for an in-ear earpiece.

D. The Products at Issue






1. The Accused Products

The accused products in this investigation are earpiece devices and components thereof, including the identified accused products of the defaulting (or non-participating) respondents. *See* First Am. Compl., ¶ 45, Ex. 35; *see also* Joint Stipulation Regarding Representative Products at Issue (EDIS Doc. ID No. 659488) (Oct. 22, 2018).




Below is a table that provides a summary of the defaulting (or non-participating) respondents' accused products, including a photograph of each accused product, and a reference to alleged infringement of the asserted claims for each product:

Defaulting Respondent	Accused Product(s)	Exemplary Product Image	Asserted Patents (Claims)
1MORE USA, Inc.	1More iBFree		'852 patent (1, 7); '590 patent (1, 6); and '853 patent (1, 8).
Beebo Online Limited	Dodocool DA 109		'852 patent (1, 7); '590 patent (1, 6); '853 patent (1, 811); and '364 patent (1, 11).

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Defaulting Respondent	Accused Product(s)	Exemplary Product Image	Asserted Patents (Claims)
	Dodocool Earhooks		'852 patent (1, 7).
Misodiko	Misodiko Earhooks		'852 patent (1, 7); and '287 patent (1, 6, 7, 8).
Phaiser LLC	Phaiser BHS-730		'852 patent (1, 7); and '287 patent (1, 6, 7, 8).
	Phaiser BHS-750		'852 patent (1, 7); '287 patent (1, 6, 7, 8); '590 patent (1, 6); '853 patent (1, 8); and '364 patent (1, 11).
Phonete	Phonete Silicone Rubber Earbuds		'852 patent (1, 7); and '287 patent (1, 6, 7, 8).

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Defaulting Respondent	Accused Product(s)	Exemplary Product Image	Asserted Patents (Claims)
REVJAMS	REVJAMS Active Sport Pro		'852 patent (1, 7); '287 patent (1, 6, 7, 8); '590 patent (1, 6); '853 patent (1, 8); and '364 patent (1, 11).
TomRich	TomRich T330		'852 patent (1, 7); and '287 patent (1, 6, 7, 8).
V4Ink, Inc.	SMARTOMI Q5		'852 patent (1, 7); and '253 patent (1, 3, 4, 6).

See Mem. at 24-26

2. The Domestic Industry Products

Bose has identified the Bose SoundSport® in-ear headphones, SoundSport® Pulse wireless headphones, SoundSport® wireless headphones, SoundTrue® Ultra in-ear headphones, and SoundSport® Free wireless headphones as the domestic industry products. See Mem. at 28 n.8; Mem. Ex. S (Maguire Decl.) ¶ 3; First Am. Compl., ¶ 172, Exs. 31, 32; Bose Identification of Products It Will Rely Upon to Satisfy the Domestic Industry Requirement (EDIS Doc. ID No. 654098) (Aug. 27, 2018).

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Further, Bose identifies the (i) Bose SoundSport® in-ear headphones, and (ii) Bose SoundSport® wireless headphones, as representative of the domestic industry products. *See* Mem. at 27-28, Mem. Ex. S (Maguire Decl.) at 2 n.1.

II. Jurisdiction

No party has contested the Commission's *in rem* jurisdiction over the accused products. Evidence of specific instances of importation of the accused products is discussed in the importation section of this initial determination. Accordingly, it is found that the Commission has *in rem* jurisdiction over the accused products.

As indicated in the Commission's notice of investigation, discussed above, this investigation involves the importation of products alleged to infringe United States patents in a manner that violates section 337 of the Tariff Act, as amended. No party has contested the Commission's jurisdiction over the subject matter of this investigation. It is found that the Commission has subject matter jurisdiction over this investigation.

No party has contested the Commission's personal jurisdiction over it. In particular, the respondents are all deemed to have received notice of this investigation at least through service of the complaint and notice of investigation. It is therefore found that the Commission has personal jurisdiction over all parties.

III. General Principles of Applicable Law

A. Summary Determination

Section 337 prohibits "[t]he 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 (i) infringe a valid and enforceable United States patent"

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19 U.S.C. § 1337(a)(1)(B). A complainant need only prove importation of a single accused product to satisfy the importation element. *See Certain Trolley Wheel Assemblies*, Inv. No. 337-TA-161, Comm’n Op. at 7-8, USITC Pub. No. 1605 (Nov. 1984).

The Commission Rules provide that “[a]ny party may move with any necessary supporting affidavits for a summary determination in its favor upon all or part of the issues to be determined in the investigation. 19 C.F.R. § 210.18(a). Summary determination “shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary determination as a matter of law.” 19 C.F.R. § 210.18(b).

B. Claim Construction

Claim construction begins with the plain language of the claim.² Claims should be given their ordinary and customary meaning as understood by a person of ordinary skill in the art, viewing the claim terms in the context of the entire patent.³ *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-13 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

² Only those claim terms that are in controversy need to be construed, and only to the extent necessary to resolve the controversy. *Vanderlande Indus. Nederland BV v. Int’l Trade Comm.*, 366 F.3d 1311, 1323 (Fed. Cir. 2004); *Vivid Tech., Inc. v. American Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999).

³ Factors that may be considered when determining the level of ordinary skill in the art include: “(1) the educational level of the inventor; (2) type of problems encountered in the art; (3) prior art solutions to those problems; (4) rapidity with which innovations are made; (5) sophistication of the technology; and (6) educational level of active workers in the field.” *Environmental Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 696 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

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In some instances, claim terms do not have particular meaning in a field of art, and claim construction involves little more than the application of the widely accepted meaning of commonly understood words. *Phillips*, 415 F.3d at 1314. “In such circumstances, general purpose dictionaries may be helpful.” *Id.*

In many cases, claim terms have a specialized meaning, and it is necessary to determine what a person of skill in the art would have understood the disputed claim language to mean. “Because the meaning of a claim term as understood by persons of skill in the art is often not immediately apparent, and because patentees frequently use terms idiosyncratically, the court looks to ‘those sources available to the public that show what a person of skill in the art would have understood disputed claim language to mean.’” *Phillips*, 415 F.3d at 1314 (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1116 (Fed. Cir. 2004)). The public sources identified in *Phillips* include “the words of the claims themselves, the remainder of the specification, the prosecution history, and extrinsic evidence concerning relevant scientific principles, the meaning of technical terms, and the state of the art.” *Id.* (quoting *Innova*, 381 F.3d at 1116).

In cases in which the meaning of a claim term is uncertain, the specification usually is the best guide to the meaning of the term. *Phillips*, 415 F.3d at 1315. As a general rule, the particular examples or embodiments discussed in the specification are not to be read into the claims as limitations. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) (*en banc*), *aff’d*, 517 U.S. 370 (1996). The specification is, however, always highly relevant to the claim construction analysis, and is usually dispositive. *Phillips*, 415 F.3d at 1315 (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90

F.3d 1576, 1582 (Fed. Cir. 1996)). Moreover, “[t]he construction that stays true to the claim language and most naturally aligns with the patent’s description of the invention will be, in the end, the correct construction.” *Id.* at 1316.

C. Infringement

1. Direct Infringement

Under 35 U.S.C. §271(a), direct infringement consists of making, using, offering to sell, or selling a patented invention without consent of the patent owner. The complainant in a section 337 investigation bears the burden of proving infringement of the asserted patent claims by a “preponderance of the evidence.” *Certain Flooring Products*, Inv. No. 337-TA-443, Comm’n Notice of Final Determination of No Violation of Section 337, 2002 WL 448690, at *59, (Mar. 22, 2002); *Enercon GmbH v. Int’l Trade Comm’n*, 151 F.3d 1376 (Fed. Cir. 1998).

Literal infringement of a claim occurs when every limitation recited in the claim appears in the accused device, *i.e.*, when the properly construed claim reads on the accused device exactly.⁴ *Amhil Enters., Ltd. v. Wawa, Inc.*, 81 F.3d 1554, 1562 (Fed. Cir. 1996); *Southwall Tech. v. Cardinal IG Co.*, 54 F.3d 1570, 1575 (Fed. Cir. 1995).

2. Indirect Infringement

a. Induced Infringement

Section 271(b) of the Patent Act provides: “Whoever actively induces infringement of a patent shall be liable as an infringer.” 35 U.S.C. § 271(b).

⁴ Each patent claim element or limitation is considered material and essential. *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538 (Fed. Cir. 1991). If an accused device lacks a limitation of an independent claim, the device cannot infringe a dependent claim. See *Wahpeton Canvas Co. v. Frontier, Inc.*, 870 F.2d 1546, 1552 n.9 (Fed. Cir. 1989).

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“To prevail on a claim of induced infringement, in addition to inducement by the defendant, the patentee must also show that the asserted patent was directly infringed.”

Epcon Gas Sys. v. Bauer Compressors, Inc., 279 F.3d 1022, 1033 (Fed. Cir. 2002).

Further, “[s]ection 271(b) covers active inducement of infringement, which typically includes acts that intentionally cause, urge, encourage, or aid another to directly infringe a patent.” *Arris Group v. British Telecomm. PLC*, 639 F.3d 1368, 1379 n.13 (Fed. Cir.

2011). The Supreme Court held that “induced infringement under § 271(b) requires knowledge that the induced acts constitute patent infringement.” *Global-Tech*

Appliances, Inc. v. SEB S.A., 563 U.S. 754, 766 (2011). The Court further held: “[g]iven the long history of willful blindness⁵ and its wide acceptance in the Federal Judiciary, we can see no reason why the doctrine should not apply in civil lawsuits for induced patent infringement under 35 U.S.C. § 271(b).” *Global-Tech*, 563 U.S. at 768 (footnote omitted).

b. Contributory Infringement

Section 271(c) of the Patent Act provides: “Whoever offers to sell or sells within the United States or imports into the United States a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a

⁵ “While the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence.” *Global-Tech*, 563 U.S. at 769.

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staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer. 35 U.S.C. § 271(c).

Section 271(c) “covers both contributory infringement of system claims and method claims.”⁶ *Arris*, 639 F.3d at 1376 (footnotes omitted). To hold a component supplier liable for contributory infringement, a patent holder must show, *inter alia*, that (a) the supplier’s product was used to commit acts of direct infringement; (b) the product’s use constituted a material part of the invention; (c) the supplier knew its product was especially made or especially adapted for use in an infringement” of the patent; and (d) the product is not a staple article or commodity of commerce suitable for substantial noninfringing use. *Id.*

D. Domestic Industry

A violation of section 337(a)(1)(B), (C), (D) or (E) can be found “only if an industry in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2). Section 337(a) further provides:

(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

⁶ “Claims which recite a ‘system,’ ‘apparatus,’ ‘combination,’ or the like are all analytically similar in the sense that their claim limitations include elements rather than method steps. All such claims can be contributorily infringed by a component supplier.” *Arris*, 639 F.3d at 1376 n.8.

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(C) substantial investment in its exploitation, including engineering, research and development.

19 U.S.C. § 1337(a)(3).

These statutory requirements consist of an economic prong (which requires certain activities)⁷ and a technical prong (which requires that these activities relate to the intellectual property being protected). *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm’n Op. at 13 (May 16, 2008) (“*Stringed Musical Instruments*”). The burden is on the complainant to show by a preponderance of the evidence that the domestic industry requirement is satisfied. *Certain Multimedia Display and Navigation Devices and Systems, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-694, Comm’n Op. at 5 (July 22, 2011) (“*Navigation Devices*”).

“With respect to section 337(a)(3)(A) and (B), the technical prong is the requirement that the investments in plant or equipment and employment in labor or capital are actually related to ‘articles protected by’ the intellectual property right which forms the basis of the complaint.” *Stringed Musical Instruments*, Comm’n Op. at 13-14.

⁷ The Commission practice is usually to assess the facts relating to the economic prong at the time that the complaint was filed. See *Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same*, Inv. No. 337-TA-560, Comm’n Op. at 39 n.17 (Apr. 14, 2010) (“We note that only activities that occurred before the filing of a complaint with the Commission are relevant to whether a domestic industry exists or is in the process of being established under sections 337(a)(2)-(3).”) (citing *Bally/Midway Mfg. Co. v. U.S. Int’l Trade Comm’n*, 714 F.2d 1117, 1121 (Fed. Cir. 1983)). In some cases, however, the Commission will consider later developments in the alleged industry, such as “when a significant and unusual development occurred after the complaint has been filed.” See *Certain Video Game Systems and Controllers*, Inv. No. 337-TA-743, Comm’n Op., at 5-6 (Jan. 20, 2012) (“[I]n appropriate situations based on the specific facts and circumstances of an investigation, the Commission may consider activities and investments beyond the filing of the complaint.”).

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“The test for satisfying the ‘technical prong’ of the industry requirement is essentially 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). “With respect to section 337(a)(3)(C), the technical prong is the requirement that the activities of engineering, research and development, and licensing are actually related to the asserted intellectual property right.” *Stringed Musical Instruments*, Comm’n Op. at 13.

With respect to the economic prong, and whether or not section 337(a)(3)(A) or (B) is satisfied, the Commission has held that “whether a complainant has established that its investment and/or employment activities are significant with respect to the articles protected by the intellectual property right concerned is not evaluated according to any rigid mathematical formula.” *Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Comm’n Op. at 27 (Feb. 17, 2011) (citing *Certain Male Prophylactic Devices*, Inv. No. 337 TA-546, Comm’n Op. at 39 (Aug. 1, 2007)). Rather, the Commission examines “the facts in each investigation, the article of commerce, and the realities of the marketplace. *Id.* “The determination takes into account the nature of the investment and/or employment activities, ‘the industry in question, and the complainant’s relative size.’” *Id.* (citing *Stringed Musical Instruments*, Comm’n Op. at 26).

With respect to section 337(a)(3)(C), whether an investment in domestic industry is “substantial” is a fact-dependent inquiry for which the complainant bears the burden of proof. *Stringed Musical Instruments*, Comm’n Op. at 14. There is no minimum monetary expenditure that a complainant must demonstrate to qualify as a domestic industry under the “substantial investment” requirement of this section. *Id.* at 25. There

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is no need to define or quantify an industry in absolute mathematical terms. *Id.* at 26.

Rather, “the requirement for showing the existence of a domestic industry will depend on the industry in question, and the complainant’s relative size.” *Id.* at 25-26.

E. Default

“In any motion requesting the entry of default or the termination of the investigation with respect to the last remaining respondent in the investigation, the complainant shall declare whether it is seeking a general exclusion order.” 19 C.F.R. § 210.16(b)(4)(2). “A party found in default shall be deemed to have waived its right to appear, to be served with documents, and to contest the allegations at issue in the investigation.” 19 C.F.R. § 210.16(b)(4). After a respondent has been found in default by the Commission, “[t]he facts alleged in the complaint will be presumed to be true with respect to the defaulting respondent.” 19 C.F.R. § 210.16(c).

IV. Summary Determination

Bose argues that substantial, reliable, and probative evidence supports a finding of infringement by the defaulting (or non-participating) respondents of the following claims:

- claims 1 and 7 of U.S. Patent No. 9,036,852;
- claims 1 and 8 of U.S. Patent No. 9,036,853;
- claims 1 and 6 of U.S. Patent No. 9,042,590;
- claim 1 of U.S. Patent No. 8,311,253;
- claims 1, 7, and 8 of U.S. Patent No. 8,249,287; and
- claims 1 and 11 of U.S. Patent No. 9,398,364.

Mot. at 1.

The Staff argues that “there is substantial, reliable and probative evidence supporting Bose’s motion.” Staff Resp. at 19.

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A. Importation

Section 337 prohibits “[t]he 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 – (i) infringe a valid and enforceable United States patent” 19 U.S.C. § 1337(a)(1)(B). A complainant “need only prove importation of a single accused product to satisfy the importation element.” *Certain Purple Protective Gloves*, Inv. No. 337-TA-500, Order No. 17 at 5 (Sept. 23, 2004); *Certain Trolley Wheel Assemblies*, Inv. No. 337-TA-161, Views of the Commission at 7-8 (Aug. 29, 1984), USITC Pub. No. 1605 (Nov. 1984), *available as* 1984 WL 951859 (importation of product sample sufficient to establish violation, even though sample “had no commercial value and had not been sold in the United States”).

Bose argues the evidence shows that each of the defaulting (or non-participating) respondents has imported accused products and/or sold such products within the United States after importation. *See* Mem. at 19-22. The Staff argues that “[t]here is no genuine issue as to any material fact that the accused products of each defaulting respondent have been imported into the United States.” Staff Resp. at 20.

As discussed below, there is no factual dispute related to importation of accused products by each of the defaulting (or non-participating) respondents. Bose’s complaint, the facts in which must be presumed to be true as to the defaulting respondents, under 19 C.F.R. § 210.16(c)(1), and the testimony of Mr. David Schuler (Mem. Ex. E (Schuler 1st Decl.)), provide substantial, reliable, and probative evidence that the defaulting (or non-

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participating)⁸ respondents import into the United States, have others make for import into the United States, and/or sell after importation into the United States earpiece devices that infringe at least one claim of each asserted patent. *See* Mem. at 19-22.

In particular, Bose submitted a declaration from David Schuler, the Chief Intellectual Property Counsel for Bose. *See* Mem. Ex. E (Schuler 1st Decl.), ¶ 1. The Schuler declaration provides evidence of specific instances of importation by each of the defaulting (or non-participating) respondents. The declaration states that the defaulting (or non-participating) respondents offered for sale earpiece devices on Amazon.com, eBay, and Alibaba, and using well-known shipping companies, including at least FedEx and DHL, import their products directly to consumers in the United States. *See id.*, ¶¶ 11-12. Mr. Schuler states that Bose purchased accused earpiece devices of each defaulting respondent “in the United States.” *See id.*, ¶¶ 14, 16, 18, 20, 22, 24, 26, 28. Invoices attached to the Schuler declaration indicate that the devices were purchased in the United States. Mem. Ex. E-1 (attached to Ex. E (Schuler 1st Decl.)). Labels on the devices or the packaging, or tracking information indicates that the devices were manufactured in China or shipped from China. *See* Mem. Ex. E (Schuler 1st Decl.), ¶¶ 15, 17, 19, 21, 23, 25, 27, 29; *see also* Mem. Exs. E-2–E-9 (photographs attached to Schuler 1st Decl.).

⁸ Commission Rule 210.17 provides that “[f]ailure to respond to a motion for summary determination under § 210.18” “may provide a basis for the presiding administrative law judge or the Commission to draw adverse inferences and to issue findings of fact, conclusions of law, determinations (including a determination on violation of section 337 of the Tariff Act of 1930), and orders that are adverse to the party who fails to act.” 19 C.F.R. § 210.17. Additionally, Commission Rule 210.15(c) provides that “a nonmoving party ... shall respond or he may be deemed to have consented to the granting of the relief asked for in the motion.” 19 C.F.R. § 210.15(c).

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1MORE USA, Inc.

Complainant purchased a representative 1MORE iBFree in the United States. *See* Mem. Ex. E (Schuler 1st Decl.), ¶ 14. The Schuler Declaration includes photographs showing an invoice indicating the product was purchased in the United States. Labels on the device and/or product packaging for the representative 1MORE iBFree indicate that the accused product was manufactured in China. *See id.*, ¶ 15.

Beebo Online Limited

Complainant purchased a representative Dodocool AirPods Earhook in the United States. *See id.*, ¶ 16. The Schuler Declaration includes photographs showing an invoice indicating the product was purchased in the United States. Labels on the device and/or product packaging for the representative Dodocool AirPods Earhook indicate that the accused product was manufactured in China. *See id.*, ¶ 17.

Misodiko

Complainant purchased a representative Misodiko Earhooks in the United States. *See id.*, ¶ 18. The Schuler Declaration includes photographs showing an invoice indicating the product was purchased in the United States. Labels on the device and/or product packaging for the representative Misodiko Earhooks indicate that the accused product was manufactured in China. *See id.*, ¶ 19.

Phaiser LLC

Complainant purchased representative Phaiser BHS-730 and BHS-750 headphones in the United States. *See* Mem. Ex. E (Schuler 1st Decl.), ¶ 20. The Schuler Declaration includes photographs showing an invoice indicating the products were purchased in the United States. Labels on the devices and/or product packaging for the

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representative Phaiser BHS-730 and BHS-750 headphones indicate that the accused products were manufactured in China. *See id.*, ¶ 21.

Phonete

Complainant purchased a representative Phonete Silicone Rubber Earbuds in the United States. *See id.*, ¶ 22. The Schuler Declaration includes photographs showing a receipt indicating the product was purchased in the United States. Labels on the device and/or product packaging for the representative Phonete Silicone Rubber Earbuds indicate that the accused product was manufactured in China. *See id.*, ¶ 23.

REVJAMS

Complainants purchased a representative REVJAMS Active Sport Pro headphones in the United States. *See id.*, ¶ 24. The Schuler Declaration includes photographs showing an invoice indicating the product was purchased in the United States. Labels on the device and/or product packaging for the representative REVJAMS Active Sport Pro headphones indicate that the accused product was manufactured in China. *See id.*, ¶ 25.

TomRich

Complainant purchased a representative TomRich T330 in the United States. *See* Mem. Ex. E (Schuler 1st Decl.), ¶ 26. The Schuler Declaration includes photographs showing an invoice indicating the product was purchased in the United States. Labels on the device and/or product packaging for the representative TomRich T330 indicate that the accused product was manufactured in China. *See id.*, ¶ 27.

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V4Ink, Inc.

Complainant purchased a representative SMARTOMI Q5 in the United States. *See id.*, ¶ 28. The Schuler Declaration includes photographs showing an invoice indicating the product was purchased in the United States. Labels on the device and/or product packaging for the representative SMARTOMI Q5 indicate that the accused product was manufactured in China. *See id.*, ¶ 29.

The evidence regarding importation by the defaulting (or non-participating) respondents includes:

Defaulting Respondent	Principal Place of Business	Evidence of Purchase	Evidence of Source of Product
1MORE USA, Inc.	San Diego, CA	Mem. Ex. E-1 at 5–7	Mem. Ex. E-2 at 1 (manufactured in China)
Beebo Online Limited	Las Vegas, NV	Mem. Ex. E-1 at 9–12	Mem. Ex. E-3 at 1–2, 20 (manufactured in China)
Misodiko	China	Mem. Ex. E-1 at 5–7	Mem. Ex. E-4 at 1 (manufactured in China)
Phaiser LLC	Houston, TX	Mem. Ex. E-1 at 5–7	Mem. Ex. E-5 at 2–3 (manufactured in China)
Phonete	China	Mem. Ex. E-1 at 3–4	Mem. Ex. E-6 at 2 (shipped from China)
REVJAMS	New York, NY	Mem. Ex. E-1 at 5–7	Mem. Ex. E-7 at 2 (manufactured in China)
V4ink, Inc.	Ontario, CA	Mem. Ex. E-1 at 5–7	Mem. Ex. E-9 at 2 (manufactured in China)
TomRich	China	Mem. Ex. E-1 at 5–7	Mem. Ex. E-8 at 2 (manufactured in China)

Accordingly, the evidence shows that the importation requirement for finding a violation of section 337 has been satisfied for each defaulting respondent (or non-participating respondent).

B. Infringement

As noted above, Bose argues that substantial, reliable, and probative evidence supports a finding of infringement by the defaulting (or non-participating) respondents of the following claims:

- claims 1 and 7 of U.S. Patent No. 9,036,852;
- claims 1 and 8 of U.S. Patent No. 9,036,853;
- claims 1 and 6 of U.S. Patent No. 9,042,590;
- claim 1 of U.S. Patent No. 8,311,253;
- claims 1, 7, and 8 of U.S. Patent No. 8,249,287; and
- claims 1 and 11 of U.S. Patent No. 9,398,364.

Mot. at 1.

1. Asserted Patents

Bose argues that the defaulting (or non-participating) respondents infringe certain claims of the following asserted patents.

U.S. Patent No. 9,036,852

Bose argues that all of the defaulting (or non-participating) respondents infringe claims 1 and 7 of the '852 patent. The asserted claims are recited below:

Claim 1:

An ear interface for an in-ear headphone, the ear interface comprising:

a body portion that fits beneath the tragus and anti-tragus and occupies substantially the entire concha of a user's ear when worn by the user,

a compliant outlet extending into at least the entrance of the user's ear canal when worn by the user, and

a compliant retaining member extending from the body portion and terminating at an extremity,

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wherein the retaining member applies pressure to the antihelix of the user's ear along substantially the entire length of an outer edge of the retaining member when the ear interface is fit into the user's ear, and

the extremity of the retaining member seats at the end of the anti-helix under the base of the helix of the user's ear.

Claim 7:

An earphone comprising:

an acoustic driver that converts applied audio signals to acoustic energy;

a housing containing the acoustic driver, the housing including a front chamber acoustically coupled to the acoustic driver; and

an ear interface comprising:

a body portion that fits beneath the tragus and anti-tragus and occupies substantially the entire lower concha of a user's ear when worn by the user,

a compliant outlet extending into at least the entrance of the user's ear canal when worn by the user, and

a compliant retaining member extending from the body portion and terminating at an extremity,

wherein the retaining member applies pressure to the antihelix of the user's ear along substantially the entire length of an outer edge of the retaining member when the ear interface is fit into the user's ear, and

the extremity of the retaining member seats at the end of the anti-helix under the base of the helix of the user's ear.

'852 Patent at claims 1, 7.

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U.S. Patent No. 9,036,853

Bose argues that certain defaulting (or non-participating) respondents infringe claims 1 and 8 of the '853 patent. The asserted claims are recited below:

Claim 1:

An earphone comprising:

an acoustic driver that converts applied audio signals to acoustic energy by moving a diaphragm along a first axis;

a housing containing the acoustic driver, the housing including a front chamber acoustically coupled to the acoustic driver and a nozzle acoustically coupled to the front chamber, wherein the nozzle extends the front chamber towards the user's ear canal along a second axis that is not parallel to the first axis; and

an ear interface comprising:

a body portion that occupies the lower concha of a user's ear when worn by the user,

an outlet extending from the body and into at least the entrance of the user's ear canal entrance when worn by the user, wherein the outlet at least partially surrounds the nozzle of the housing, and

a retaining member formed of a compliant material, wherein the retaining member applies pressure to the antihelix of the user's ear along at least a portion of a length of the retaining member when the ear interface is worn by the user.

Claim 8:

An earphone comprising:

an acoustic driver that converts applied audio signals to acoustic energy;

a housing containing the acoustic driver, the housing including a front chamber acoustically coupled to the acoustic driver, wherein the housing includes a nozzle that extends the front chamber towards the ear canal of a user when the earphone is worn; and

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an ear interface comprising:

a body portion that occupies substantially the entire lower concha of a user's ear when worn by the user,

an outlet extending from the body portion and into at least the entrance of the user's ear canal when worn by the user, wherein the outlet at least partially surrounds the nozzle of the housing and provides a passageway for conducting acoustic energy to the user's ear canal, and

a retaining member extending from the body portion, wherein the retaining member is formed of a compliant material and applies pressure to the antihelix of the user's ear along substantially the entire length of the retaining member when the ear interface is worn by the user.

'853 Patent at claims 1, 8.

U.S. Patent No. 9,042,590

Bose argues that certain defaulting (or non-participating) respondents infringe claims 1 and 6 of the '590 patent. The asserted claims are recited below:

Claim 1:

An earphone comprising:

an acoustic driver that converts applied audio signals to acoustic energy;

a housing containing the acoustic driver, the housing including a front chamber acoustically coupled to the acoustic driver, wherein the housing includes a nozzle that extends the front chamber towards the ear canal of a user when the earphone is worn; and

an ear interface comprising:

an outlet extending from the body portion and into at least the entrance of the user's ear canal when worn by the user,

wherein the outlet at least partially surrounds the nozzle of the housing and provides a passageway for conducting acoustic energy to the user's ear canal, and

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a retaining member extending from the body portion,

wherein the retaining member is formed of a compliant material and applies pressure to the antihelix of the user's ear along substantially the entire length of the retaining member when the ear interface is worn by the user,

the retaining member lies in a plane when not worn by the user,
and

the plane in which the retaining member is angled relative to the housing, such that the retaining member is tilted outward from the side of the user's head when the earphone is seated in a user's ear.

Claim 6:

An earphone comprising:

an acoustic driver that converts applied audio signals to acoustic energy by moving a diaphragm along a first axis;

a housing containing the acoustic driver; and

a removable ear interface comprising:

a body portion that fits beneath the tragus and anti-tragus and occupies the lower concha of a user's ear when worn by the user,

an outlet extending from the body portion and into at least the entrance of the user's ear canal when worn by the user, wherein the outlet extends towards the user's ear canal along a second axis that is not parallel to the first axis, and

a retaining member extending from the body portion at terminating an extremity, wherein the retaining member is formed of a compliant material and applies pressure to the antihelix of the user's ear along substantially the entire length of the retaining member when the ear interface is fit into the user's ear, and the extremity of the retaining member seats at the end of the anti-helix under the base of the helix of the user's ear.

'590 Patent at claims 1, 6.

U.S. Patent No. 8,311,253

Bose argues that respondent V4ink, Inc. infringes claim 1 of the '253 patent.⁹

The asserted claim is recited below:

Claim 1:

An earphone, comprising:

an acoustic driver that transduces applied audio signals to acoustic energy;

a housing containing the acoustic driver, the housing including a front chamber acoustically coupled to the acoustic driver and a nozzle acoustically coupled to the front chamber;

an ear interface comprising a unitary structure having a body and a positioning and retaining structure,

the body being configured to fit within the concha of a user's ear, and further including an outlet dimensioned and arranged to fit inside the user's ear canal entrance, the outlet being coupled to the nozzle of the housing and providing a passageway for conducting acoustic energy from the acoustic driver to the user's ear canal;

the positioning and retaining structure including a member extending from the body and configured to rest against and apply outward pressure to the antihelix of the user's ear to retain the earphone in the user's outer ear.

'253 Patent at claim 1.

U.S. Patent No. 8,249,287

Bose argues that certain defaulting (or non-participating) respondents infringe claims 1, 7, and 8 of the '287 patent.¹⁰ The asserted claims are recited below:

⁹ See Mot. at 1. Thus, reference to asserted claims 3, 4, and 6 of the '253 patent at page 26 of the memorandum appears to refer to additional claims that were asserted against V4ink, Inc. during the investigation, and not to claims for which Bose is currently seeking a summary determination of a violation. See Mem. at 26.

¹⁰ See Mot. at 1. Thus, reference to asserted claim 6 of the '287 patent at pages 25-26 of

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Claim 1:

A positioning and retaining structure for an in-ear earpiece comprising:

an outer leg and an inner leg attached to each other at an attachment end and attached to a body of the earpiece at the other end, the outer leg lying in a plane, the positioning and retaining structure having a stiffness that is greater when force is applied to the attachment end in a counterclockwise direction in the plane of the outer leg than when force is applied to the attachment end in a clockwise direction in the plane of the outer leg.

Claim 7:

A positioning structure for an in-ear earpiece comprising:

a first leg and a second leg attached to each other at an attachment end to form a tip and attached to a body of the earpiece at the other end,

wherein the positioning structure provides at least three modes for preventing clockwise rotation of the earpiece past a rotational position, the modes including

the tip contacting the base of the helix;

the tip becoming wedged under the anti-helix in the cymba concha region;

and the inner leg contacting the base of the helix.

Claim 8:

A positioning and retaining structure for an in-ear earpiece, comprising:

an inner leg and an outer leg attached at attachment end to each other to form a tip and at a second end to an earpiece body, the inner leg and outer leg arranged to provide at least three modes for preventing clockwise rotation of the earpieces, the modes including

the memorandum appears to refer to an additional claim that was asserted during the investigation, and not to a claim for which Bose is currently seeking a summary determination of a violation. *See* Mem. at 25-26.

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the tip contacts the base of the helix;

the tip becomes wedged under the anti-helix; and

the inner leg contacts the base of the helix; the inner leg and the outer leg further arranged so that with the earpiece in its intended position, the outer leg is urged against the anti-helix at the rear of the concha, the body engages the ear canal; and

at least one of

tip is under the anti-helix; or

a portion of at least one of the body and the outer leg are under the anti-tragus.

'287 Patent at claims 1, 7, 8.

U.S. Patent No. 9,398,364

Bose argues that certain defaulting (or non-participating) respondents infringe claims 1 and 11 of the '364 patent. The asserted claims are recited below:

Claim 1:

An ear tip for an in-ear earpiece, comprising:

a body shaped to fit in the lower concha of a wearer's ear, the body having a generally flat surface that rests against the surface of the concha;

a nozzle extending from the body towards the ear canal of the wearer's ear, the nozzle including an acoustic passage to conduct sound waves to the ear canal of the wearer;

an ear-canal sealing structure extending from the nozzle; and

a retaining structure extending from the body towards the antihelix of the wearer's ear;

wherein the sealing structure comprises a thin layer of material forming a hollow frusto-conical shape surrounding the nozzle,

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the sealing structure is joined to the nozzle at a narrow end of the frusto-conical shape,

a wide end of the frusto-conical shape is larger than a typical ear canal is wide, and

when the ear tip is placed in an ear,

the retaining structure presses against the antihelix along an outer edge of the retaining structure and thereby presses the body and the nozzle towards the ear canal,

the sealing structure seals the entrance to the ear canal, and

the body prevents the nozzle and sealing structure from extending into the ear canal beyond the entrance.

Claim 11:

An ear-tip for an in-ear earpiece, comprising:

a disc-shaped base, the disc shape lying in a plane;

a nozzle extending from the base, the nozzle being tapered to smoothly transition from a surface of the base to an end of the nozzle in a direction away from the plane in which the disc lies;

a frusto-conical flap surrounding the nozzle, with a narrow end of the flap joined to the end of the nozzle, and the flap having a stiffness to maintain a gap between the flap and the nozzle absent external forces; and

a retaining leg extending from and curving around a portion of the base, wherein when the ear-tip is placed in a users ear; the retaining leg applies pressure to the antihelix of the user's ear along an outer edge of the retaining member, the flap seals the entrance to the ear canal, and the base prevents the nozzle and flap from extending into the ear canal beyond the entrance.

'364 Patent at claims 1, 11.

2. A Person of Ordinary Skill in the Art

Bose did not offer any arguments concerning the technical qualifications of a

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person of ordinary skill in the art at the time of the claimed inventions. The Staff discussed the qualifications of a technical expert in the context of the infringement analysis. *See* Staff Resp. at 26-27.

The administrative law judge has determined to discuss the technical qualifications in the infringement analysis section of this initial determination.

3. Claim Construction

“Determination of a claim of infringement involves a two step inquiry. First, the claims are construed, a question of law in which the scope of the asserted claims is defined.” *Advanced Cardiovascular Sys.*, 261 F.3d at 1336. To ascertain the meaning of a claim term, the courts rely on intrinsic evidence: the claims, specification, and prosecution history for the patent at issue. *Phillips*, 415 F.3d 1303, 1313-14 (Fed. Cir. 2005) (*en banc*); *Vitronics*, 90 F.3d 1576, 1582 (Fed. Cir. 1996). Extrinsic evidence may be considered if necessary to explain scientific principles, technical terms, and terms of art that appear in the patent and prosecution history. Extrinsic evidence consists of all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises. *Vitronics*, 90 F.3d at 1582-83.

A court need not construe every term in a claim, but may limit its analysis to terms that do not have a readily apparent ordinary meaning and are relevant to the dispute. *O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008); *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997).

Bose argues that only three claim terms need to be construed: (i) “frusto-conical,” (ii) “outward pressure,” and (iii) “configured to rest against and apply outward pressure to the antihelix.” Mem. at 22-24. However, during the investigation, Bose, terminated

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respondent Spigen, and the Staff filed a Joint Claim Construction Chart identifying five claim terms having agreed-upon constructions:

Claim Term	Patent (s)	Agreed-Up Upon Construction
“frusto-conical”	‘364 Patent (claims 1, 8, 11, 16)	Having a substantially conical shape truncated before the pointed end
“outward pressure”	‘253 Patent (claim 1)	Should be construed in the context of the larger phrase in which it appears
“configured to rest against and apply outward pressure to the antihelix”	‘253 Patent (claim 1)	Configured to rest against the antihelix and apply pressure to the antihelix along the Z axis in a direction away from the head
“body portion”	‘852 Patent (claims 1, 7); ‘853 Patent (claims 1, 8); ‘590 Patent (claim 6)	Main section of the ear interface
“body of the earpiece”/ “earpiece body”	‘287 Patent (claims 1, 7, 8)	The main section of the physical structure of the earpiece device

See Staff Resp. at 21-22 (citing Joint Claim Construction Chart at 1-3 (EDIS Doc. ID No. 662055) (Nov. 16, 2018)). No other party filed a list of disputed claim terms and proposed constructions.

The Joint Claim Construction Chart identifies 11 claim terms as having agreed-upon constructions of plain and ordinary meaning. Joint Claim Construction Chart at 2-3. The chart also identifies four disputed claim terms, but as of the filing of the pending motion, there does not appear to be any current dispute. *Id.* at 3-4. For these terms, Bose and the Staff proposed a plain and ordinary meaning, while respondent Spigen disagreed and offered alternative constructions. *Id.* However, on December 20, 2018, Bose and

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Spigen jointly moved to terminate the investigation as to Spigen in view of a settlement agreement “resolving the present disputes between Bose and Spigen.” Thus, Spigen no longer disputes the construction of these claim terms. As a result, these four claim terms previously identified as disputed should be construed according to their plain and ordinary meaning.

There is no dispute as to the agreed-upon constructions for the five claim terms identified above. As for the remaining claims terms, there is no dispute as to whether those terms should be construed according to their plain and ordinary meaning. Thus, the remaining terms (and other claim terms not identified for construction) should be construed according to their plain and ordinary meaning. *See Hakim v. Cannon Avent Group, PLC*, 479 F.3d 1313, 1318-29 (Fed. Cir. 2007) (“[c]laim construction is directed to claims or claim terms whose meaning is disputed as applied to the patentee’s invention in the context of the accused device. When there is no dispute as to the meaning of a term that could affect the disputed issues of the litigation, ‘construction’ may not be necessary.”); *Phillips*, 415 F.3d at 1314.






4. Infringement Analysis of the Asserted Claims

Bose provides the following “chart summarizing infringement of the asserted patents among the defaulting (or non-participating) respondents in the investigation”:

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Defaulting Respondent	Accused Product(s)	Exemplary Product Image	Asserted Patents (Claims)
1MORE USA, Inc.	1More iBFree		'852 patent (1, 7); '590 patent (1, 6); and '853 patent (1, 8).
Beebo Online Limited	Dodocool DA 109		'852 patent (1, 7); '590 patent (1, 6); '853 patent (1, 811); and '364 patent (1, 11).
	Dodocool Earhooks		'852 patent (1, 7).
Misodiko	Misodiko Earhooks		'852 patent (1, 7); and '287 patent (1, 6, 7, 8).
Phaiser LLC	Phaiser BHS-730		'852 patent (1, 7); and '287 patent (1, 6, 7, 8).

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Defaulting Respondent	Accused Product(s)	Exemplary Product Image	Asserted Patents (Claims)
	Phaiser BHS-750		'852 patent (1, 7); '287 patent (1, 6, 7, 8); '590 patent (1, 6); '853 patent (1, 8); and '364 patent (1, 11).
Phonete	Phonete Silicone Rubber Earbuds		'852 patent (1, 7); and '287 patent (1, 6, 7, 8).
REVJAMS	REVJAMS Active Sport Pro		'852 patent (1, 7); '287 patent (1, 6, 7, 8); '590 patent (1, 6); '853 patent (1, 8); and '364 patent (1, 11).
TomRich	TomRich T330		'852 patent (1, 7); and '287 patent (1, 6, 7, 8).
V4Ink, Inc.	SMARTOMI Q5		'852 patent (1, 7); and '253 patent (1, 3, 4, 6).

See Mem. at 24-26.

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Bose argues that accused earpiece devices of the defaulting (or non-participating) respondents infringe certain claims of the following asserted patents:





Defaulting Respondent	'852 Patent		'853 Patent		'590 Patent		'253 Patent	'287 Patent			'364 Patent	
(claim)	1	7	1	8	1	6	1	1	7	8	1	11
1MORE USA, Inc.	x	x	x	x	x	x						
Beebo Online Limited	x	x	x	x	x	x					x	x
Misodiko	x	x						x	x	x		
Phaiser LLC	x	x	x	x	x	x		x	x	x	x	x
Phonete	x	x						x	x	x		
REVJAMS	x	x	x	x	x	x		x	x	x	x	x
V4ink, Inc.	x	x					x					
TomRich	x	x						x	x	x		

See Mot. at 1; Mem. at 24-26.






The Staff provides the following table showing the specific exhibit numbers of the photographs and infringement claim charts for each of the defaulting (or non-participating) respondents' products that allegedly infringe certain claims of the asserted patents:

Defaulting Respondent	Accused Product	Photo-graphs	Asserted Claims	Claim Chart
1MORE USA, Inc.	iBFree BT	E-2	'852 patent, claims 1, 7	E-10
			'853 patent, claims 1, 8	E-11
			'590 patent, claims 1, 6	E-12


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Beebo Online Limited	Dodocool Earhooks 	E-3	'852 patent, claims 1, 7	E-13
	Dodocool DA-109 	E-3	'852 patent, claims 1, 7	E-13
			'853 patent, claims 1, 8	E-14
			'590 patent, claims 1, 6	E-15
			'364 patent, claims 1, 11	E-16
Misodiko	Misodiko Earhooks 	E-4	'852 patent, claims 1, 7	E-18
			'287 patent, claims 1, 7, 8	E-19

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Phaiser LLC	BHS-730	E-5	'852 patent, claims 1, 7	E-20
			'287 patent, claims 1, 7, 8	E-23
			'364 patent, claims 1, 11	E-24
	BHS-750	E-5	'852 patent, claims 1, 7	E-20
			'853 patent, claims 1, 8	E-21
			'590 patent, claims 1, 6	E-22
			'287 patent, claims 1, 7, 8	E-23
Phonete	Phonete Earbuds	E-6	'852 patent, claims 1, 7	E-25
			'287 patent, claims 1, 7, 8	E-26
REVJAMS	Active Pro Sport	E-7	'852 patent, claims 1, 7	E-27
			'853 patent, claims 1, 8	E-28
			'590 patent, claims 1, 6	E-29
			'287 patent, claims 1, 7, 8	E-30
			'364 patent, claims 1, 11	E-31
V4ink, Inc.	SmartOmi Q5	E-9	'852 patent, claims 1, 7	E-34
			'253 patent, claim 1	E-35

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TomRich	<div style="text-align: center;">T330 Earhook</div> 	E-8	'852 patent, claims 1, 7	E-32
			'287 patent, claims 1, 7, 8	E-33

See Staff Resp. at 24-26 (citing Mem. Exs. E-2 to E-16, E-18 to E-35 (attached to Ex. E (Schuler 1st Decl.))).

Bose submitted two declarations of David Schuler, the Chief Intellectual Property Counsel for Bose. In his first declaration, Mr. Schuler declares that the defaulting (or non-participating) respondents' accused products infringe numerous claims of the asserted patents and that the claim charts "illustrate the infringement." Mem. Ex. E (Schuler 1st Decl.), ¶¶ 30-37. In the second declaration, he declares that certain accused products include a housing having an "acoustic driver."¹¹ Mem. Ex. II (Schuler 2nd Decl.) (EDIS Doc. Attachment ID No. 668877-1404635), ¶¶ 3-11.

In both declarations, Mr. Shuler states: "I . . . have personal knowledge of or have been informed of the facts set forth in this declaration." Mem. Ex. E (Schuler 1st Decl.) at 1; Mem. Ex. II (Schuler 2nd Decl.) at 1.¹² In any event, this investigation does

¹¹ See claim 7 of the '852 patent; claims 1 and 8 of the '853 patent; claims 1 and 6 of the '590 patent; and claim 1 of the '253 patent.

¹² The declarations do not set forth Mr. Schuler's technical qualifications, particularly with respect to one of ordinary skill in the art. Therefore, it is unclear whether Mr. Schuler is qualified as a technical expert in the claimed subject matter. See *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1362 (Fed. Cir. 2008) ("Unless a patent lawyer is also a qualified technical expert, his testimony on these kinds of technical issues is improper and thus inadmissible. Because [the witness] was never offered as a technical expert, and in fact was not qualified as a technical expert, it was an abuse of

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not appear to be sufficiently complex so as to require explanatory expert testimony. *See Centricut, LLC v. Esab Group, Inc.*, 390 F.3d 1361, 1369 (Fed. Cir. 2004) (“In many patent cases expert testimony will not be necessary because the technology will be easily understandable without the need for expert explanatory testimony.”) (quotation omitted).

The asserted claims are generally directed to the structure of an earpiece device, particularly aspects of the fit and retention characteristics of the earpiece devices. *See, e.g.*, Mem. Ex. S (Maguire Decl.), ¶ 2. Some asserted claims include an “acoustic driver” that converts the received audio signals to acoustic energy. *See, e.g.*, ‘852 Patent at 1:28-30 (claim 7). Additionally, the factual inquiries underlying a finding of direct infringement are not in dispute. As discussed below, as to the alleged indirect infringement by certain accused products (Misodiko, Phonete, and TomRich), Bose did not offer substantial, reliable and probative evidence.

The infringement claim charts and photographs of the accused products depict or describe each of the claimed elements of the following asserted claims in relation to the accused products of the defaulting (or non-participating) respondents:

Defaulting Respondent	Accused Product	Asserted Claims
1MORE USA, Inc.	iBFree BT	‘852 patent, claims 1, 7
		‘853 patent, claims 1, 8
		‘590 patent, claims 1, 6
Beebo Online Limited	Dodocool Earhooks	‘852 patent, claims 1, 7
	Dodocool DA-109	‘852 patent, claims 1, 7

discretion for the district court to permit him to testify as an expert on the issues of noninfringement or invalidity.”); *Raylon, LLC v. Complis Data Innovations, Inc.*, 700 F.3d 1361, 1376 (Fed. Cir. 2012) (“patent practitioners are unqualified to opine on the issue of infringement.”). As discussed above, the questions presented in the pending motion do not require such a qualification.

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		'853 patent, claims 1, 8
		'590 patent, claims 1, 6
		'364 patent, claims 1, 11
Misodiko	Misodiko Earhooks	'852 patent, claim 1
		'287 patent, claims 1, 7, 8
Phaiser LLC	BHS-730	'852 patent, claims 1, 7
		'287 patent, claims 1, 7, 8
		'364 patent, claims 1, 11
	BHS-750	'852 patent, claims 1, 7
		'853 patent, claims 1, 8
		'590 patent, claims 1, 6
Phonete	Phonete Earbuds	'287 patent, claims 1, 7, 8
		'852 patent, claim 1
REVJAMS	Active Pro Sport	'852 patent, claims 1, 7
		'853 patent, claims 1, 8
		'590 patent, claims 1, 6
		'287 patent, claims 1, 7, 8
		'364 patent, claims 1, 11
V4ink, Inc.	SmartOmi Q5	'852 patent, claims 1, 7
		'253 patent, claim 1
TomRich	T330 Earhook	'852 patent, claim 1
		'287 patent, claims 1, 7, 8

There is no dispute as to this evidence offered by Bose. Thus, there is no genuine issue of material fact that the defaulting (or non-participating) respondents' accused products infringe the claims identified above with the exception of claim 7 of the '852 patent with respect to Misodiko, Phonete, and TomRich products.

Bose did not offer substantial, reliable, and probative evidence regarding indirect infringement of claim 7 of the '852 patent with respect to Misodiko, Phonete, and TomRich products.

Defaulting Respondent	Accused Product	Asserted Claims
Misodiko	Misodiko Earhooks	'852 patent, claim 7
Phonete	Phonete Earbuds	'852 patent, claim 7

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TomRich	T330 Earhook	'852 patent, claim 7
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For example, claim 7 of the '852 patent recites, among other things, an “earphone comprising . . . an acoustic driver that converts applied audio signals to acoustic energy.” '852 patent at claim 7. However,, the Misodiko Earhook, depicted below, does not include an “acoustic driver.”



See Mem. Exs. E-4, E-18 (attached to Ex. E (Schuler 1st Decl.).

Instead, Bose relies on the Misodiko Earhooks “when used with Apple AirPods” to find the claimed “acoustic driver.” *See* Mem. Ex. E-18 (attached to Ex. E (Schuler 1st Decl.) at 5. Bose did not offer sufficient evidence that Misodiko induces or contributes to the infringement of claim 7 of the '852 patent. Although Bose did not offer sufficient evidence that Misodiko, Phonete, and TomRich indirectly infringe claim 7 of the '852 patent, Bose has offered substantial, reliable, and probative evidence that the same products of these defaulting (or non-participating) respondents infringe claim 1 of the '852 patent, as discussed above.

* * *

Accordingly, with the exception discussed above, Bose has provided substantial, reliable and probative evidence that the defaulting (or non-participating) respondents'

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accused products were imported into the United States and infringe certain claims of the asserted patents, thereby making summary determination appropriate as to the following patent claims:

- U.S. Patent No. 9,036,852 — claims 1 and 7
- U.S. Patent No. 9,036,853 — claims 1 and 8
- U.S. Patent No. 9,042,590 — claims 1 and 6
- U.S. Patent No. 8,311,253 — claim 1
- U.S. Patent No. 8,249,287 — claims 1, 7, and 8
- U.S. Patent No. 9,398,364 — claims 1 and 11.

C. Validity

The patents at issue are presumed valid as a matter of law. 35 U.S.C. § 282. This presumption of validity may be overcome only by “clear and convincing evidence.” *Pfizer, Inc. v. Apotex, Inc.*, 480 F.3d 1348, 1359 (Fed. Cir. 2007). Bose argues that “[s]ince no party has raised any invalidity challenges to the Asserted Patents in this proceeding, there is no issue of material fact as to their validity.” Mem. at 18. Bose argues that each of the asserted patents is “valid, enforceable, and currently in full force and effect.” *Id.* at 18-19. The Staff states that it is “not aware of any prior art or other evidence that would rebut the presumption that the asserted patents are valid and enforceable.” Staff Resp. at 29. No party has challenged the validity or enforceability of any of the patents at issue. Thus, there is no issue of material fact as to the validity or enforceability of the asserted patents. See *Lannom Mfg. Co., Inc. v. International Trade Comm’n*, 799 F.2d 1572, 1580 (Fed. Cir. 1986) (Commission did not have authority to redetermine patent validity when no defense of invalidity had been raised).

D. Domestic Industry (Technical Prong)

In a section 337 investigation, the complainant has the burden of proving the existence (or establishment) of a domestic industry relating to articles protected by the patent-at-issue. 19 U.S.C. § 1337(a)(2). For a patent-based claim, the domestic industry requirement consists of a technical prong and an economic prong. *See, e.g., Certain Variable Speed Wind Turbines & Components Thereof*, Inv. No. 337-TA-376, Comm’n Op. at 14-17, USITC Pub. No. 3003 (Nov. 1996) (“*Wind Turbines*”). The complainant bears the burden of establishing that both prongs have been satisfied. *See, e.g., Certain Concealed Cabinet Hinges & Mounting Plates*, Inv. No. 337-TA-289, 1990 WL 710375, Comm’n Op. at 22 (Jan. 8, 1990).

With regard to the technical prong, the requirement is satisfied here for each patent at issue if the domestic industry products are shown to practice at least one claim of the asserted patent. *Wind Turbines* at 15; *Certain Point of Sale Terminals & Components Thereof*, Inv. No. 337-TA-524, Order No. 40 at 17-18 (Apr. 11, 2005) (“The test for claim coverage for the purposes of the domestic industry requirement is the same as that for infringement.”).

Bose argues that “substantial, reliable, and probative evidence shows that a domestic industry exists under 19 U.S.C. § 1337(a)(2).” Mem. at 27.

Bose argues:

Bose develops and sells in the United States a variety of products that practice claims of the asserted patents. For example, the Bose® SoundSport® in-ear headphones and the Bose® SoundSport® Wireless, which are representative of the domestic products identified in Bose’s complaint, practice at least one claim of each asserted patent. Maguire Decl., ¶ 3 (Mem. Ex. S). Exhibits AA, BB, CC, DD, EE, and FF, attached

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hereto, show how the representative domestic industry products practice at least one claim of each asserted patent.

Id. at 27-28 (citations omitted) (footnote omitted).

The Staff argues:

The Staff is not aware of any dispute as to the evidence offered by Bose. In the Staff's view, Bose has presented substantial, reliable, and probative evidence that the technical prong of the domestic industry requirement has been satisfied with respect to each asserted patent. Therefore, Bose is entitled to a summary determination that it has satisfied the technical prong of the domestic industry requirement for each asserted patent.

Staff Resp. at 30-31.

Bose asserts that the representative domestic industry products, *i.e.*, the (i) Bose SoundSport® in-ear headphones, and (ii) Bose SoundSport® wireless headphones, practice at least one claim of each asserted patent. *See* Mem. at 27-28.

In support of its motion, Bose submitted the declaration of Brian Maguire, the Director of Product Planning and Management at Bose and claim charts for each asserted patent. *See* Mem. at 27-28, Mem. Ex. S (Maguire Decl.). Mr. Maguire states that he “understand[s] that the SoundSport® Wireless practices at least one claim of each of the asserted patents” and “the SoundSport® in-ear headphones practice at least one claim of U.S. patent Nos. 9,036,852, 9,036,853, 9,042,590, 8,311,253, and 8,249,287.” Mem. Ex. S (Maguire Decl.), ¶ 3. Bose also submitted claim charts showing how the representative domestic industry products practice one claim of each asserted patent:

Practiced Claim	DI Product(s)	Claim Chart
‘852 patent, claim 1	Bose SoundSport®; Bose SoundSport® wireless	Mem. Ex. AA
‘853 patent, claim 1	Bose SoundSport®; Bose SoundSport®	Mem. Ex. BB

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	wireless	
'590 patent, claim 6	Bose SoundSport®; Bose SoundSport® wireless	Mem. Ex. CC
'253 patent, claim 1	Bose SoundSport®; Bose SoundSport® wireless	Mem. Ex. DD
'287 patent, claim 7	Bose SoundSport®; Bose SoundSport® wireless	Mem. Ex. EE
'364 patent, claim 1	Bose SoundSport® wireless	Mem. Ex. FF

See Mem. Exs. AA, BB, CC, DD, EE, FF.

There is no dispute with respect to the evidence offered by Bose. Bose has presented substantial, reliable, and probative evidence that the technical prong of the domestic industry requirement has been satisfied with respect to each asserted patent. Therefore, Bose is entitled to a summary determination that it has satisfied the technical prong of the domestic industry requirement for each asserted patent.

E. Domestic Industry (Economic Prong)

With respect to the economic prong, and whether or not section 337(a)(3)(A) or (B) is satisfied, the Commission has held that “whether a complainant has established that its investment and/or employment activities are significant with respect to the articles protected by the intellectual property right concerned is not evaluated according to any rigid mathematical formula.” *Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Comm’n Op. at 27 (Feb. 17, 2011) (citing *Certain Male Prophylactic Devices*, Inv. No. 337 TA-546, Comm’n Op. at 39 (Aug. 1, 2007)). Rather, the Commission examines “the facts in each investigation, the article of commerce, and the realities of the marketplace. *Id.* “The determination takes into account the nature of

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the investment and/or employment activities, ‘the industry in question, and the complainant’s relative size.’” *Id.* (citing *Stringed Musical Instruments*, Comm’n Op. at 26).

With respect to section 337(a)(3)(C), whether an investment in domestic industry is “substantial” is a fact-dependent inquiry for which the complainant bears the burden of proof. *Stringed Musical Instruments*, Comm’n Op. at 14. There is no minimum monetary expenditure that a complainant must demonstrate to qualify as a domestic industry under the “substantial investment” requirement of this section. *Id.* at 25. There is no need to define or quantify an industry in absolute mathematical terms. *Id.* at 26. Rather, “the requirement for showing the existence of a domestic industry will depend on the industry in question, and the complainant’s relative size.” *Id.* at 25-26.

Bose argues:

Pursuant to 19 U.S.C. §§ 1337(a)(3)(A), (B), and (C), an industry in the United States exists for each of the asserted patents. The evidence shows that, with respect to articles protected by each asserted patent, Bose has made significant investments in plant and equipment in the United States; significant employment of labor and capital in the United States; and substantial investment in its exploitation, including engineering, and research and development.

Mem. at 28.

The Staff argues: “Bose has set forth substantial, reliable, and probative evidence to support a summary determination that it satisfies the economic prong of the domestic industry requirement under § 337(a)(3)(A), (B), or (C).” Staff Resp. at 33.

Bose argues that a domestic industry exists under 19 U.S.C. §1337(a)(3)(A), (B), and (C) based on its domestic activities related to the domestic industry products that includes research, development, engineering, and design. Bose relies on the uncontested

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declaration of Mr. Maguire, the Director of Product Planning and Management at Bose.

See Mem. at 28-30; Mem. Ex. S (Maguire Decl.).

During its most recent full fiscal year, which ended on March 31, 2018 (“fiscal year 2018”), Bose had net revenues of [] in approximately 134 countries. *See* Mem. Ex. S (Maguire Decl.), ¶ 4. North America is Bose’s largest market, accounting for [] of Bose’s net revenues in fiscal year 2018. *See id.* During this period, Bose’s net revenues in the United States totaled [] including [] from the [] domestic industry products sold. As of April 23, 2018, Bose employs approximately [] people worldwide, including approximately [] employees in the United States. *See id.*

Plant and Equipment (Section 337(a)(3)(A))

The evidence shows that Bose’s headquarters is located in Framingham, Massachusetts. *See* Mem. Ex. S (Maguire Decl.), ¶ 1. Bose’s research and development facilities at Framingham, Massachusetts and Stowe, Massachusetts total over [] square feet valued at []. *See id.*, ¶ 6. Bose’s Consumer Electronic Division (“CED”), located at multiple facilities in Massachusetts, is primarily responsible for the domestic industry products. *See id.*, ¶ 5. Research and development facilities in Framingham, Massachusetts and Stowe, Massachusetts related to the domestic industry products include approximately [] square feet valued at over []. *Id.*, ¶ 6. The CED’s activities related to the domestic industry products include:

- development of products for manufacturing and sale;

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- research, which encompasses invention and enhancement, into technologies that might be incorporated into future earpiece devices;
- core support for engineering functions used in the process of designing the domestic industry products, such as computer-aided design (CAD) tools; and
- industrial design of the domestic industry products.

Id., ¶ 5.

Bose has [] of equipment for research and development, including [] of equipment for research and development in the United States related to the domestic industry products. *See id.*, ¶ 7. In addition, Bose's technical support and warranty service facilities in Westborough, Massachusetts directed to the domestic industry products include approximately [] square feet valued at []. *Id.*, ¶ 9.

There is no dispute as to any material fact establishing that Bose satisfies the economic prong of the domestic industry requirement under 19 U.S.C. § 1337(a)(3)(A).

Labor and Capital (Section 337(a)(3)(B))

As of April 23, 2018, Bose employs approximately [] people worldwide, including approximately [] employees in the United States. *See* Mem. Ex. S (Maguire Decl.), ¶ 4.

Bose has made substantial employment of U.S. labor in connection with its investments in research, advanced development, engineering, and design associated with the domestic industry products. *See id.*, ¶ 8. As of April 23, 2018, Bose employs approximately [] employees dedicated to research and development [] of which are based in the United States), including [] research and development employees working on the domestic industry products in the United States. *Id.*

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In fiscal year 2018, Bose spent [] on technical support and warranty service of its CED products in the U.S., including [] for the domestic industry products. *See id.*, ¶ 9. Technical support and warranty service includes the following activities:

- a call center of approximately [] telephonic sales representatives [] of which are based in the United States), and other professionals;
- replacement parts and products in the U.S. totaling [] and
- [] of additional costs to cover any outstanding warranty liability.

Id. Bose employs over [] employees dedicated to technical support and warranty service [] of which are based in the United States), including seven for the domestic industry products. *Id.*

Bose sells the domestic industry products in its own network of 68 retail stores located throughout the United States and through various retail channels, including Apple® stores, Best Buy, and Target, also located throughout the United States. *See id.*, ¶ 10. Bose also sells and supports the domestic industry products through its own direct (online) sales channel organizations which in total employ approximately [] persons in the United States as of March 31, 2018. *Id.*

Thus, the record evidence establishes that Bose has made significant investments in labor and capital with respect to the products protected by the asserted patents. There is no dispute as to any material fact establishing that Bose satisfies the economic prong of the domestic industry requirement under 19 U.S.C. § 1337(a)(3)(B).

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Exploitation of the Asserted Patents (Section 337(a)(3)(C))

The evidence shows that in fiscal year 2018, Bose spent [] on research and development, including [] directed to the domestic industry products. *See* Mem. Ex. S (Maguire Decl.), ¶ 6. Bose's total cumulative research and development investment over the past five fiscal years is [] including [] directed to the domestic industry products. *Id.*

As noted above, [] employees based in the United States were dedicated to research and development work on domestic industry products. *See* Mem. Ex. S (Maguire Decl.), ¶ 8. In view of the significant number of U.S. employees involved in research and development on domestic industry products, Bose's research and development costs are substantial. Inasmuch as the domestic industry products were designed and developed in the United States at Bose's Consumer Electronics Division, located at multiple facilities in Bose's Massachusetts campus, its domestic industry products would not exist without them. Under the required contextual analysis, Bose's research and development costs are substantial.

Accordingly, there is no dispute as to any material fact, and it is found that Bose satisfies the economic prong of the domestic industry requirement under 19 U.S.C. § 1337(a)(3)(C).

* * *

There is no dispute with respect to the evidence offered by Bose. Bose has presented substantial, reliable, and probative evidence that the economic prong of the domestic industry requirement has been satisfied. Therefore, Bose is entitled to a

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summary determination that it has satisfied the economic prong of the domestic industry requirement.

V. Recommended Determination on Remedy and Bonding

The Commission has broad discretion in selecting the form of the remedy in a section 337 proceeding. *See Fuji Photo Film v. International Trade Comm'n*, 386 F.3d 1095, 1106-07 (Fed. Cir. 2004); *Certain Hydraulic Excavators and Components Thereof*, Inv. No. 337-TA-582, Comm'n Op. at 15 (Feb. 3, 2009), USITC Pub. No. 4115 (Dec. 2009). Where a violation is found, the Commission generally issues a limited exclusion order directed against products imported by persons found in violation of the statute. In certain circumstances, however, the Commission may issue a general exclusion order directed against all infringing products. 19 U.S.C. § 1337(d)(2).

Bose argues:

Section 1337(g) “unambiguously requires the Commission to grant relief against defaulting respondents, subject only to public interest concerns, if all prerequisites of § 1337(g)(1) are satisfied.” *Laerdal Med. Corp. v. ITC*, 2018 U.S. App. LEXIS 34465 at *8 (Dec. 7, 2018).

Bose respectfully requests that, upon entry of summary determination finding a violation, the administrative law judge:

1. Issue a recommended determination that the Commission should issue a general exclusion order pursuant to 19 U.S.C. §1337(d)(2) covering earpiece devices that infringe claims 1 and 7 of U.S. Patent No. 9,036,852; claims 1 and 8 of U.S. Patent No. 9,036,853; claims 1 and 6 of U.S. Patent No. 9,042,590; claim 1 of U.S. Patent No. 8,311,253; claims 1, 7, and 8 of U.S. Patent No. 8,249,287; and claims 1 and 11 of U.S. Patent No. 9,398,364;
2. Issue a recommended determination that the Commission should issue cease and desist orders against each of the defaulting respondents; and
3. Set the bond for the Presidential Review period at 100% of the entered value of the infringing earpiece devices.

Mem. at 30-31.

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A. General Exclusion Order

A GEO is warranted when “a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons” or “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)(A)-(B). Satisfaction of either criterion is sufficient for imposition of a GEO. *Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-643, Comm’n Op. at 24 (Oct. 1, 2009). The Commission “now focus[es] principally on the statutory language itself” when determining whether a GEO is warranted. *Certain Ground Fault Circuit Interrupters and Products Containing Same*, Inv. No. 337-TA-615, Comm’n Op. at 25 (Mar. 27, 2009). The Commission may look not only to the activities of active respondents, but also to those of non-respondents as well as respondents that have defaulted or been terminated from an investigation. *See, e.g., Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same*, Inv. No. 337-TA-650, Comm’n Op. at 59 (Apr. 14, 2010).

The Commission has long recognized that it has the authority to issue a general exclusion order when all respondents have been found in default. *See, e.g., Certain Plastic Molding Machines With Control Systems Having Programmable Operator Interfaces Incorporating General Purpose Computers, and Components Thereof II*, Inv. No. 337-TA-462, Comm’n Opinion, 2003 WL 24011979 at *8 (April 2, 2003) (The Commission made clear that section 1337(g)(2) applied not only to situations in which all respondents were found in default, but also to situations where some respondents were in default and others were not.).

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A GEO is warranted in this investigation both to prevent circumvention of an exclusion order limited to products of named entities, and because there is a pattern of violation of section 337 and it is difficult if not impossible to identify the source of infringing products, as discussed below.

In the event the Commission does not issue a GEO, the administrative law judge finds that the default determination is sufficient to establish a violation for the purpose of issuing limited exclusion orders directed to the defaulting (or non-participating) respondents.¹³ *See* 19 C.F.R. § 210.16(c)(1).

Bose argues that a GEO should issue because (i) it is necessary to prevent circumvention of a limited exclusion order, and (ii) there is “widespread pattern of infringement by both respondents and non-respondents” and that it is difficult to identify the source of infringing products. *See* Mem. at 31-45.

Bose requests the administrative law judge to:

Issue a recommended determination that the Commission should issue a general exclusion order pursuant to 19 U.S.C. §1337(d)(2) covering earpiece devices that infringe claims 1 and 7 of U.S. Patent No. 9,036,852; claims 1 and 8 of U.S. Patent No. 9,036,853; claims 1 and 6 of U.S. Patent No. 9,042,590; claim 1 of U.S. Patent No. 8,311,253; claims 1, 7, and 8 of U.S. Patent No. 8,249,287; and claims 1 and 11 of U.S. Patent No. 9,398,364.

Mem. at 30.

¹³ “After a respondent has been found in default by the Commission, the complainant may file with the Commission a declaration that it is seeking immediate entry of relief against the respondent in default. The facts alleged in the complaint will be presumed to be true with respect to the defaulting respondent. The Commission may issue an exclusion order, a cease and desist order, or both, affecting the defaulting respondent only after considering the effect of such order(s) upon the public [interest.]” 19 C.F.R. § 210.16(c)(1).

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The Staff argues:

When a violation of Section 337 is found, the Commission has “broad discretion in selecting the form, scope and extent of the remedy.” *Viscofan, S.A. v. U.S. Int’l Trade Comm’n*, 787 F.2d 544, 548 (Fed. Cir. 1986). For the reasons set forth below, the Staff is of the view that the appropriate remedy in this investigation is a GEO covering earpiece devices that infringe the following claims:

- U.S. Patent No. 9,036,852 — claims 1 and 7
- U.S. Patent No. 9,036,853 — claims 1 and 8
- U.S. Patent No. 9,042,590 — claims 1 and 6
- U.S. Patent No. 8,249,287 — claims 1, 7, and 8
- U.S. Patent No. 9,398,364 — claims 1 and 11

(“GEO Patents.”) As to claim 1 of the ‘253 patent, however, the Staff does not believe that the evidence supports the issuance of a GEO.

Staff Resp. at 33.¹⁴

The Commission has recognized that it has the authority to issue a GEO where some respondents have been terminated based on settlement and consent order, while others have been found in default. *See, e.g., Certain Lighting Control Devices Including Dimmer Switches and Parts Thereof*, Inv. No. 337-TA-776, Order No. 18 at 6-7, 34 (June 7, 2012) (un-reviewed in relevant part) (motion for summary determination granted in part after all remaining respondents found in default, but request for GEO denied on evidentiary grounds); *Certain Toner Cartridges and Components Thereof*, Inv. No. 337-TA-740, Order No. 26 at 3-5 (June 1, 2011) (un-reviewed) (motion for summary determination granted, GEO recommended, after all remaining respondents found in default).

In this investigation, the respondents have been terminated, found in default, or have failed to participate in the investigation:

¹⁴ The administrative law judge adopts the Staff’s reference to the five asserted patents as “GEO Patents.”

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Respondent	Status
1MORE USA, Inc.	Failed to respond or appear
Beebo Online Limited	Found in default
APSkins	Terminated
Zeikos, Inc.	Terminated
LMZT LLC	Terminated
Misodiko	Found in default
Phaiser LLC	Found in default
Phonete	Failed to respond or appear
REVJAMS	Failed to respond or appear
V4Ink, Inc.	Found in default
Spigen, Inc.	Terminated
Sudio AB	Terminated
Sunvalley Tek	Terminated
TomRich	Found in default

The three respondents that failed to participate, (i) 1MORE USA, Inc., (ii) Phonete, and (iii) REVJAMS, are essentially in default. *See Certain Sucralose, Sweeteners Containing Sucralose, and Related Intermediate Compounds Thereof*, 337-TA-604, Comm'n Op. at 99–100 (Apr. 28, 2009). Specifically, in *Certain Sucralose*, involving respondents that were found in default or that failed to participate, the Commission analyzed whether to issue a GEO. *Id.* After identifying the respondents that had been found in default under 19 C.F.R. § 210.16, the Commission addressed the remaining respondents that had not been found in default but had failed to participate in the investigation. *Id.* The Commission noted that it could draw adverse inferences

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against respondents that had failed to participate under 19 C.F.R. § 210.17, and concluded that the case was “essentially a default case.” *Id.* at 100.¹⁵

In this investigation, (i) IMORE USA, Inc., (ii) Phonete, and (iii) REVJAMS failed to respond or appear throughout the entirety of the investigation. After the Commission failed to serve IMORE USA, Inc. and Phonete, Bose moved to attempt personal service upon these respondents. *See* Motion Docket No. 1121-8 (the copies of the complaint and notice of investigation had been returned as undelivered); Mem. Exs. A, B (proof of personal service). As to REVJAMS, there is no proof that the complaint, notice of investigation, or Orders 1-7 were undeliverable. *See Certain Sildenafil or Any Pharmaceutically Acceptable Salt Thereof, such as Sildenafil Citrate and Products Containing the Same*, Inv. No. 337-TA-489, Order No. 12 at 3 (May 13, 2003) (non-participating respondents found in default even when there was no evidence that they received the complaint and notice of investigation). Therefore, for purposes of determining whether a GEO is appropriate in this investigation, non-participating respondents (i) IMORE USA, Inc., (ii) Phonete, and (iii) REVJAMS will be treated as defaulting respondents for failing to act under 19 C.F.R. § 210.17.¹⁶

¹⁵ Other cases have explicitly found a respondent in default under § 210.17 so to allow the administrative law judge to find violation. *See, e.g., Certain Electrical Connectors and Products Containing Same*, 337-TA-374, 1996 WL 964844 at *2 (Feb. 9, 1996) (affirmed by Commission) (finding respondent to be in default under § 210.17 because of its failure to “respond to Complainants’ Motion” and “participate meaningful [sic] in the investigation”); *Certain Composite Wear Components and Products Containing*, 337-TA-644, Order No. 26 at 14 (June 8, 2009) (finding respondent in default under § 210.17, and adverse inferences justified, for failing to file a pre-hearing brief).

¹⁶ Commission Rule 210.17 provides that “[f]ailure to respond to a motion for summary determination under § 210.18” “may provide a basis for the presiding administrative law judge or the Commission to draw adverse inferences and to issue findings of fact, conclusions of law, determinations (including a determination on violation of section 337

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The Commission's authority to issue a GEO in a situation such as this one, where some respondents have been terminated and the remaining respondents have been found in default, is found in 19 U.S.C. § 1337(d)(2). *See Certain Handbags, Luggage, Accessories, and Packaging Thereof*, Inv. No. 337-TA-754, Comm'n Op. at 5 n.3 (June 13, 2012) ("Although 19 U.S.C. § 1337(g)(2) governs the consideration of whether to issue a GEO in default cases, this provision applies only when no respondent appears to contest the investigation. In this case, since several respondents did appear and were later terminated based on consent orders or settlement agreements, section 337(g)(2) does not apply.").

Section 337(d)(2) states in relevant part:

(d) Exclusion of articles from entry . . .

(2) The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that –

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

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

19 U.S.C. § 1337(d)(2). "The standards for finding a violation of 337 under section 337(d)(2) are the same as those for finding a violation under 337(g)(2)." *Certain Digital Multimeters, and Products with Multimeter Functionality*, Inv. No. 337-TA-588, Comm'n Op. at 4 (June 3, 2008). In other words, a violation of section 337 under

of the Tariff Act of 1930), and orders that are adverse to the party who fails to act." 19 C.F.R. § 210.17. Additionally, Commission Rule 210.15(c) provides that "a nonmoving party ... shall respond or he may be deemed to have consented to the granting of the relief asked for in the motion." 19 C.F.R. § 210.15(c).

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337(d)(2) must be supported by “substantial, reliable, and probative evidence.” *Id.* at 4 (citing *Certain Sildenafil or any Pharmaceutically Acceptable Salt Thereof Such as Sildenafil Citrate, and Products Containing Same*, Inv. 337-TA-489, Comm’n Op. at 5 (Feb. 9, 2004) (under the Administrative Procedure Act, 5 U.S.C. § 556, a violation under section 337(d) must be supported by “reliable, probative, and substantial evidence”; there is no difference between this standard and the “substantial, reliable, and probative evidence” standard of 337(g)(2)).

1. Necessary to Prevent Circumvention of an LEO

Under section 337(d)(2)(A), the Commission considers whether conditions are ripe for circumvention of a limited exclusion order. *See Certain Electronic Paper Towel Dispensing Devices and Components Thereof*, Inv. No. 337-TA-718, Comm’n Op. (Pub. Version), at 8, 16 (Jan. 20, 2012). In considering whether conditions are ripe for circumvention, the Commission has relied on “evidence [that] shows the following: (1) there is a strong demand for the [patented products]; (2) the importation and sale of infringing products can be extremely profitable...; (3) extensive domestic marketing and distribution networks already exist which allow foreign manufacturers to widely distribute infringing [products] throughout the United States...; (4) large online marketplaces ... have emerged which provide both foreign manufacturers and domestic retailers a dedicated, flexible way to sell to consumers; (5) it is difficult to identify the sources of infringing products because of the ability to package infringing [products] in unmarked, generic packaging, . . . and (6) manufacturers can easily evade a limited exclusion order by establishing shell offshore distribution companies with unclear ties to the original manufacturer.” *Certain Inkjet Ink Supplies & Components Thereof* (“*Inkjet*

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Ink”), Inv. No. 337-TA-730, Comm’n Op. (Pub. Version), at 4-5 (Feb. 24, 2012).

As discussed below, Bose has presented substantial, reliable, and probative evidence that a GEO is necessary under section 337(d)(2)(A) to prevent circumvention of a LEO.

Bose has provided evidence showing that it is difficult to obtain information about the entities selling infringing earpiece devices. *See* Mem. at 32. Many of the companies selling these devices use false or non-existent addresses. *See* NOI Returned from 1MORE USA, Inc. (EDIS Doc. ID No. 650945); NOI Returned from Phonete (EDIS Doc. ID No. 650270). Some respondents were difficult to serve because of misleading or inaccurate address information on their websites or seller profiles. *See* Order No. 2 Returned from Misodiko (EDIS Doc. ID No. 654344); Order No. 2 Returned from Misodiko (EDIS Doc. ID No. 654379); Order No. 34 Returned from PLC VIP Shop d/v/a VIP Tech Ltd. (EDIS Doc. ID No. 654345); Order Nos. 8, 9, 10 and 11 Returned from REVJAMS (EDIS Doc. ID No. 661320); Order Nos. 5, 6, 7, 8, and 9 Returned from SMARTOMI Products, Inc., (EDIS Doc. ID No. 661327); Order Nos. 10 and 11 Returned from SMARTOMI Products, Inc. (EDIS Doc. ID No. 661842).

The evidence shows that all of the respondents use e-commerce websites such as Amazon.com, eBay, Groupon, Alibaba, or A4C to sell their products in the United States. *See, e.g.*, Mem. Ex. F (Wilhem Decl.), ¶ 8, Mem. Ex. G (Dreiblatt Decl.) at App. C-1, Mem. Ex. H (Saideh Decl.) ¶ 10; Mem. Ex. I (Gawell Decl.); Mem. Ex. J (Fung Decl.), ¶ 7.

Respondents such as Misodiko and Beebo conduct operations anonymously via Amazon, eBay and other online marketplaces while providing little or no information

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about the company behind the products. *See* Mem. at 33-34 (citing *e.g.* <https://www.amazon.com/s?marketplaceID=ATVPDKIKX0DER&me=AFUJM8UR8X25D&merchant=AFUJM8UR8X25D> (showing Beebo's Amazon storefront including products sold under numerous names including dodocool, Homgeek, and CACAGOO)). Other respondents such as TomRich operate under alternative names. *See* Mem. at 33 (citing First Am. Compl., ¶ 182). Companies such as 1MORE (<https://usa.1more.com>) and Smartomi (www.smartomi.com) maintain websites that advertise and sell their products without providing any address information. *See* Mem. at 33 (citing Mem. Ex. E (Schuler 1st Decl.), ¶ 52).

Bose also identified additional allegedly infringing products being sold on various online shopping sites. *See* Mem. at 44-45, Mem. Ex. E (Schuler 1st Decl.), ¶ 48. Based on the lack of identifying information, it is clear that manufacturers of these infringing earpiece devices can easily change names and set up new online “storefronts” with retailers like Amazon to circumvent any limited exclusion order. *See Certain Arrowheads with Deploying Blades and Components Thereof and Packaging Therefor*, Inv. No. 337-TA-977, Comm’n Op. at 55-56 (Apr. 28, 2017) (noting “that counterfeit manufacturers of broadhead arrowheads conduct their operations anonymously via Amazon, eBay, Alibaba, and AliExpress, providing little or no information about the company behind the products” and “counterfeiters often change or repost the listing after the take-down in order to continue their activities.”).

Many of the respondents obtain their allegedly infringing products from factories in China. *See* Mem. at 34 (citing *e.g.* Mem. Ex. G, ¶ 2; Mem. Ex. H, ¶ 2; Mem. Ex. I, ¶ 2; Mem. Ex. J, ¶ 2). The fact that factories exist that are prepared to manufacture

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additional infringing product for other companies if the named respondents in this case become subject to a limited exclusion order shows that a general exclusion order is necessary. *See Certain Electric Skin Care Devices, Brushes and Chargers Therefor, and Kits Containing the Same*, Inv. No. 337-TA-959, Comm’n Op. at 16-17 (Feb. 13, 2017) (“*Skin Care Devices*”) (citing “low barriers to entry into the market” and prevalence of other companies in addition to named respondents producing infringing goods in support of general exclusion order). Moreover, such evidence establishes (1) that the ultimate sources of the infringing products are unknown or difficult to identify, and (2) that market conditions exist to facilitate other infringers currently in the market and new infringers to enter the market.

The record demonstrates that there is established foreign manufacturing capability. *See* Mem. at 34, Mem. Ex. G (Dreiblatt Decl.) ¶ 2, Mem. Ex. H (Saideh Decl.) ¶ 2, Mem. Ex. I (Gawell Decl.), Mem. Ex. J (Fung Decl.) ¶ 2. However, Bose found many companies with too little identifying information to name them as respondents in this investigation. *See* Mem. at 35. There is evidence that these companies, which sell earpiece devices under names such as ALXCD, Lunies, WERO, TopGo, Tricon, and Tutor, import their products into the United States in nondescript packaging with little or no identifying information. *See* Mem. at 35, Mem. Ex. E (Schuler 1st Decl.), ¶ 38. These sellers often remove their products from Amazon before Bose is able to seek relief against them. Non-respondent sellers such as Pantheon Wireless and ihomx sold allegedly infringing products on Amazon as of October 2017, but as of the filing of Bose’s complaint, the same URLs led to different products. *See*

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First Am. Compl., ¶ 186. As another example, non-respondent Tutor changed its name to Yuping after institution of this investigation. *See* Mem. Ex. E (Schuler 1st Decl.), ¶ 39.

Given the large number of importers importing the infringing devices under a wide variety of names and aliases, it is difficult, if not impossible, for Bose to determine which of these companies have stopped importing allegedly infringing goods, and which have simply rebranded themselves and their products to continue importing the same goods under new aliases. *See Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm’n Op. at 13 (June 26, 2015) (“[A] large number of anonymous infringing sales on the Internet [] supports a likelihood of circumvention under subparagraph (A) and also supports a determination that it is difficult to identify the source of infringing products under subparagraph (B).”). These business practices support the conclusion that the defaulting (or non-participating) respondents would be highly capable of evading a limited exclusion order. *Certain Portable Electronic Devices*, Inv. No. 337-TA-861/867, Comm’n Op. at 9 (Jul. 10, 2014) (“[T]he Commission finds that the respondents have, or are capable of, changing names, facilities, or corporate structure to avoid detection.”); *see also Skin Care Devices*, at 15 (citing name changes to escape detection); *Arrowheads*, at 56 (same); *Mounting Apparatuses*, at 89 (same).

Furthermore, the evidence shows that companies import their products in small quantities and generic packaging making it difficult to identify the seller. *See* Mem. at 36-37. For example, Bose purchased the following products which arrived in packaging that contained little or no description of the seller or product origin:

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TopGo

Tricon

Tutor



Lunies Generic Packaging 1



Lunies Generic Packaging 2

See First Am. Compl., ¶¶ 184-85. Such evidence shows that the identity of infringers is difficult to discern and that a limited exclusion order could easily be evaded.

The availability of online retail and manufacturing sources creates low barriers to entry, allowing entities easily to replace respondents. See *Skin Care Devices*, at 16.

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Finally, there is a significant incentive encouraging defaulting (or non-participating) respondents to circumvent an LEO. Respondents are able to sell infringing earpieces at substantial margins while simultaneously underselling Bose at substantial margins. *See* Mem. at 37-39, Mem. Ex. E (Schuler 1st Decl.), ¶¶ 14, 20, 24, 28, 41. Bose's SoundSport products sell for \$100-\$200. *See* Mem. Ex. E (Schuler 1st Decl.), ¶ 41. 1More sells its iBFree earphones for \$60; Phaiser sells its BHS-730 and BHS-750 earphones for \$36; V4Ink sells its SMARTOMI Q5 earphones for \$24; and REVJAMS sells its Active Plus Wireless earphones for \$23. *See* Mem. Ex. E (Schuler 1st Decl.), ¶¶ 14, 20, 28, 24.

These companies have an unfair advantage in that they do not have to pay costs associated with research and development, physical locations, marketing, or distribution that Bose pays. *See Arrowheads*, at 57-58 (noting the respondents' unfair advantage because "they avoid costs that [the complainant] must pay, including federal excise taxes and expenses for research and development, marketing, distribution, and quality control, thereby allowing respondents to undercut [the complainant's] price by about 75%.").

Moreover, inasmuch as these companies do not pay any significant overhead, they sell their products at considerable profit margins. For example, Zeikos's iHip Warrior earphones cost less than \$4 per unit to manufacture, yet sell for approximately \$10.00. *See* Mem. Ex. E (Schuler 1st Decl.), ¶ 45; Mem. Ex. H, ¶ 3. Sudio's Tre earphones cost less than \$13-14 per unit to manufacture, yet sell for \$99.00, at a profit margin as high as 50%. *See* Mem. Ex. E (Schuler 1st Decl.), ¶ 46; Mem. Ex. I, ¶¶ 3, 7. Sunvalleytek's TaoTronics's BH-06 earbuds cost \$12 per unit to manufacture, but sell for \$26, a 54% profit margin. *See* Mem. Ex. E (Schuler 1st Decl.), ¶ 47; Mem. Ex. J ¶ 3.

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Inasmuch as selling infringing earpiece devices is a highly profitable enterprise, respondents and non-respondents alike have a large financial incentive to circumvent any limited exclusion order that the Commission would impose upon them. *See Arrowheads*, at 58 (noting the respondents' extremely low prices induce would-be FeraDyne customers to purchase counterfeits instead); *Skin Care Devices*, at 15-16 (noting price comparisons and "demand for the infringing products is strong and profits are high" as support for general exclusion order). The fact that the defaulting (or non-participating) respondents have ignored proceedings in this investigation (which resulted in them being found in default) suggests that they would not abide by the terms of any LEO order that the Commission may impose.

Substantial, reliable, and probative evidence establishes that a general exclusion order is necessary to prevent circumvention of an exclusion order limited to products of named persons. Thus, the evidence supports the issuance of a GEO under 19 U.S.C. § 1337(d)(2)(A) directed to the identified claims of the GEO Patents. As to the '253 patent, however, the evidence does not support the issuance of a GEO under 19 U.S.C. § 1337(d)(2)(A). Although there is evidence that one defaulting respondent, *i.e.*, V4ink., Inc., sells earpiece devices that infringe claim 1 of the '253 patent, an LEO directed to V4ink., Inc. would be sufficient to stop the importation of the infringing products.

Accordingly, the issuance of a general exclusion order under 19 U.S.C. § 1337(d)(2)(A) is appropriate with respect to the GEO Patents, but not as to the '253 patent.

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2. Widespread Pattern of Violation Where It Is Difficult to Identify the Source of Infringing Products

As discussed below, Bose has presented substantial, reliable, and probative evidence for the issuance of GEO under section 337(d)(2)(B) directed to the identified claims of the GEO Patents due to a pattern of violation and the difficulty in identifying the source of infringing earpiece devices.

The evidence shows a pattern of infringement by respondents and possibly others. *See* Mem. at 39-45. As discussed above in the infringement section of this initial determination, there is sufficient evidence that at least the following defaulting (or non-participating) respondents infringe the claims identified:

Defaulting Respondent	'852 Patent		'853 Patent		'590 Patent		'253 Patent	'287 Patent			'364 Patent	
(claim)	1	7	1	8	1	6	1	1	7	8	1	11
1MORE USA, Inc.	x	x	x	x	x	x						
Beebo Online Limited	x	x	x	x	x	x					x	x
Misodiko	x	x						x	x	x		
Phaiser LLC	x	x	x	x	x	x		x	x	x	x	x
Phonete	x	x						x	x	x		
REVJAMS	x	x	x	x	x	x		x	x	x	x	x
V4ink, Inc.	x	x					x					
TomRich	x	x						x	x	x		

Moreover, three terminated respondents—APskins; Zeikos, Inc.; and Sudio AB—admitted that their products infringed certain claims of the asserted patents. *See* Mem. at 40, Mem. Ex. U (APskins Consent Order Stip.), ¶ 3, Mem. Ex. V (Zeikos, Inc. Consent

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Order Stip.), ¶ 3, Mem. Ex. W (Sudio AB Consent Order Stip.), ¶ 3. In addition to the respondents, Bose has identified 16 other allegedly infringing products sold online in the United States. *See* Mem. at 44, Mem. Ex. E (Schuler 1st Decl.), ¶ 48. “The Commission has found in other investigations that numerous online sales of infringing imported goods can constitute a pattern of violation of Section 337.” *Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm’n Op. at 14 (June 26, 2015) (citing cases).

The evidence also establishes that it would be difficult to identify the sources of the allegedly infringing products. For example, Bose has presented evidence that sellers use fake names and addresses, and generic or unmarked packaging to disguise the actual manufacturer and seller of infringing earpiece devices, thereby making it difficult to identify the source of the products. *See* Mem. at 35-36, 41-42; Am. Compl., ¶¶ 184-86.

Such evidence supports a finding of a widespread pattern of unauthorized use. *See Arrowheads*, at 61; *Mounting Apparatuses*, at 91; *Beverage Containers*, at 26. Many sellers on Amazon.com remove their products before Bose is able to seek relief against them. *See* First Am. Compl., ¶¶ 184-86. For example, sellers such as Pantheon Wireless and ihomx sold products on Amazon as of October 2017, but after Bose filed its complaint, the same URLs now lead to different products. *See* Mem. at 35-36, 42-43; Am. Compl., ¶ 186. Even though terminated respondent LMZT LLC stopped selling its accused product in July 25, 2018, and had no inventory as of August 1, 2018, LMZT LLC is aware of at least four other entities that have sold or are currently selling its accused product without permission. *See* Mem. at 45, Mem. Ex. F (Wilhem Decl.), ¶¶ 6-7, 9.

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Sellers offering allegedly infringing products on e-commerce sites such as Amazon.com, eBay, and Alibaba are ubiquitous, which supports a finding that unauthorized use of Bose's patents is widespread. *See Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm'n Op. at 14 (Jun. 26, 2015) ("The Commission has found in other investigations that numerous online sales of infringing imported goods can constitute a pattern of violation of section 337."). For example, Bose has identified 16 allegedly infringing products being sold online in the United States through a variety of online platforms. *See* Mem. at 44 citing Schuler Decl., ¶ 48 (Mem. Ex. E).

Moreover, these companies often employ Fulfillment By Amazon (FBA) accounts which provide the overseas sellers with the inventory-handling and distribution infrastructure they would otherwise need to distribute their infringing products themselves.¹⁷

Based on the undisputed evidence presented, Bose has met its burden of establishing (with respect to the GEO Patents) a pattern of infringement by respondents, and that it is difficult to identify the sources of infringing products. *See* 19 U.S.C. § 1337(d)(2)(B). Therefore, the circumstances of this particular industry are such that a GEO is necessary to provide Bose with an effective remedy.

As to the '253 patent, however, the evidence does not support the issuance of a GEO under 19 U.S.C. § 1337(d)(2)(B). Given that Bose has only identified one defaulting respondent, V4ink., Inc., as a source of infringing products, Bose has not met

¹⁷ *See* Mem. at 45 n.9 citing <https://services.amazon.com/fulfillment-by-amazon/benefits.html> ("With Fulfillment by Amazon (FBA), you store your products in Amazon's fulfillment centers, and we pick, pack, ship, and provide customer service for these products.").

its burden of showing a pattern of violation or difficulty in identifying the source of other infringing earpiece devices.¹⁸ *See, e.g., Certain Ground Fault Circuit Interrupters and Products Containing Same*, Inv. No. 337-TA-615, Comm’n Op. at 26-27 (Mar. 26, 2009) (holding “we do not regard infringement by four respondents to establish a ‘pattern of violation’ of the type to be sufficient to justify the imposition of a general exclusion order when a limited exclusion order is available instead”).

Accordingly, the issuance of a GEO under 19 U.S.C. § 1337(d)(2)(B) is appropriate with respect to the GEO Patents, but not as to the ‘253 patent.

B. Cease and Desist Orders

Bose seeks cease and desist orders against all domestic and foreign defaulting (or non-participating) respondents. *See* Mem. at 46-52. Bose identifies four domestic defaulting (or non-participating) respondents: 1MORE, Beeebo, Phaiser, and REVJAMS; and four foreign defaulting (or non-participating) respondents: Misodiko, Phonete, V4Ink, and TomRich. Mem. at 47. However, the evidence suggests that V4Ink is a domestic respondent.¹⁹ Therefore, as summarized below, there are five domestic and three foreign defaulting (or non-participating) respondents:

¹⁸ Although Bose identified additional infringing products of non-respondents, it is unclear from the record whether any of the products specifically infringe claim 1 of the ‘253 patent. *See* Mem. at 44; Mem. Ex. E (Schuler 1st Decl.), ¶ 38.

¹⁹ *See* 83 Fed. Reg. 62900 (Dec. 6, 2018) (correcting address of V4ink, Inc. from “Canada” to “Ontario, California”); *see also* <https://www.manta.com/c/mb58b0y/v4ink-inc>; <https://www.amazon.com/sp?seller=A2LWXBWN4DTXYS>; <https://www.linkedin.com/company/v4ink/about/>.

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Defaulting Respondent	Principal Place of Business	Evidence of Purchase	Evidence of Source of Product
1MORE USA, Inc.	San Diego, CA	Mem. Ex. E-1 at 5–7	Mem. Ex. E-2 at 1 (manufactured in China)
Beebo Online Limited	Las Vegas, NV	Mem. Ex. E-1 at 9–12	Mem. Ex. E-3 at 1–2, 20 (manufactured in China)
Misodiko	China	Mem. Ex. E-1 at 5–7	Mem. Ex. E-4 at 1 (manufactured in China)
Phaiser LLC	Houston, TX	Mem. Ex. E-1 at 5–7	Mem. Ex. E-5 at 2–3 (manufactured in China)
Phonete	China	Mem. Ex. E-1 at 3–4	Mem. Ex. E-6 at 2 (shipped from China)
REVJAMS	New York, NY	Mem. Ex. E-1 at 5–7	Mem. Ex. E-7 at 2 (manufactured in China)
V4ink, Inc.	Ontario, CA	Mem. Ex. E-1 at 5–7	Mem. Ex. E-9 at 2 (manufactured in China)
TomRich	China	Mem. Ex. E-1 at 5–7	Mem. Ex. E-8 at 2 (manufactured in China)

See Mem. Ex. E (Schuler 1st Decl.), ¶¶ 3-10; First Am. Compl. at 5-11.

For the reasons discussed below, the evidence supports issuance of cease and desist orders directed to all of the domestic defaulting (or non-participating) respondents but not the foreign defaulting (or non-participating) respondents.

Section 337(g)(1) authorizes the Commission to issue cease and desist orders against defaulted respondents. 19 U.S.C. § 1337(g)(1); *see also Certain Hand Dryers and Housing for Hand Dryers*, Inv. No. 337-TA-1015, Comm’n Op. at 9-10 (Oct. 30, 2017) (“*Hand Dryers*”). This provision provides, in relevant part:

If—

(A) a complaint is filed against a person under this section;

(B) the complaint and a notice of investigation are served on the person;

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(C) the person fails to respond to the complaint and notice or otherwise fails to appear to answer the complaint and notice;

(D) the person fails to show good cause why the person should not be found in default; and

(E) the complainant seeks relief limited solely to that person;

19 U.S.C. § 1337(g)(1). When these requirements are satisfied, 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, limited to that person unless, after considering the effect of such exclusion or order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the Commission finds that such exclusion or order should not be issued.” *Id.*

As discussed above, the Commission has personal jurisdiction over all the respondents in this investigation. Nevertheless, “[i]n determining whether the issuance of a CDO against a defaulted respondent is appropriate, the Commission considers whether the defaulted respondent maintains commercially significant inventories in the United States or has significant domestic operations that could undercut the remedy provided by an exclusion order.” *Hand Dryers*, Inv. No. 337-TA-1015, Comm’n Op. at 10; *see also Skin Care Devices*, at 21-31 (discussion of statutory provision and Commission precedent).²⁰ The Commission’s practice recognizes that inasmuch as a defaulted respondent has chosen not to participate in the investigation, complainants are not able to

²⁰ Bose argues for a change in Commission policy with respect to the issue of cease and desist orders. *See Mem.* at 47-52.

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obtain detailed information in discovery to support a request for a cease and desist order.

See Hand Dryers, Inv. No. 337-TA-1015, Comm’n Op. at 10.

As to domestic respondents found in default under section 337(g)(1), the Commission has consistently inferred the presence of commercially significant inventories in the United States and granted complainant’s request for relief in the form of a cease and desist order. *See Hand Dryers*, Inv. No. 337-TA-1015, Comm’n Op. at 24 (citing *Certain Agricultural Tractors, Lawn Tractors, Riding Lawnmowers, and Components Thereof*, Inv. No. 337-TA-486, Comm’n Op. at 17-18 (July 14, 2003)); *Certain Mobile Device Holders and Components Thereof*, Inv. No. 337-TA-1028, Comm’n Op. at 24 (Mar. 22, 2018) (“*Mobile Devices*”).

In this investigation, inasmuch as the domestic defaulting (or non-participating) respondents are located in the United States, the evidence supports the inference that they maintain commercially significant inventories in the United States or have significant domestic operations. *See, e.g., Mobile Devices*, Inv. No. 337-TA-1028, Comm’n Op. at 27 (because three domestic defaulting respondents “maintain addresses in the United States. . . . “the Commission infers that the domestic respondents have commercially significant inventory and significant domestic operations”); *Hand Dryers*, Inv. No. 337-TA-1015, Comm’n Op. at 24 (“Because US Air is located in the United States, the Commission infers that US Air maintains commercially significant inventory in the United States, and finds that the issuance of a CDO against US Air is appropriate.”). Thus, the evidence warrants the issuance of a cease and desist orders against all domestic defaulting (or non-participating) respondents.

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With respect to the foreign respondents found in default under section 337(g)(1), the Commission has declined to presume the presence of domestic inventories in the United States that would support the issuance of a cease and desist order. *Mobile Devices*, Inv. No. 337-TA-1028, Comm’n Op. at 24. Rather, the Commission has examined whether the facts alleged in the complaint and any other record evidence support the inference that the foreign defaulting respondent or its agents maintains a commercially significant inventory and/or engages in significant commercial operations in the United States. *See id.*; *Hand Dryers*, Inv. No. 337-TA-1015, Comm’n Op. at 11.

For example, the Commission has examined “circumstantial evidence of U.S. distribution of infringing products with corresponding supporting documents relating to those sales by foreign defaulting respondents.” *Mobile Devices*, Inv. No. 337-TA-1028, Comm’n Op. at 24-25 (citing *Skin Care Devices*, at 31; *Arrowheads* at 18-20).

In this investigation, the evidence does not support the issuance of cease and desist orders against the three foreign defaulting (or non-participating) respondents: Misodiko, Phonete, and TomRich.

With regard to Misodiko, Bose argues that “[r]eliable evidence obtained from subpoenaed third party Amazon.com indicates that at least Misodiko maintains inventory in the United States through a Fulfillment By Amazon (“FBA”) account. (Ex. E, ¶ 49.)” Mem. at 47. The cited Schuler Declaration, Exhibit E, ¶ 49, states: “The Declaration of Forma Gosalia, Litigation Paralegal in the Litigation and Regulatory sector for Amazon, is attached hereto as Exhibit 36.” Mem. Ex. E (Schuler 1st Decl.) ¶ 49. However, the cited Exhibit 36 was not of record at the time the pending motion and the Staff’s response was filed. *See* Staff Resp. at 45; Replacement Exhibit E to Bose Corrected Motion for

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Summary Determination (Motion Docket No. 1121-20) (EDIS Doc. ID No. 669857) (Mar. 12, 2019). Thus, there is insufficient evidence to support the issuance of cease and desist order against Misodiko.

As to Phonete and TomRich, the evidence suggests that infringing products sold online are fulfilled from China. *See* Mem. Ex. E-6 at 2 (tracking information for Phonete product showing Shenzhen); E-1 at 5 (Amazon order showing TomRich product sold by “Holder-Mate”); Mem. Ex. E-8 at 2 (“Holder-Mate Direct storefront” seller located in China). “The Commission, however, has specifically found that sales from a foreign country shipped directly to U.S. customers does not support the inference that a foreign respondent maintains a commercially significant inventory in the United States and/or engages in significant commercial operations in the United States.” *Hand Dryers*, Inv. No. 337-TA-1015, Comm’n Op. at 11-12. Thus, the evidence also does not support the issuance of cease and desist orders against Phonete and TomRich.

Accordingly, the administrative law judge recommends that cease and desist orders issue only to the five domestic defaulting (or non-participating) respondents: 1MORE, Beebo, Phaiser, REVJAMS, and V4ink.

C. Bond

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. The purpose of the bond is to protect the complainant from any injury. 19 U.S.C. § 1337(j)(3); 19 C.F.R. §§ 210.42(a)(1)(ii),

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When reliable price information is available, the Commission has often set bond by eliminating the differential between the domestic product and the imported, infringing product. *See Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Op. at 24 (1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *See Certain Integrated Circuit Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm'n Op. at 41 (1995). A 100 percent bond has been required when no effective alternative existed. *See Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 26-27 (July 1997) (a 100% bond imposed 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 minimis* and without adequate support in the record).

Bose argues: "In view of the fact that all respondents remaining in this investigation are in default, the bond amount should be set at 100 percent of the entered value of the accused products during the Presidential Review period." Mem. at 53. The Staff agrees. Staff Resp. at 46-47.

A bond of 100% is appropriate in this investigation. Inasmuch as the evidence shows that the sales were made online at various price points and quantities, calculating an average price would be difficult. Given this state of the evidentiary record, and the fact that all of the affected respondents have defaulted rather than provide discovery, a bond value of 100% is appropriate. Under these circumstances, the administrative law

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judge recommends that the defaulting (or non-participating) respondents be required to post a bond of 100% of entered value during the 60-day Presidential review period. This amount should be sufficient to prevent any harm to Bose during the period of Presidential review.

VI. Initial Determination and Order

It is the initial determination of the administrative law judge that Bose's Motion No. 1121-20 for summary determination of violation of section 337 by the defaulting (or non-participating) respondents is granted to the extent indicated in this initial determination.

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 of the initial determination 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 contained herein.

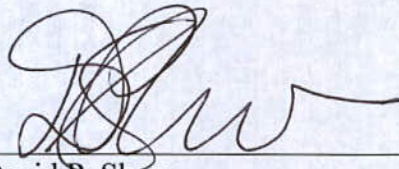
Further, it is recommended that the Commission issue a general exclusion order with respect to the GEO Patents, issue certain CDOs discussed above, and that a 100 percent bond be established for importation during the Presidential review period.

All issues delegated to the administrative law judge, pursuant to the notice of investigation, have been decided, with dispositions as to all respondents. Accordingly, this investigation is concluded in its entirety.

To expedite service of the public version, each party is hereby ordered to file with the Commission Secretary no later than July 9, 2019, a copy of this initial and recommended determination with brackets to show any portion considered by the party

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(or its suppliers of information) to be confidential, accompanied by a list indicating each page on which such a bracket is to be found. At least one copy of such a filing shall be served upon the office of the undersigned, and the brackets shall be marked in red. If a party (and its suppliers of information) considers nothing in the initial determination to be confidential, and thus makes no request that any portion be redacted from the public version, then a statement to that effect shall be filed.²¹

A handwritten signature in dark ink, appearing to read 'D. Shaw', written over a horizontal line.

David P. Shaw
Administrative Law Judge

Issued: June 28, 2019

²¹ Confidential business information (“CBI”) is defined in accordance with 19 C.F.R. § 201.6(a) and § 210.5(a). When redacting CBI or bracketing portions of documents to indicate CBI, a high level of care must be exercised in order to ensure that non-CBI portions are not redacted or indicated. Other than in extremely rare circumstances, block-redaction and block bracketing are prohibited. In most cases, redaction or bracketing of only discrete CBI words and phrases will be permitted.

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **Order No. 16 (Initial Determination)** has been served by hand upon the Commission Investigative Attorney, **Todd Taylor, Esq.**, and the following parties as indicated, on 7/25/2019



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

On Behalf of Complainants Bose Corporation:

Andrew Kopsidas, Esq.
FISH & RICHARDSON P.C.
1000 Maine Avenue, S.W., 10th Floor
Washington, DC 20024

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

Respondents:

1MORE USA, Inc.
10225 Barnes Canyon Rd., Suite A202
San Diego, CA 92121

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

Beebo Online Limited
3837 Bay Lake Trail, Suite 115
North Las Vegas, NV 89030

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

Misodiko
NanShanQu XiLiJieDao PingShanCun
192 Dong 509
ShenZhen GuangDong 518055 CN

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

Phaiser LLC
909 Silber Road
Houston, TX 77024

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

**CERTAIN EARPIECE DEVICES AND COMPONENTS
THEREOF**

Inv. No. 337-TA-1121

Certificate of Service – Page 2

Phonete

A-201 No. 1 Qianwan Yilu
Qianhai Shenggang hezuoqu,
Shenzhen, CN

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

REVJAMS

248 Lafayette St.
New York, NY 10012

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

V4ink, Inc.

1241 S. Rockfeller Ave Unit B
Ontario, CA 91761

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

TomRich

Room 842, 3B, HuaNanXiYuan
PingHu town, LongGang District
Shenzhen, 518100 CN

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