EXHIBIT C

CONFIDENTIAL VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC

In the Matter of	
CERTAIN COLLAPSIBLE SOCKETS FOR MOBILE ELECTRONIC DEVICES AND COMPONENTS THEREOF	Investigation No. 337-TA-1056

COMMISSION OPINION

On February 1, 2018, the presiding administrative law judge ("ALJ") issued an initial determination ("ID") (Order No. 11) granting summary determination that certain respondents that were found in default have violated section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337. The Commission determined to review in part the ID and requested briefing on certain issues under review and on the issues of remedy, the public interest, and bonding. 83 Fed. Reg. 12812 (Mar. 23, 2018).

Having considered the record of this investigation, including the ID and the various submissions, the Commission has determined to affirm, with modifications, the ID's finding of a section 337 violation and to issue a general exclusion order.

I. BACKGROUND

A. Procedural History

The Commission instituted this investigation on May 15, 2017, based on a complaint filed on April 10, 2017 on behalf of PopSockets LLC of Boulder, Colorado ("PopSockets"). 82 Fed. Reg. 22348 (May 15, 2017). The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain collapsible sockets for mobile electronic devices and components thereof by reason of infringement of U.S. Patent No. 8,560,031 ("the '031 patent").

The notice of investigation named as respondents Agomax Group Ltd. of Kowloon, Hong Kong; Hangzhou Hangkai Technology Co., Ltd. of Zhejiang, China; Yiwu Wentou Import & Export Co., Ltd. of Zhejiang, China; Shenzhen Enruize Technology Co., Ltd. of Shenzhen, China; and Guangzhou Xi Xun Electronics Co., Ltd.; Shenzhen Chuanghui Industry Co., Ltd. of Guangdong, China; Shenzhen VVI Electronic Limited; Shenzhen Yright Technology Co., Ltd.; Shenzhen Kinsen Technology Co., Limited; Shenzhen Showerstar Industrial Co., Ltd.; Shenzhen Lamye Technology Co., Ltd.; Jiangmen Besnovo Electronics Co., Ltd.; Shenzhen Belking Electronic Co., Ltd.; Shenzhen CEX Electronic Co., Limited, all of Guangdong, China. The Office of Unfair Import Investigations ("OUII") also was named as a party in the investigation.

On August 22, 2017, 13 out of 14 respondents were found in default. Notice (Aug. 22, 2017) (determining not to review Order No. 9 (Aug. 4, 2017)). On September 18, 2017, the Commission terminated the only remaining respondent, Shenzhen Chuanghui Industry Co., Ltd., based on withdrawal of the complaint as to that respondent. Notice (Sept. 18, 2017) (determining not to review Order No. 10 (Aug. 28, 2017)).

On August 8, 2017, PopSockets filed a motion for summary determination that: (1) the defaulting respondents have sold for importation into the United States, imported into the United States, or sold after importation certain collapsible sockets for mobile electronic devices and components thereof that allegedly infringe certain claims of the '031 patent in violation of section 337; (2) the accused products infringe the asserted claims of the '031 patent; and (3) a domestic industry with respect to the '031 patent exists.[1] The motion also requested a

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[1] *See* Complainant PopSockets' Motion for Summary Determination of Violations by the Defaulting Respondents, for the Existence of a Domestic Industry, for a General Exclusion

recommendation for entry of a general exclusion order and a bonding requirement pending Presidential review.[2] On August 31, 2017, OUII filed a response supporting the motion in substantial part and supporting the requested remedy of a general exclusion order.[3]

On February 1, 2018, the ALJ issued the subject ID (Order No. 11), granting PopSockets' motion for summary determination of a section 337 violation. The ID found that the defaulting respondents' accused products infringe one or more of claims 9-12 of the '031 patent (apparatus claims), but found no infringement of claims 16 and 17 of the '031 patent (method claims). The ID found that the defaulting respondents' accused products have been imported into the United States and that a domestic industry exists in the United States with respect to the '031 patent. The ALJ also issued a Recommended Determination on Remedy and Bonding ("RD"), recommending that, if the Commission finds a section 337 violation, the Commission issue a general exclusion order and impose a bond of 100 percent during the period of Presidential review. No petitions for review of the ID were filed.

On March 19, 2018, the Commission determined to review in part the ID. 83 Fed. Reg. at 12812. Specifically, the Commission determined to review (1) the ID's findings on the technical prong of the domestic industry requirement to correct a typographical error and (2) the

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Order, and for a Recommended Determination on Remedy and Bonding; Complainant PopSockets' Memorandum of Points and Authorities in Support of Its Motion for Summary Determination of Violations by the Defaulting Respondents, for the Existence of a Domestic Industry, for a General Exclusion Order, and for a Recommended Determination of Remedy and Bonding ("PopSockets Mem.").

[2] *Id.*

[3] *See* Commission Investigative Staff's Response to Complainant PopSockets' Motion for Summary Determination of Violations by Defaulting Respondents, for the Existence of a Domestic Industry, and for a Recommended Determination on Remedy and Bonding.

ID's findings on the economic prong of the domestic industry requirement. *Id.* The Commission determined not to review the remaining issues decided in the ID. *Id.* The Commission requested additional briefing from the parties on the issues under review and also invited the parties, interested government agencies, and any other interested parties to file written submissions on the issues of remedy, the public interest, and bonding. *Id.*

On April 2, 2018, PopSockets and OUII filed initial written submissions in response to the Commission's notice.[4] On April 4, 2018, non-party Quest USA Corporation ("Quest") filed a written submission concerning remedy.[5] On April 11, 2018, PopSockets filed a reply to Quest's submission.[6] Also on that day, OUII filed a reply to the submissions of PopSockets and Quest.[7]

B. The Asserted Patent

The '031 patent is entitled "Extending Socket for Portable Media Player" and issued on October 15, 2013, to named inventors David B. Barnett and Lawrence E. Carlson. Compl. Ex. 1 ('031 patent). PopSockets is the sole assignee and owner of the '031 patent. *See* Compl. Ex. 3 (assignment); Compl. Ex. 4 (owner name change).

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[4] *See* Complainant PopSockets' Response Regarding the Notice of Commission Determination to Review an Initial Determination in Part ("PopSockets Br."); Submission of Office of Unfair Import Investigation on the Issues under Review, Remedy, Public Interest, and Bonding ("OUII Br.").

[5] *See* Quest USA Corporation's Submission on Remedy, Bonding, and Public Interest ("Quest Br."). On March 30, 2018, the Chairman granted Quest a two-day extension to file a written submission until April 4, 2018, and further set the deadline for responses to Quest's submission for April 11, 2018. Ltr. from Secretary to Brian Schwartz (Mar. 30, 2018).

[6] Complainant PopSockets' Reply to Non-Party Quest USA Corporation's Submission on Remedy, Bonding, and Public Interest ("PopSockets Reply").

[7] Reply Submission of Office of Unfair Import Investigations on the Issues under Review, Remedy, Public Interest, and Bonding ("OUII Reply").

The '031 patent relates to extending sockets for portable media players and is directed to a feature that attaches to a portable media player to enable functions beyond protection of the player. Compl. Ex. 1 ('031 patent), 1:7-18. The extending sockets provide functions such as "storing headphone cords and preventing the cords from tangling, forming stand legs, forming gaming grips, clipping to belts, waistbands and shirt pockets, forming legs for wedging players that are phones between the shoulder and ear, and forming a grip that allows a user to securely hold and manipulate the player with one hand." *Id.* 1:37-44.

Figure 1A below depicts an embodiment of the invention in which two sockets attached to a portable media player are retracted or collapsed. *Id.* 4:37-40. Figure 1B below depicts an embodiment of the invention in which the two sockets are opened or extended. *Id.* 4:40-42.

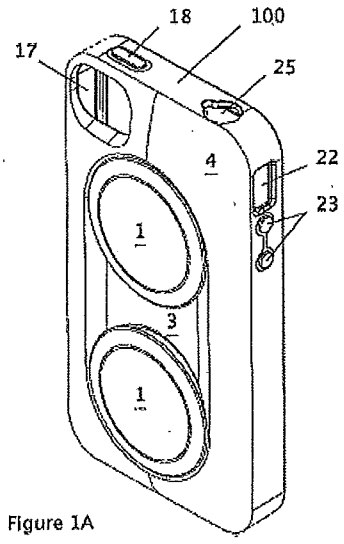

Figure 1A

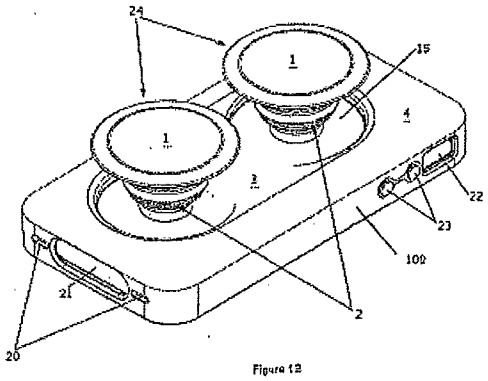

Figure 1B

At issue in this investigation are apparatus claims 9-12 and method claims 16 and 17 of the '031 patent. PopSockets asserts all of these claims against each defaulting respondent, except for claim 12, which is not asserted against Yiwu Wentou Import & Export Co., Ltd. ID at 30. Claims 9 and 16 are independent claims.

The asserted claims are recited below:

9. A socket for attaching to a portable media player or to a portable media player case, comprising:

a securing element for attaching the socket to the back of the portable media player or portable media player case; and

an accordion forming a tapered shape connected to the securing element, the accordion capable of extending outward generally along its axis from the portable media player and retracting back toward the portable media player by collapsing generally along its axis; and

a foot disposed at the distal end of the accordion.

10. The socket of claim 9 wherein the accordion comprises rigid walls interspersed with flexural hinges.

11. The socket of claim 10 wherein the tapered shape comprises a cone shape constructed and arranged such that the walls fold generally parallel to the axis of the accordion when the accordion is collapsed.

12. The socket of claim 11 wherein the accordion is formed of polyester-based thermoplastic polyurethane elastomer, the walls are about 1 to 2 mm thick and 2 to 4 mm long, and the flexural hinges are about 0.2 to 0.4 mm thick and 1 to 2 mm long.

16. A method comprising the steps of:

attaching a socket including an accordion forming a tapered shape and having walls interspaced with flexural hinges to a portable media player;

selectively extending the socket by unfolding the accordion generally along its axis; and

selectively retracting the socket by folding the accordion generally along its axis such that the walls fold next to each other.

17. The method of claim 16 wherein the retracting step folds the walls into an orientation such that the walls are generally parallel to the axis of the accordion.

Id., claims 9-12, 16-17; Certificate of Correction for U.S. Patent No. 8,560,031 (Mar. 7, 2017) (correcting claims 1, 9, and 20).

II. STANDARD ON REVIEW

Once the Commission determines to review an initial determination, its review is conducted *de novo*. *Certain Polyethylene Terephthalate Yarn and Products Containing Same*,

Inv. No. 337-TA-457, USITC Pub. No. 3550, Comm'n Op. at 9 (June 18, 2002). Upon review, "the Commission has 'all the powers which it would have in making the initial determination,' except where the issues are limited on notice or by rule." *Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 14 (June 26, 1997) (quoting *Certain Acid-Washed Denim Garments and Accessories*, Inv. No. 337-TA-324, USITC Pub. No. 2576, Comm'n Op. at 5 (Aug. 28, 1992)). Commission practice in this regard is consistent with the Administrative Procedure Act. *See* 5 U.S.C. § 557(b).

Upon review, "the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge." 19 C.F.R. § 210.45(c). "The Commission may also make any findings or conclusions that in its judgment are proper based on the record in the proceeding." *Id.* This rule reflects the fact that the Commission is not an appellate court, but is the body responsible for making the final agency decision.

III. DISCUSSION

A. Issues Under Review

The Commission determined to review (1) the ID's findings on the technical prong of the domestic industry requirement to correct a typographical error, namely, to modify a reference on page 107 of the ID from "Mem. Ex. 2 (Kemnitzer Decl.) at ¶ 77 (Infringement Analysis and Chart)" to "Mem. Ex. 2 (Kemnitzer Decl.) at ¶ 61 (Analysis and Chart)" and (2) the ID's findings on the economic prong of the domestic industry requirement. 83 Fed. Reg. at 12812. To assist with its review, the Commission requested responses from the parties to the following questions:

1. Please describe the nature and significance of PopSockets' alleged domestic industry investments, *i.e.*, in the context of PopSockets' operations, marketplace, or industry,

and whether PopSockets' activities have a direct bearing on the practice of the '031 patent. As part of your response, please describe in detail PopSockets' activities in engineering, research, development, operations, marketing, sales, service, and assembly and what amount or portion of the total alleged investment under each of 19 U.S.C. § 1337(a)(3)(A), (B), and (C) is allocable to each activity.

2. Please provide a basis for crediting any investments that occurred after the filing date of the complaint towards the domestic industry requirement.

Id.

1. Domestic Industry: Technical Prong

The ID found that the PopSockets product practices apparatus claims 9-12 of the '031 patent. ID at 105-11. As a result, the ID found unnecessary a technical prong analysis of method claims 16 and 17 but noted that PopSockets presented uncontroverted evidence showing the practice of such method claims. *Id.* at 111.

The Commission affirms the ID's finding on the technical prong with the exception of the ID's citation to Mr. Kemnitzer's infringement analysis instead of his domestic industry analysis. The citation at page 107 of the ID to "Mem. Ex. 2 (Kemnitzer Decl.) at ¶ 77 (Infringement Analysis and Chart)" is corrected to refer instead to "Mem. Ex. 2 (Kemnitzer Decl.) at ¶ 61 (Analysis and Chart)."

2. Domestic Industry: Economic Prong

Subsections 337(a)(2) and (3) set forth the domestic industry requirement:

> (2) Subparagraphs (B), (C), (D), and (E) of paragraph (1) apply only if an industry in the United States, relating to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established.
>
> (3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned—
>
> (A) significant investment in plant and equipment;
>
> (B) significant employment of labor or capital; or

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

19 U.S.C. § 1337(a)(2)-(3).

a) The ID

The ID found that PopSockets satisfied the economic prong of the domestic industry requirement under 19 U.S.C. § 1337(a)(3)(A), (B), and (C). ID at 112-19.

Under subsection (A), the ID found that PopSockets' investments in plant and equipment consisted of the following:

- PopSockets maintains a square foot facility at its headquarters in Boulder, Colorado, which houses employees who perform various jobs relating to PopSockets products covered by the '031 patent, including engineering, product development, product assembly, supply chain and operation management, marketing, sales, customer service, and administration;
- Applying a sales-based allocation of percent, approximately $ spent on rent on the Boulder, Colorado facility from 2014 through July 2017 is allocable to the PopSockets domestic industry product; and
- Applying a sales-based allocation of percent, approximately $ spent on capital investments in fixtures and furniture used by employees at the facility, and in computer software and equipment used for the design, engineering, operations, and management from 2014 through July 2017 is associated with the PopSockets domestic industry product.

Id. at 114-15.

The ID found that PopSockets' investments in plant and equipment are significant, considering that PopSockets' domestic industry products were designed solely in the United States; all of the individuals involved in the design, engineering, operations, and management associated with the PopSockets' domestic industry products are located in Boulder; and PopSockets' domestic industry products would not exist without these investments, under the required contextual analysis. *Id.* at 115.

Under subsection (B), the ID found that PopSockets' investments in labor and capital consisted of the following:

- PopSockets employs at its facility in Boulder, Colorado, individuals involved in engineering, research, development, operations, marketing, sales, service, and assembly of PopSockets products;
- PopSockets' employees have assembled, packed, and/or shipped approximately PopSockets products covered by the '031 patent, and, as of March, 2017, printed approximately top surface designs in Boulder, Colorado, and approximately top surface designs in Seattle, Washington;
- PopSockets' total labor cost from 2014 through July 2017 is approximately $ to its employees in the United States;
- PopSockets' total costs to outside vendors ((" ") and Amazon.com) from 2014 through July 2017 for various services related to the PopSockets product is $;
- PopSockets' total costs to physical retail stores in 2017 is approximately $;
- PopSockets' U.S. expenditures for website hosting services and/or website developer fees from 2014 through 2017 are approximately $;
- PopSockets' capital expenditures from 2014 through July 2017 in fixtures, furniture, computer software and equipment used by employees at its Boulder facility is approximately $;
- PopSockets' total labor and capital expenditures from 2014 through July 2017 were approximately $; and
- Applying the sales-based allocation of percent to these expenditures, PopSockets' total labor and capital expenditures from 2014 through July 2017 allocable to the domestic industry product are approximately $.

Id. at 115-18.

The ID also found that PopSockets' investments in labor and capital are significant. *Id.* at 118. The ID noted that, while some of PopSockets' investments relating to marketing, sales, and distribution would not alone be sufficient to satisfy the economic prong, its investments in labor and capital as a whole are significant. *Id.* It further noted that the activities discussed

above, including the required product assembly, take place solely in the United States, making these investments significant. *Id.*

Under subsection (C), the ID found that PopSockets' investments in research and development consisted of the following:

- From the conception and patenting of the PopSockets product, and the personnel used in the engineering, marketing, business, to the distribution departments employed by PopSockets to research and develop, produce, sell, and design the PopSockets products—all of these activities are conducted at PopSockets' headquarters in Boulder, Colorado; and
- PopSockets invested, from 2014 through July 2017, approximately $ in research and development costs for designing, engineering, and testing various aspects of the PopSockets products protected by the '031 patent.

Id. at 118-19.

The ID found that PopSockets' investments in research and development are substantial inasmuch as its domestic industry products were designed and developed in the United States; all of the individuals involved in the design, engineering, and testing associated with its domestic industry products are located in Colorado; its domestic industry products would not exist without them; and, under the required contextual analysis, PopSockets' research and development costs are substantial. *Id.* at 119.

b) The Parties' Arguments

PopSockets argues the nature and significance of its domestic industry investments separately from and before discussing its investments under each subsection of section 337(a)(3). PopSockets Br. at 6-8. Specifically, PopSockets argues that its business activities "focus almost exclusively" on the PopSockets domestic industry product and that its only other product is an accessory mount designed for use with the PopSockets product. *Id.* at 6. PopSockets argues that the PopSockets products "have experienced widespread acclaim and success in the marketplace" and that PopSockets' investments have grown to meet demand and market expectations,

including activities allowing consumers to customize the top surface of the PopSockets product. *Id.* at 7-8. With respect to its investments in plant and equipment, as well as labor and capital, PopSockets' arguments are generally consistent with the ID's findings, but with the following exceptions: (1) PopSockets provides investment totals through March 2017 (before the filing of the complaint); (2) PopSockets does not allocate any of its investments under subsections (A) and (B) to the PopSockets domestic industry product (as opposed to the accessory mount), yet argues that a sales-based allocation is appropriate with respect to its investments under subsection (C); and (3) PopSockets identifies, by submission of a new declaration, the portions of its investments that are allocable to each of the activities of engineering, research and development, operations, marketing and sales, service, and assembly. *Id.* at 8-15. With respect to its investments in the exploitation of the '031 patent, PopSockets provides a breakdown of the compensation component of its research and development activities by identifying the portions paid to certain individuals. *Id.* at 13. PopSockets also argues that, if the sales of the PopSockets domestic industry and the optional mount accessory are considered together, then " % of this U.S.-based revenue . . . is attributable to the substantial investment in the exploitation" of the '031 patent. *Id.* at 15. PopSockets argues that its post-complaint investments demonstrate that a domestic industry "exists or is in the process of being established" and that "such information demonstrates the growth of PopSockets' domestic industry." *Id.* at 19-20.

OUII generally agrees with the ID's findings. OUII argues that the record "does not provide sufficient detail to break out investments allocable to PopSockets' activities in engineering, research, development, operations, marketing, sales, service, and assembly as requested in the Commission's question." OUII Br. at 7-8. OUII argues that activities under subsections (A) and (B) need only relate to the article protected by the patent and that

PopSockets' product customization activities and sales and marketing investments may be included. *Id.* at 9. OUII argues that "at least the payment to PopSockets' contractor, , is an appropriate domestic industry expenditure" and that the payment is "representative of i investments in plant and equipment and labor and capital used to perform assembly services for PopSockets." *Id.* at 6 & n.4. OUII argues that PopSockets' investments in plant and equipment and labor and capital are significant because "*all* activities required to develop, make, and sell the product, with the exception of the molding of the plastic parts, take[] place in the United States"[8] and "PopSockets' domestic investments in plant and equipment and labor and capital . . . are in excess of $." *Id.* at 9-10 (emphasis in original). OUII also argues that PopSockets' investments are significant based on other measures, including: (1) PopSockets' activities related to the domestic industry products compared to its activities related to the optional mount accessory; (2) PopSockets' activities in the United States compared to overseas; (3) various evidence as to the qualitative significance; and (4) PopSockets' investments as a percentage of sales of the PopSockets' domestic industry product. OUII Reply at 6-8. With respect to PopSockets' investments in the exploitation of the '031 patent, OUII argues that those investments may be overstated to the extent they include costs related to the design, printing, and application of the label placed on the top surface of PopSockets domestic industry product because "there is no nexus between the label and the '031 Patent and no activities relating solely to the label have a direct bearing on the practice of the '031 Patent." OUII Br. at 8. OUII argues that there is no basis to credit PopSockets' investments after the filing of the complaint. *Id.* at 10

[8] OUII later notes that PopSockets also has foreign investments in the development and hosting of the PopSockets website. OUII Br. at 10 n.6.

("Here no significant and unusual development occurred after the filing of the Complaint. The same investments continued, although their magnitude increased.").

c) Analysis and Findings

At the outset, the Commission addresses several issues affecting the domestic industry analysis.

PopSockets' Submission of New Evidence. In connection with its initial submission in response to the Commission's March 23, 2018 notice, and despite the notice's request for briefing "with reference to the applicable law and the record," PopSockets filed a Second Supplemental Declaration of David B. Barnett (Apr. 2, 2018). This declaration was not before the ALJ and thus is not part of the record certified to the Commission by the ALJ. *See* 19 C.F.R. § 210.38; OUII Reply at 6 (describing declaration as "non-record evidence"). The Commission has determined not to consider this declaration in its disposition of the issues under review.

PopSockets' Post-Complaint Expenditures. A large portion of the labor and capital expenditures asserted by PopSockets occurred after the complaint was filed on April 10, 2017. *See* ID at 112-19. For example, PopSockets' capital investments in fixtures, furniture, and computer software and equipment through March 2017 totalled approximately $, but, through July 2017, the capital expenditures increased to approximately $ —an increase of nearly %. *See* Supplemental Declaration of David B. Barnett (Aug. 4, 2017), PopSockets Mem. Ex. 10 ("Supp. Barnett Decl.") at ¶ 6.[9] As another example, PopSockets' labor costs through March 2017 totalled approximately $, but, through July 2017, the

[9] This declaration is part of the record evidence and was relied upon by the ID. The record evidence provides PopSockets' sales for 2014-2016 on an annual basis; for 2017, PopSockets' sales are provided for January to March 2017 (before the filing date of the complaint) and for April to July 2017.

labor costs increased to approximately $ —an increase of approximately %. *See id.* ¶ 5. The ID considered the post-complaint expenditures without explanation.

However, even if "in 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," "as a general matter, the only activities that are relevant to the determination of whether a domestic industry exists or is in the process of being established are those that occurred before the complaint was filed." *See Certain Video Game Systems and Controllers*, Inv. No. 337-TA-743, Comm'n Op. at 5-6 (Jan. 20, 2012), *aff'd sub nom. Motiva, LLC v. Int'l Trade Comm'n*, 716 F.3d 596, 601 n.6 (Fed. Cir. 2013).[10] The Commission has determined not to credit any of PopSockets' expenditures that occurred after the filing of the complaint. PopSockets' submission on review does not identify any specific facts or circumstances, much less a significant and unusual development, to warrant considering expenditures after the filing of the complaint.

Sales-Based Allocation. In addition to the domestic industry product, PopSockets sells an optional mounting accessory, which PopSockets acknowledges is not covered by the '031 patent and is not a domestic industry product. ID at 113. The ID applied a percent sales-based allocation to apportion expenditures to the domestic industry product and to account for costs associated with the optional mounting accessory. *Id.* at 113-18. This sales allocation was based on PopSockets' U.S. sales from 2014 through July 2017, which includes post-complaint

[10] *See also Certain Television Sets, Television Receivers, Television Tuners, and Components Thereof* ("*Certain Television Sets*"), Inv. No. 337-TA-910, Comm'n Op. at 72 (Oct. 30, 2015) ("[T]he Commission will consider post-complaint evidence regarding domestic industry only in very specific circumstances, *i.e.*, 'when a significant and unusual development has occurred after the complaint has been filed.").

investments. *See id.* at 113. A sales-based allocation may be applied to determine, under each subsection, the investments "relating to the articles protected by the patent." *See* 19 U.S.C. § 1337(a)(3); *Certain Mobile Device Holders and Components Thereof*, Inv. No. 337-TA-1028, Comm'n Op. at 18-19 (Mar. 22, 2018). When only pre-complaint activities are considered, as set forth in the chart below showing PopSockets' U.S. sales, the Commission finds that a sales-based allocation of percent is appropriate.

Period	PopSockets U.S. Sales of Domestic Industry Products Only	PopSockets Combined U.S. Sales of Domestic Industry Products and Mounts	Sales-Based Allocation to Domestic Industry Product
2014 – July 2017 (including post-complaint expenditures)	$	$	%
2014 – March 2017 (pre-complaint expenditures only)	$	$	%

See Supp. Barnett Decl. at ¶ 18 & Table 10. Further, to the extent that PopSockets argues for consideration of its expenditures without any allocation, that argument is waived because PopSockets did not petition for review of the ID's application of a sales-based allocation.

Turning to PopSockets' alleged employment of labor and capital, the Commission finds that a domestic industry exists under subsection (B). The following chart, which is based on the Supplemental Declaration of David B. Barnett, summarizes the record related to subsection (B).

Employment of Labor and Capital	2014 – March 2017 (Pre-Complaint Expenditures)	% Sales-Based Allocation to Domestic Industry Product Through Filing of Complaint
Employees at Boulder, Colorado facility involved in engineering, product development, product assembly, supply chain and operation management, marketing, sales, customer service, and administration	Not in record evidence	Not in record evidence
Salaries paid to U.S. employees involved in engineering, product development, product assembly, supply chain and operation management, marketing, sales, customer service, and administration	$	Approximately $
Payments to U.S. vendor for assembly and other services	$	Approximately $
Payments to U.S. vendor Amazon.com for marketing	$	Approximately $
Payments to U.S. vendors with physical retail stores, such as Target Stores, Wal-Mart, and others for marketing	Not in record evidence	Not in record evidence
Payment to website hosting services and/or website developers for marketing and sales	$	Approximately $
Capital investments in fixtures, furniture, computer software, and equipment used for design, engineering, operations, and management	$	Approximately $

Supp. Barnett Decl. at ¶¶ 4-6, 12, 19, 21 & Tables 2, 3, 6, 11 & 12. The column under the heading "2014 – March 2017 (Pre-Complaint Expenditures)" identifies PopSockets' expenditures prior to the filing of the complaint, which is the correct timeframe to consider domestic industry.[11] In the final column, the percent sales-based allocation is applied to the pre-complaint expenditures. Adding the expenditures in the last column of the chart yields a total of approximately $.[12] However, for the reasons explained below, the Commission finds that, at most, approximately $ out of the $ of PopSockets' alleged employment in labor and capital may be credited toward the domestic industry under subsection (B).

The record evidence does not support crediting PopSockets' approximately $ in payments to . Although the payments are for assembly, as well as unidentified "other services," PopSockets has not shown what portion of its payments to pertains to labor or capital. In *Lelo Inc. v. International Trade Commission*, the Federal Circuit rejected an alleged investment where the record contained "no data indicating the share of labor and capital costs attributable solely to purchases made by [the complainant]" and further noted that the analysis is "incomplete" if "it does not account for the value expended on *relevant* domestic activities, as opposed to total profit or total general administrative costs." 786 F.3d 879, 884-85 & n.4 (Fed. Cir. 2015) (emphasis in original). Since *Lelo*, the Commission has found evidence insufficient

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[11] It is not clear whether the amounts asserted under subsection (B) include PopSockets' product customization activities, through which PopSockets employees create and print designs of varying colors or graphics selected by the customer for the top surface of the PopSockets products in the United States. *See* Supp. Barnett Decl. ¶¶ 9-10, 13. To the extent they are included and reflected in the chart above, they may be credited toward the domestic industry because they relate to the article protected by the patent. *See* 19 U.S.C. § 1337(a)(3).

[12] This total excludes expenditures for which PopSockets failed to provide sufficient information to determine a pre-complaint amount.

where the complainant relied on supplier payments without providing evidence regarding its suppliers' relevant investments in the complainant's products. *See Certain Television Sets*, Comm'n Op. at 63-64; *Certain Sleep-Disordered Breathing Treatment Systems and Components Thereof*, Inv. No. 337-TA-890 (Remand), Final ID at 19-22, 24 (Nov. 29, 2016), *aff'd in relevant part*, Notice at 3-4 (Jan. 12, 2017).

PopSockets' payments to Amazon.com, vendors with physical retail stores, and website hosting services and/or website developers also are not credited for a similar reason. PopSockets has not shown what portion of these investments pertains to the employment of labor or capital.

With respect to the remaining expenditures of approximately $, it is well-settled that evidence of sales and marketing investments alone are not sufficient to demonstrate the existence of a domestic industry. *See* H. Rep. No. 100-40, at 157 (1987) ("Marketing and sales in the United States alone would not, however, be sufficient to meet this test."). While the Commission has, in some investigations, credited such investments in its assessment of a complainant's domestic industry under subsections (A) and (B), *see, e.g.*, *Certain Air Mattress Systems, Components Thereof, and Methods of Using the Same*, Comm'n Op. at 44-47 (June 20, 2017); *Certain Protective Cases and Components Thereof*, Inv. No. 337-TA-780, Final ID at 104-09 (July 10, 2012), *not reviewed in relevant part*, Notice at 3 (Aug. 30, 2012), the analysis has always been conducted on a case-by-case basis.

In the case at hand, PopSockets is not relying solely on marketing and sales expenditures to satisfy the economic prong. While Popsockets has included sales and marketing expenditures, it has also provided evidence of significant expenditures in its employment of labor in other qualifying activities, such as engineering, product development, product assembly, supply chain and operation management, and customer service, as well as capital expenditures for fixtures,

furniture, software, and equipment used for design, engineering, and operation management, which are sufficient to establish the existence of a domestic industry under subsection (B).

The record demonstrates that PopSockets' expenditure of approximately $ constitutes significant employment of labor and capital. These expenditures represent approximately percent of PopSockets' U.S. sales of its domestic industry product from 2014 through the filing of the complaint. *See* Supp. Barnett Decl. ¶ 18 & Table 10. Both the absolute and percentage amounts are quantitatively significant.

As OUII argues,[13] the evidence as to PopSockets' size, industry, and the importance of being able to "provide customers the ability to select the colors and the decorative labels for their PopSockets products" are all evidence of the "qualitative significance" of PopSockets' domestic industry activities. OUII Reply at 7; *see also* PopSockets Br. at 6-8. Such qualitative evidence, while not sufficient on its own, supports a finding of significant employment of labor and capital.

The Commission has determined to take no position on whether a domestic industry exists under subsection (A) and (C). Having found the existence of a domestic industry under subsection (B), the Commission affirms, on modified grounds, the ID's finding of a section 337 violation.

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[13] OUII argues that the investments are quantitatively, as well as qualitatively, significant based on "a comparative analysis between its activities related to the asserted patent and its other operations" and "comparative analysis between its U.S. and foreign activities." OUII Reply at 6-7. But the former is simply the sales-based allocation that the ID used to determine the amount of the investments allocable to the article protected by the patent as opposed to other products that are not protected by the patent. OUII does not point to any instance in which the Commission has determined the quantitative significance of each of the asserted investments based solely on the sales-based allocation. As to the latter, a comparison of U.S. and foreign activities may be appropriate under certain circumstances, but the record here lacks information on PopSockets' foreign investments to make an adequate comparison. *See* OUII Br. at 9 ("[T]he value of the foreign molding of the plastic parts is not in the record.").

B. Remedy

1. The RD

The RD recommended that, in the event the Commission finds a violation of section 337, the Commission should issue a general exclusion order. RD at 131. The RD found that (1) a general exclusion is necessary to prevent circumvention of an exclusion order limited to products of the named entities and (2) there is a pattern of violation of section 337 and it is difficult to identify the sources of the infringing products. *Id.* at 121-30. In the event that the Commission does not issue a general exclusion order, the RD recommended the issuance of a limited exclusion order directed to the defaulting respondents. *Id.* at 121 & n.10.

2. The Parties' and Non-Parties' Arguments

PopSockets and OUII agree with the RD's findings and recommendation to issue a general exclusion order. PopSockets Br. at 22-39; OUII Br. at 12-15. PopSockets' submission does not request, and the RD does not recommend, issuance of cease and desist orders. *Id.* PopSockets and OUII each provide its own proposed general exclusion order. OUII notes that PopSockets' proposed general exclusion order covers claims 16 and 17 of the '031 patent, which the Commission found to be not infringed. OUII Reply at 14. PopSockets' submission also includes a reference to the '031 patent expiration date, HTSUS numbers that may cover the importation of the infringing products, and a list of known importers of the subject articles. PopSockets Br. at 42-43 & Ex. 2. OUII notes that many of the HTSUS numbers provided by PopSockets do not exist or were not verified. OUII Reply at 15-16.

Non-party Quest requests that the Commission decline to issue a general exclusion order or, in the alternative, to expressly exclude its products from the scope of any general exclusion order. Quest Br. at 1-2. Quest argues that issuance of a general exclusion order would contravene the Commission's policy of encouraging section 337 complainants to name all

suspected infringers that are known to the complainant before institution or at an investigation's early stages. *Id.* at 10-14. Quest argues that PopSockets knew of Quest's collapsible socket product two weeks after this investigation was instituted and filed a patent infringement suit against Quest in the U.S. District Court for the Eastern District of New York about a month later, but deliberately avoided naming Quest in the section 337 investigation to obtain quick relief against likely defaulters. *Id.* at 9, 13-14. Quest argues that, by contrast, it learned of this investigation after PopSockets filed its summary determination motion against the defaulting respondents and that PopSockets made certain representations indicating the investigation did not involve Quest. *Id.* at 9-10, 15. Quest argues that, under these circumstances, it did not have to intervene in the section 337 investigation and it would be unfair to place the burden on Quest to demonstrate to U.S. Customs and Border Protection ("Customs") that its products are not subject to a general exclusion order. *Id.* at 15 & n.7.

PopSockets and OUII argue that Quest's requests should be denied. PopSockets Reply at 1-2; OUII Reply at 14. PopSockets and OUII argue that Quest should or could have previously moved to intervene when it had notice of this investigation and that the Commission has denied similar attempts by non-parties to oppose or obtain a carve-out from a remedial order at the remedy phase. PopSockets Reply at 7-9; OUII Reply at 11-14. PopSockets and OUII argue that the Commission's *Federal Register* notice of institution provided notice of PopSockets' request for a general exclusion order. PopSockets Reply at 4-5, 8; OUII Reply at 14. PopSockets and OUII argue that the Commission has several procedures in which Quest may obtain a ruling as to whether its products are subject to any order issued by the Commission. PopSockets Br. at 8; OUII Reply at 13. PopSockets argues that Quest's noninfringement arguments are outside the scope of the issues on which non-parties may provide comments at this point (namely, remedy,

the public interest, and bonding) and that Quest does not dispute the evidence considered by the ALJ in recommending a general exclusion order nor does Quest raise any public interest concerns. PopSockets Reply at 5-7, 9-10. PopSockets argues that it was not aware of Quest's product until after the investigation was instituted and that Quest contorts the statements PopSockets made in district court out of context. *Id.* at 12-14.

3. Analysis and Findings

Section 337(g)(2) provides:

> In addition to the authority of the Commission to issue a general exclusion from entry of articles when a respondent appears to contest an investigation concerning a violation of the provisions of this section, a general exclusion from entry of articles, regardless of the source or importer of the articles, may be issued if—
>
> > (A) no person appears to contest an investigation concerning a violation of the provisions of this section,
> >
> > (B) such a violation is established by substantial, reliable, and probative evidence, and
> >
> > (C) the requirements of subsection (d)(2) are met.

19 U.S.C. § 1337(g)(2). Section 337(d)(2) further provides that:

> 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.

Id. § 1337(d)(2).

The Federal Circuit has recognized that "the Commission can impose a general exclusion order that binds parties and non-parties alike and effectively shifts to would-be importers of potentially infringing articles, as a condition of entry, the burden of establishing

noninfringement." *Hyundai Elecs. Indus. Co. v. U.S. Int'l Trade Comm'n*, 899 F.2d 1204, 1210 (Fed. Cir. 1990); *Sealed Air Corp. v. U.S. Int'l Trade Comm'n*, 645 F.2d 976, 988-89 (C.C.P.A. 1981). "If a complainant wishes to obtain an exclusion order operative against articles of non-respondents, it must seek a GEO [general exclusion order] by satisfying the heightened burdens of §§ 1337(d)(2)(A) and (B)." *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340, 1356 (Fed. Cir. 2008). "[T]he 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).

The Commission finds that the record evidence supports the ALJ's findings and issuance of a general exclusion order. No person has appeared to contest the section 337 allegations in this investigation. As discussed above and in the ID, the Commission's finding of a section 337 violation is supported by substantial, reliable, and probative evidence. The requirements of § 1337(d)(2) are also met. *See* RD at 121-29.

Specifically, the record evidence demonstrates a widespread pattern of violation with respect to the '031 patent. A significant number of additional instances of unlawful sales of infringing products have appeared on online marketplaces such as Amazon and on Alibaba. *See* PopSockets Mem. Ex. 3 (Monton Decl.) at ¶ 2. Manufacturers and sellers promote hundreds to thousands of new infringing product online listings per day; despite PopSockets' efforts to enforce its intellectual property, those listings have not decreased. *See* Supp. Barnett Decl. ¶¶ 26-27 & Ex. 1; RD at 122-24. The record also shows difficulty in identifying the sources of infringing products. Manufacturers of collapsible sockets employ complex business arrangements, do business under more than one name, ship from multiple addresses, and/or form intricate arrays of confusingly similar affiliates. *See* Compl. Ex. 26 (Weber Decl.) at ¶¶ 11-24.

The small size and portability of the products and manufacturing equipment allow manufacturers to quickly and easily relocate. *See* Supp. Barnett Decl. ¶¶ 22-25. Suppliers of collapsible sockets are able to hide their identities and locations by conducting online transactions. *See* Compl. Ex. 26 (Weber Decl.) at ¶¶ 10-11, 22-24. Some sellers of collapsible sockets use packaging with confusing, contradictory, and/or incomplete labels, whereas others use photographs and packaging identical to that of the PopSockets products. *See* PopSockets Mem. Ex. 3 (Monton Decl.) ¶ 3 & Ex. 1-6; PopSockets Mem. Ex. 2 (Kemnitzer Decl.) at ¶ 72.

The record also demonstrates the necessity of a general exclusion order to prevent circumvention of an order limited to products of the named respondents. The record shows that suppliers of collapsible sockets can easily evade an exclusion order limited to the named respondents due to the difficulty in identifying the source of the infringing products, the nature of the relevant trade channels, and the ease of manufacturing and distribution of infringing collapsible sockets for mobile electronic devices. *See* Compl. Ex. 26 (Weber Decl.) at ¶¶ 10-11, 22-24; Supp. Barnett Decl. ¶¶ 22-25.

Quest does not argue that PopSockets failed to satisfy the statutory requirements for a general exclusion order. Nor does Quest provide a compelling reason why its products should be exempted from a general exclusion order. As such, the Commission denies Quest's request that it not issue a general exclusion order, and the Commission also denies Quest's alternative proposal to expressly exclude its products from the scope of any general exclusion order.

The Commission does have a policy of "encourag[ing] complainants to include in an investigation all those foreign manufacturers which it believes have entered, or are on the verge of entering, the domestic market with infringing articles." *Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293, USITC Pub. No. 2391 (June 1991), Comm'n Op. at 31-32

(Mar. 15, 1990) (denying issuance of a general exclusion order and declining to include non-parties in a limited exclusion order where complainant "could have named [the entities] as proposed respondents before institution of or at a very early stage in [the] investigation" but did not); *see also Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles*, Inv. No. 337-TA-334 (Remand), USITC Pub. No. 3063 (Sept. 1997), Comm'n Op. at 35-36 (Sept. 10, 1997); *Certain Ground Fault Circuit Interrupters and Products Containing Same* ("*Ground Fault Circuit Interrupters*"), Inv. No. 337-TA-739 (Modification), Comm'n Op. at 8 (Nov. 13, 2012) ("[A]s a general matter, the Commission encourages complainants to name all known importers of infringing products when filing a complaint."). However, in expressing this policy, the Commission's decisions use a permissive term, such as "encouraging," rather than a mandatory term, such as "requiring."

This case is not materially different from *Ground Fault Circuit Interrupters*, where the Commission denied a non-party's similar requests at the remedy phase. Comm'n Op. at 87-92 (June 8, 2012). After finding that the statutory requirements for issuance of a general exclusion order were satisfied, the Commission stated:

> With regard to the request by [non-party] P&S to be carved out from a general exclusion order, we find that P&S has not presented a compelling reason to make such an exception. Moreover, P&S apparently knew about the present investigation as early as the institution phase, but chose not to intervene to protect its interests. Any burden imposed on P&S by remedial orders could have been avoided if P&S had participated in the present investigation and had presented meritorious defenses. P&S may avail itself of other Commission procedures to obtain a ruling as to whether its products are subject to the general exclusion order.

Id. at 91-92.

Here, the record shows that the *Federal Register* published notice of the Commission's institution of this investigation and PopSockets' request for a general exclusion order on May 15, 2017, and that Quest was aware of the investigation no later than August 30, 2017, three weeks

after PopSockets filed its summary determination motion against the defaulting respondents. *See* 82 Fed. Reg. 22348; Quest Br. Srour Decl. ¶ 13, J. Srour Decl. ¶ 7, Auvil Decl. ¶ 5. Quest knew early on in the investigation of the possibility that its products may be subject to exclusion but decided not to intervene to protect its interests. Any decision to rely on PopSockets' statements as to the subject of this investigation (*see* Quest Br. at 15)—rather than the *Federal Register* notice and the public record of this investigation as to the general exclusion order PopSockets was seeking—was at Quest's own peril. Further, the Federal Circuit in *Hyundai* already rejected Quest's "unfairness" argument by recognizing that a general exclusion order "binds parties and non-parties alike and effectively shifts to would-be importers of potentially infringing articles, as a condition of entry, the burden of establishing noninfringement." 899 F.2d at 1210.

As noted in *Ground Fault Circuit Interrupters*, the denial of Quest's request does not leave it without recourse. For example, prior to importation, Quest may seek an advisory opinion from the Commission, or a Part 177 ruling from Customs, regarding whether an article is subject to the exclusion order. *See* 19 C.F.R. § 210.79; 19 C.F.R. Part 177.

Accordingly, the Commission has determined to adopt the RD's findings and to issue a general exclusion order covering the claims that the Commission found to be infringed.

C. The Public Interest

Sections 337(d) and (g) of the Tariff Act of 1930, as amended, direct the Commission to consider certain public interest factors before issuing a remedy. These public interest factors include the effect of any remedial order on 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." 19 U.S.C. § 1337(d), (g).

The Commission did not instruct the ALJ to issue a recommended determination concerning the public interest in this investigation. *See* 19 C.F.R. § 210.50(b)(1).

PopSockets and OUII argue that issuance of the recommended general exclusion order would not be contrary to the public interest. PopSockets Br. at 39-41; OUII Br. at 16. The Commission did not receive any comments from the public on this issue in response to its notice of review.

The Commission finds no evidence in the record indicating that a general exclusion order would have an adverse impact on the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers. The products at issue are consumer products that attach to portable media players that make them more convenient to use. *See* Compl. Ex. 1 ('031 patent), 1:37-44. The evidence also shows that PopSockets, as well as numerous third-party suppliers, has the capacity to produce more PopSockets products to meet the demand for the infringing products if the infringing products are excluded from the United States. *See* Public Interest Statement at 4; PopSockets Mem. Ex. 2 (Kenmitzer Decl.) at ¶¶ 38-39.

Accordingly, the Commission finds that the statutory public interest factors do not preclude issuance of a general exclusion order.

D. Bonding

If the Commission enters an exclusion order, a respondent may continue to import and sell its products during the 60-day period of Presidential review under bond in an amount determined by the Commission to be "sufficient to protect the complainant from any injury." 19 U.S.C. § 1337(j)(3); *see also* 19 C.F.R. 210.50(a)(3). Ordinarily, the Commission sets the bond during the period of Presidential review based on the price differential between the domestic and the infringing products or based on a reasonable royalty. *Certain Ink Cartridges and Components Thereof*, Inv. No. 337-TA-946, Comm'n Op. at 18 (June 29, 2016). Where the

available pricing or royalty information in insufficient, the Commission has set a 100 percent bond. *Id.*

The RD recommended the imposition of a bond of 100 percent of the entered value of the infringing goods during the period of Presidential review. RD at 132. The RD found that the defaulting respondents' failure to participate in the investigation prevented PopSockets from developing reliable pricing and royalty information and that a 100 percent bond should be sufficient to prevent any harm to PopSockets during the period of Presidential review. *Id.*

PopSockets and OUII agree with the RD. PopSockets Br. at 41-42; OUII Br. at 15.

The Commission finds that the defaulting respondents' failure to appear and participate in the investigation prevents the Commission from determining a price differential or a reasonable royalty. Accordingly, the Commission has determined to set the bond during the period of Presidential review at 100 percent of the entered value of the infringing products.

IV. CONCLUSION

The Commission has determined to affirm, on modified grounds, the ID's finding of a section 337 violation and to issue a general exclusion order prohibiting the unlicensed importation of certain collapsible sockets that infringe one or more of claims 9-12 of the '031 patent. The Commission adopts all findings and conclusions in the ID that are not inconsistent with this opinion.

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: June 14, 2018

CERTAIN COLLAPSIBLE SOCKETS FOR MOBILE ELECTRONIC DEVICES AND COMPONENTS THEREOF **Inv. No. 337-TA-1056**

CONFIDENTIAL CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **Opinion, Commission** has been served by hand upon the Commission Investigative Attorney, **Paul Gennari, Esq.**, and the following parties as indicated, on 6/14/2018.

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