PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN PERCUSSIVE MASSAGE DEVICES**	**Investigation No. 337-TA-1206**

COMMISSION OPINION

On August 20, 2021, the administrative law judge ("ALJ") issued an initial determination ("ID") (Order No. 40) granting in part Complainant's motion for summary determination of a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337. The ID found a violation of section 337 with respect to U.S. Patent No. 10,561,574 ("the '574 patent"). On October 20, 2021, the Commission determined to review only the ID's finding that Complainant satisfied the economic prong of the domestic industry requirement with respect to the '574 patent. The Commission requested written submissions from the parties on the issue under review, and requested briefing from the parties, interested government agencies, and other interested persons on the issues of remedy, the public interest, and bonding.

Upon consideration of the submissions received, the Commission determines to affirm the ID's finding that Complainant has satisfied the economic prong of the domestic industry requirement as to the '574 patent.[1] Accordingly, the Commission finds a violation of section 337 as to respondents Kinghood International Logistics Inc. ("Kinghood"), Manybo Ecommerce Ltd. ("Manybo"), Shenzhen Infein Technology Co., Ltd. ("Shenzhen Infein"), and Hong Kong

[1] Chair Kearns dissenting. *See* n.10 *infra*. Because he does not find a violation of section 337, Chair Kearns does not reach the issue of appropriate remedy.

Yongxu Capital Management Co., Ltd. ("Hong Kong Yongxu") with respect to the asserted claims of the '574 patent.

The Commission determines that the appropriate remedy in this investigation is a general exclusion order ("GEO") prohibiting the unlicensed importation of certain percussive massage devices that infringe one or more of claims 1-7, 9, 14, and 15 of the '574 patent and a cease and desist order ("CDO") prohibiting respondent Kinghood from further importing, selling, and distributing infringing products in the United States. The Commission also determines that the public interest factors do not preclude issuance of these remedial orders. Finally, the Commission determines that the bond during the period of Presidential review pursuant to 19 U.S.C. § 1337(j) shall be in the amount of one hundred percent (100%) of the entered value of the imported articles.

I. BACKGROUND

A. Procedural History

The Commission instituted this investigation on July 22, 2020, based on a complaint filed on behalf of Hyper Ice, Inc. ("Hyperice") of Irvine, California. 85 Fed. Reg. 44322 (July 22, 2020). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain percussive massage devices by reason of infringement of certain claims of U.S. Design Patent No. D855,822 and U.S. Design Patent No. D886,317 (collectively, "the Asserted Design Patents"), and the '574 patent. The complaint further alleged that a domestic industry exists. The Commission's notice of investigation named the following nineteen respondents: Laiwushiyu Xinuan Trading Company of Shandong District, China; Shenzhen Let Us Win-Win Technology Co., Ltd. of Guangdong, China; Shenzhen Qifeng Technology Co., Ltd. of Guangdong, China; Shenzhen

QingYueTang E-commerce Co., Ltd. of Guangdong, China; and Shenzhen Shiluo Trading Co., Ltd. of Guangdong, China (collectively, the "Unserved Respondents"); Kinghood of La Mirada, California; Manybo of Hong Kong, China; Shenzhen Infein of Guangdong, China; Hong Kong Yongxu of Hong Kong, China; Kula eCommerce Co., Ltd. ("Kula") of Guangdong, China; Performance Health Systems, LLC ("Performance Health") of Northbrook, Illinois; Rechar, Inc. ("Rechar") of Strasburg, Colorado; Ning Chen of Yancheng, Jiangsu China; Opove, Ltd. ("Opove") of Azusa, California; Shenzhen Shufang E-Commerce Co., Ltd. ("Shufang E-Commerce") of Shenzhen, China; Fu Si ("Shenzhen Fusi Technology") of Guangdong, China;[2] WODFitters of Lorton, Virginia; Massimo Motor Sports, LLC ("Massimo") of Garland, Texas; and Addaday LLC ("Addaday") of Santa Monica, California. The notice of investigation also names the Office of Unfair Import Investigations ("OUII") as a party.

On October 16, 2020, the Commission determined not to review Order No. 11 granting motions to intervene by third parties Shenzhen Xinde Technology Co., Ltd. ("Xinde") and Yongkang Aijiu Industrial & Trade Co., Ltd. ("Aijiu") in the investigation. *See* Order No. 11 (Sept. 25, 2020), *unreviewed by* Comm'n Notice (Oct. 16, 2020).

Respondents Addaday, WODFitters, Massimo, and Opove were terminated from the investigation based upon settlement agreements. *See* Order No. 10 (Sept. 16, 2020), *unreviewed by* Comm'n Notice (Oct. 15, 2020); Order No. 12 (Nov. 4, 2020), *unreviewed by* Comm'n Notice (Nov. 20, 2020).

[2] Respondent Fu Si's full name is Shenzhen Fusi Technology Co., Ltd. *See* Response of Opove Ltd., Shenzhen Shufang E-Commerce Co., Ltd., and Fu Si to the Complaint and Notice of Investigation at ¶ 40, Doc ID 716966 (Aug. 11, 2020). The principal place of business of Shenzhen Fusi Technology Co., Ltd. was changed to 14E, Building A, Guanghao International Center, No. 441 Meilong Road, Minzhi Street, Longhua District, Shenzhen, China, 518131, effective September 15, 2020. *Id.*

On January 19, 2021, Respondents Shufang E-Commerce, Shenzhen Fusi Technology, Rechar, Ning Chen, Performance Health, Aijiu, and Xinde ("the Participating Respondents") filed a motion for summary determination that Complainant Hyperice failed to satisfy the economic prong of the domestic industry requirement. On February 10, 2021, Hyperice and OUII filed responses to the motion. Thereafter, the Participating Respondents were terminated from the investigation based upon settlement agreements. *See* Order No. 30 (Apr. 8, 2021), *unreviewed by* Comm'n Notice (Apr. 22, 2021).

The Unserved Respondents were terminated from the investigation based upon withdrawal of the Complaint. *See* Order No. 36 at 2 (Aug. 3, 2021), *unreviewed by* Comm'n Notice (Aug. 19, 2021).

The remaining Respondents Kinghood, Manybo, Shenzhen Infein, Hong Kong Yongxu, and Kula (collectively, "the Defaulting Respondents") were found in default. *See* Order No. 17 (Dec. 17. 2020), *unreviewed by* Comm'n Notice (Jan. 5, 2021).

On January 8, 2021, the ALJ issued Order No. 18, a *Markman* order that adopted the claim constructions upon which the parties agreed and construed the sole, disputed claim term of the '574 patent.

On May 6, 2021, OUII filed a motion to terminate the Asserted Design Patents from this investigation on the ground that Complainant did not have sufficient rights to the design patents at the time the investigation was instituted. On May 17, 2021, Hyperice filed its response in opposition to OUII's motion to terminate which included a cross-motion to amend the Complaint to reflect proper inventorship.

On May 7, 2021, Hyperice filed a motion for summary determination that the Defaulting Respondents violated section 337 for infringing its three asserted patents.[3] Hyperice supplemented its motion on May 14, 2021 with additional declarations.[4] On May 20, 2021, Hyperice again supplemented its motion with claim charts inadvertently omitted from the expert report of Mr. Alan Ball and exhibits in support of its motion.[5] OUII filed a response in support of the motion with respect to the '574 patent but not with respect to the Asserted Design Patents.[6]

On August 17, 2021, the ALJ issued Order No. 38, denying Hyperice's motion to amend the complaint and the notice of investigation to reflect proper inventorship. That same day, the ALJ issued Order No. 39, granting OUII's motion to terminate the two Asserted Design Patents

[3] *See* Complainant Hyperice's Motion for Summary Determination That the Defaulting Respondents Have Violated Section 337 and for a Recommended Determination on Remedy and Bonding, Doc. ID No. 1633955 ("Motion"); Complainant Hyperice's Memorandum of Points and Authorities in Support of Motion for Summary Determination That the Defaulting Respondents Have Violated Section 337 and for a Recommended Determination on Remedy and Bonding, Doc. ID No. 1633958 ("Mem."); Statement of Material Facts, Doc. ID No. 1633957 (May 7, 2021).

[4] *See* Complainant Hyperice, Inc.'s Unopposed Motion to Supplement its Motion for Summary Determination That the Defaulting Respondents Have Violated Section 337 and for a Recommended Determination on Remedy and Bonding with Declarations in Further Support Thereof, Doc. ID No. 742521 (May 14, 2021) ("Suppl. MSD"); Order No. 33 (May 17, 2021) (granting Hyperice's request to supplement its Motion with three (3) supporting declarations: the Arnold Declaration, Ex.1; the Ball Declaration, Ex. 2; and the Sakioka Declaration, Ex. 3).

[5] *See* Complainant Hyperice, Inc.'s Unopposed Motion to Supplement its Motion for Summary Determination That the Defaulting Respondents Have Violated Section 337 and for a Recommended Determination on Remedy and Bonding, Doc. ID No. 743064 (May 20, 2021); Order No. 34 (Jul. 27, 2021) (granted Hyperice's request to supplement its Motion with the Claim Charts).

[6] *See* Commission Investigative Staff's Response to Complainant's Motion for Summary Determination of Violation and for Recommended Determination on Remedy and Bonding, Doc ID No. 742938 (May 19, 2021).

for lack of standing. Hyperice filed a petition for review challenging Order No. 39 but not Order No. 38. On November 22, 2021, the Commission determined to review in part Order No. 39 and, on review, the Commission affirmed the ALJ's determination to terminate the Asserted Design Patents for lack of standing and to deny relief with respect to the Asserted Design Patents under section 337(g)(1).

As stated above, on August 20, 2021, the ALJ issued the subject ID (Order No. 40) granting in part Complainant's motion for summary determination of violation of section 337. Specifically, the ID found: (1) that Hyperice established the importation requirement as to Defaulting Respondents Kinghood, Manybo, Shenzhen Infein, and Hong Kong Yongxu, but not Kula; (2) that Hyperice established infringement of one or more of claims 1-7, 9, 14, and 15 of the '574 patent by the accused products of Defaulting Respondents Kinghood, Manybo, Shenzhen Infein, and Hong Kong Yongxu; (3) that at least one of Hyperice's domestic industry products practice at least one claim of the '574 patent; and (4) that Hyperice has proven that a domestic industry exists within the United States related to articles protected by that patent. Accordingly, the ALJ found that four of the five Defaulting Respondents have infringed one or more of claims 1-7, 9, 14, and 15 of the '574 patent in violation of section 337. No petitions for review of the ID were filed. The ALJ also issued a Recommended Determination ("RD") on remedy and bonding should a violation be found in the investigation.

On September 15, 2021, the Commission solicited submissions on public interest issues raised by the ALJ's recommended relief should the Commission find a violation. *See* 86 Fed. Reg. 51380 (Sept. 15, 2021). No response was received from the public.

On October 20, 2021, the Commission determined to review only the ID's finding that Hyperice satisfied the economic prong of the domestic industry requirement with respect to the

'574 patent. *See* 86 Fed. Reg. 59187 (Oct. 26, 2021). The Commission requested written submissions from the parties on the issue under review, and requested briefing from the parties, interested government agencies, and other interested persons on the issues of remedy, the public interest, and bonding. *Id.* at 59188.

On November 3, 2021, OUII and Hyperice filed their initial submissions.[7] OUII filed a reply submission on November 10, 2021.[8]

B. The '574 patent

The '574 patent, entitled "Battery-Powered Percussive Massage Device," was filed on October 17, 2019, and names Robert Marton and Anthony Katz as inventors. Compl., Ex. 1 (the '574 patent). The patent is directed generally toward battery-powered motorized percussive massage devices. Percussive massage is the "rapid, percussive tapping, slapping and cupping of an area of the human body." '574 patent at 1:21-23; *see* Compl. ¶ 63.

The percussive massage device of the '574 patent includes a main enclosure, a motor with a rotatable shaft, a reciprocation assembly in the main enclosure including a piston, a massage head removably attached to the piston, a battery assembly extending from the main enclosure, a battery assembly receiving tray within the longitudinal cavity of the main enclosure, and a battery assembly with an outer gripping surface. *See* '574 patent at claims 1, 14.

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[7] *See* Response of the Office of Unfair Import Investigations to the Commission's Request for Written Submissions on the Issue Under Review and on Remedy, Bonding, and the Public Interest, Doc ID 755806 (Nov. 3, 2021) ("OUII Sub."); Complainant Hyperice, Inc.'s Response to the Commission's Determination to Review in Part the Final Initial Determination; Submission on Remedy, the Public Interest, and Bonding, Doc ID 755839 (Nov. 3, 2021) ("Hyperice Sub.").

[8] *See* Reply of the Office of Unfair Import Investigations to Complainant Hyperice, Inc.'s Response to the Commission's Determination to Review in Part the Final Initial Determination; Submission on Remedy, the Public Interest, and Bonding, Doc ID 756282 (Nov. 10, 2021) ("OUII Reply").

Figure 1 of the ’574 patent, shown below, depicts one embodiment of the claimed percussive massage device:

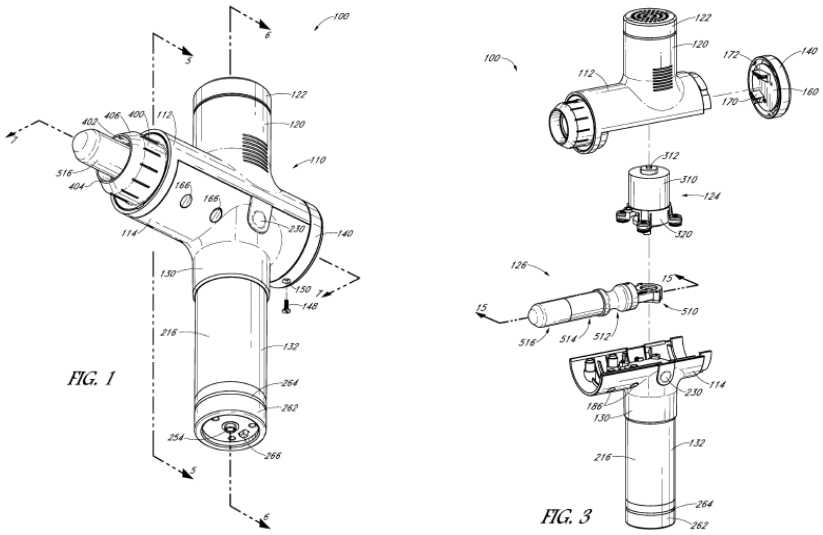

Figure 3 of the ’574 patent, shown above, provides an “exploded perspective view” of the percussive massage device of Figure 1, including a depiction of the horizontal enclosure (**112** & **114**), the battery assembly receiving enclosure (**130**), and the motor enclosure (**120**).

Hyperice asserted claims 1-9, 14, and 15 of the ’574 patent in this investigation against each of the Defaulting Respondents, except claim 9 is not asserted against Respondent Hong Kong Yongxu. Mem. at 22.

C. Products at Issue

Hyperice contends that its Hypervolt and Hypervolt Plus (“DI Products”) practice the asserted claims of the ’574 patent and thus are the domestic industry products. Hyperice’s products are generally used by athletes (and others) for deep tissue massage and for myofascial release. Compl. ¶ 5.

Hyper Ice Hypervolt	Hyper Ice Hypervolt Plus
	

Motion, Ex. 26 at 1.

The Accused Products include Kinghood's Theradrill, Manybo's FBF Pulse Gun, Shenzhen Infein's ALI2 Massage Gun, Hong Kong Yongxu's AM1 Massage Gun, and Kula's AM5 Massage Gun ("Accused Products"). *See* ID at 17-18 (pictures of samples of the Defaulting Respondents' accused products that Hyperice purchased); Compl. ¶¶ 19, 21, 26, 29, 37, 85-102; Compl., Exs. 18, 20, 25, 28, 36.

Manybo – FBF Pulse Gun

Kinghood International – Theradrill

Shenzhen Infein Massage Gun (ALI2)

Hong Kong Yongxu Massage Gun (AM1)

Kula eCommerce Massage Gun (AM5)

Compl. ¶ 57.

II. DISCUSSION

A. Economic Prong of the Domestic Industry Requirement

The Commission reviewed the ID's finding that Hyperice satisfied the economic prong of the domestic industry requirement under section 337(a)(3)(B) with respect to the '574 patent.[9]

The ID found that Hyperice's Hypervolt and Hypervolt Plus products practice the asserted claims of the '574 patent. ID at 33. Hyperice stated that it "designed and developed the incredibly successful Hypervolt products in the United States beginning in 2016, selling the first Hypervolt product in February 2018." *Id.* at 34 (quoting Mem. at 29). The ID noted that "[f]rom 2017 through 2019, all of Hyperice's employees were located in the United States." *Id.* at 34-35; *see* Motion, Ex. 10 (Sakioka Dep.) 125:12-127:7 (Dec. 2, 2020). According to Hyperice, "its employees facilitate the product development, product engineering, client management, sales, and/or support of the DI Products." ID at 35 (citing Mem. at 32; Motion, Ex. 5).

As noted in the ID, Hyperice put forth evidence of its overall domestic expenditures in labor and capital from 2018-2020, allocated based on sales, attributable to the DI Products. *Id.* at 34. The ID found Hyperice's sales-based allocation for the 2018-2019 time-period to be reasonable and appropriate. *Id.* at 36-37. However, it found Hyperice's sales-based allocation for expenditures in 2020 unreliable because the allocated expenditures included a new facility in Boston that Hyperice acquired in 2020, but that facility does not relate to the DI Products. *See id.* at 37 (citing Sakioka Decl. ¶ 5). Focusing on just Hyperice's properly allocated expenditures, the ID found the evidence shows that "Hyperice has made [] investments of approximately

[9] Having found that Hyperice satisfied the economic prong under section 337(a)(3)(B), the ID did not decide whether Hyperice also satisfied the economic prong under section 337(a)(3)(A). ID at 41 n.23. Hyperice did not assert the existence of a domestic industry under section 337(a)(3)(C). *See* Compl. ¶ 105.

[redacted] in labor and capital expenditures that are attributable to the DI Products in 2018 and 2019." *Id*.

The ID also found Hyperice's domestic industry expenditures both quantitatively and qualitatively significant. Regarding quantitative significance, the ID found that "[f]rom 2018 to 2019, Hyperice steadily expanded its workforce and domestic industry investments as the DI Products were launched and sales grew." *Id.* at 38. The ID stated that the "quantitative significance of these expenditures is best represented by Hyperice's growth from a five-employee company in 2017 to a fifty (50) employee company by 2020." *Id.* at 37-38; *see id.* at 34 (citing Sakioka Dep. at 124:2-129:19). The ID noted that "Hyperice's domestic expenditures reflect that the DI Products accounted for approximately [redacted] of Hyperice's sales from 2017 to 2020." *Id.* at 38. Furthermore, the ID reasoned that "Hyperice's increase in domestic industry expenditures, from [redacted] in 2018 to [redacted] in 2019 is itself significant." *Id.*

With regard to qualitative significance, the ID found that Hyperice's DI Products "would not exist without Hyperice's domestic operations and spending" because "Hyperice designed and developed the DI Products in the United States." *Id.* at 39 (citing Compl. ¶¶ 5, 106-107; Motion, Ex. 5 (Employee Salary Data 2016-2019)). The ID noted that "the simultaneous growth in Hyperice's number of employees and in Hyperice's increase in sales of the DI Products" is indicative of qualitative significance since "it can be inferred reasonably that Hyperice's labor and capital expenditures contributed to the growth of the DI Product market." *Id.* The ID also noted that "Hyperice claims it has [redacted] of the United States Market while its two (2) main competitors dominate another approximate [redacted] of the United States market for the type of percussive device that Hyperice sells." *Id.* at 40. Finally, the ID found "Hyperice's gross

domestic sales were typically at least three (3) times [] higher than its foreign sales" from 2018-2020. *Id.* (citing Motion, Exs. 3 & 4).

Having examined the record of this investigation, including the ID and the submissions received on review, the Commission has determined to affirm the ID's finding that Hyperice satisfied the economic prong of the domestic industry requirement as to the '574 patent, as supplemented below. [10] The ID's finding that Hyperice's domestic expenditures in labor and

[10] Chair Kearns does not join his colleagues in finding the economic prong requirement met under section 337(a)(3)(B) and does not join the remainder of this opinion. As noted above, Complainant asserted satisfaction of the economic prong requirement under section 337(a)(3)(A) and (B), and the ID found it satisfied under subsection (B). The economic prong analysis must take into account that section 337 does not protect mere importers, *see, e.g.*, *Schaper Mfg. Co. v. U.S. Int'l Trade Comm'n*, 717 F.2d 1368, 1372-73 (Fed. Cir. 1983). In his view, the record in this investigation does not support a finding that, at the time of the complaint (June 2020), Complainant had significant employment of labor or capital for activities other than those of an importer. (Chair Kearns notes that he agrees with the ID's sales-based allocation of labor and capital.)

From 2016 to 2017, Complainant appears to have been primarily involved in design and development of the DI products. However, there is no evidence that these design and development activities continued past 2017. *See* Respondents' Memorandum of Points and Authorities in Support of Their Motion for Summary Determination of Failure to Satisfy the Economic Prong of Domestic Industry Requirement, Doc. ID No. 731184 at 17 (Jan. 19, 2021), *quoting* Huether Depo. Tr. at 141:18-142:13 ("The final design for the Hypervolt was completed in or about June 2017. Then, Anthony and Rob worked with Esino to create CAD files, computer aided design files, for the device and the injection molds. In July 2017, they submitted a purchase order to Esino for 200 beta prototypes, but they actually only created approximately 20 prototypes before finalizing the design."); Hyperice Sub. at 5 and 12.

Since that time, the DI product has been manufactured in China (through a contract manufacturer), and most of Complainant's domestic activities at the time of the filing of the complaint, such as supply chain and operation management for foreign manufacturing, sales, marketing, and customer service, do not appear to be distinguishable from those of a mere importer. The record does not permit any breakout of Complainant's expenses by various activities; in response to a question from the Commission, Complainant did not provide even an estimated breakout for the 2018-2020 time period it relies upon. Thus, while some of the claimed expenses (*e.g.*, warranty and repair) may be cognizable under appropriate facts, the record contains no way to quantify such expenses. While Chair Kearns recognizes Complainant's growth, increased employment or expenses for activities of an importer do not, in his view, help a complainant satisfy the economic prong. Finally, Chair Kearns need not and does not reach the issue of whether the economic prong analysis should take into account

capital in 2018-2019 are properly allocated to the DI Products and that those allocated expenditures totaling approximately [redacted] are both qualitatively and quantitatively significant is supported by substantial, reliable, and probative evidence. *See* ID at 34-40; Hyperice Sub. at 10-11, 13-14.

With respect to quantitative significance, the record evidence shows that Hyperice's commercial activities and investments in the United States resulted in significant growth in its domestic industry relating to the articles protected by the '574 patent since the company was founded. For example, Hyperice expanded its domestic workforce by ten-fold from 5 employees in 2017, to 30 employees in 2019, and 50 employees in 2020. *See* ID at 34, 37-38. All of Hyperice's employees have been located in the United States since its conception, development, and launch of the DI products in 2017 through 2019. *Id.* at 34-35. Hyperice currently employs 100 people, only two of which are located outside the United States. Hyperice Sub. at 6, 10, 13. Hyperice's U.S. labor expenses relating to the DI Products nearly doubled from [redacted] in 2018 to [redacted] in 2019. ID at 38. These increases in the number of Hyperice's U.S. employees and in Hyperice's U.S. labor expenses are indicative of quantitative significance under section 337(a)(3)(B) consistent with the Federal Circuit's decision in *Lelo*. As the Court

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Complainant's foreign contract manufacturer's operations (*e.g.*, expenses or employment) related to the domestic industry products.

In conclusion, given that Complainant has the burden of proof to establish it has satisfied the domestic industry requirement, Chair Kearns cannot conclude, based on this record, that the requirement is satisfied under section 337(a)(3)(B). He therefore cannot find a violation of section 337 on this record. However, it is possible that Complainant could have satisfied the economic prong under section 337(a)(3)(C). That subsection was added to allow a research and development-based industry to qualify for relief under section 337. In a situation such as this, where a firm conducted all its R&D for the domestic industry products in the United States several years prior to the filing of the complaint, it might still be appropriate to find subsection (C) satisfied even though the firm's emphasis has shifted to non-R&D activities at the time of the complaint. Of course, this would be a fact-specific inquiry for each investigation.

explained in *Lelo*, "the terms 'significant' and 'substantial' refer to an increase in quantity, or to a benchmark in numbers." *Lelo Inc. v. Int'l Trade Comm'n*, 786 F.3d 879, 883 (Fed. Cir. 2015). In addition, as the ID found, all product development and design of the DI Products took place in the United States. ID at 39. In addition to the research, design, and development of the DI Products, Hyperice's employees are engaged in ongoing activities in the United States relating to management of production of the DI Products; warranty, repair, and customer service of the DI Products; among others. *Id.* ("In addition to product design, Hyperice's domestic workforce is engaged in, *inter alia*, 'engineering, supply chain and operation management, sales, marketing, warranty, customer service, executive, intellectual property protection, and other business operations' in support of the DI Products."); *see also* Hyperice Sub. at 5-6, 10. Hyperice concludes that the record supports the conclusion that it "has made all the investments necessary to create, design, develop, sell, service, and repair the Hypervolt DI products in the United States, with the exception of contract manufacturing performed in China." Hyperice Sub. at 6. This further supports the quantitative significance of Complainant's investments in the United States.

With respect to qualitative significance, the ID emphasized the importance of Hyperice's activities in the United States directed toward the DI Products, noting that "Hyperice's evidence demonstrates that its DI Products simply would not exist without Hyperice's domestic operations and spending." ID at 39. Among the evidence the ID cited, the Complaint at paragraph 106 states that Hyperice's "activities include, but are not limited to, research and development, design, engineering, supply chain and operation management, sales, marketing, warranty, customer service, executive, intellectual property protection, and other business operations." *Id.* (citing Compl. ¶¶ 5, 106-107; Ex. 5 to Motion and Mem. (Employee Salary Data 2016-2019)

(including salary data for inventors of the '574 patent, Robert Marton and Anthony Katz)). Moreover, the record evidence supports a finding that Hyperice is more than a mere importer because Hyperice started as a small domestic entity where a majority of its expenses went towards designing and developing the DI Products in the United States. *Id.* at 37-39. Hyperice grew its domestic industry based on the commercial success of the DI Products that practice the '574 patent, which Hyperice internally developed and continues to support. *Id.* Accordingly, the Commission affirms the ID's finding that Hyperice satisfied the economic prong of the domestic industry requirement.

III. REMEDY, BONDING, AND THE PUBLIC INTEREST

A. Remedy

1. General Exclusion Order

The RD recommends that the Commission issue a GEO as to the '574 patent under either section 337(d)(2)(A) or section 337(d)(2)(B). RD at 43-49. Hyperice submits the GEO should cover the Asserted Design Patents in addition to the '574 patent. Hyperice Sub. at 16. OUII supports the RD's recommendation for a GEO covering only the asserted claims of the '574 patent. OUII Sub. at 19.

The Commission's authority to issue a GEO when respondents appear to contest the investigation is found in section 337(d)(2).[11] Section 337(d)(2) provides that the Commission

[11] While all remaining respondents were found in default, other respondents appeared to contest the complaint but subsequently entered into settlement agreements with the complainant and were terminated from the investigation. *See* Order No. 10 (Sept. 16, 2020), *unreviewed by* Comm'n Notice (Oct. 15, 2020); Order No. 12 (Nov. 4, 2020), *unreviewed by* Comm'n Notice (Nov. 20, 2020); Order No. 30 (Apr. 8, 2021), *unreviewed by* Comm'n Notice (Apr. 22, 2021). In contrast to section 337(d)(2), section 337(g)(2) provides the authority to issue a GEO when "no person appears to contest an investigation concerning a violation of the provisions of this section[.]" 19 U.S.C. § 1337(g)(2).

may, after an investigation determining that there is a violation of section 337 based on substantial, reliable, and probative evidence and the public interest does not warrant against it, issue a GEO that applies to all infringing products, regardless of their manufacture, when:

> (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).

As explained below, the Commission finds that the statutory requirements for a general exclusion from entry of infringing articles under section 337(d)(2), 19 U.S.C. § 1337(d)(2), are met in this investigation. Based on the evidence in the record, the Commission finds that: (1) there is a pattern of violation of section 337 and a difficulty identifying the source of infringing products; and (2) a GEO is necessary to prevent circumvention of an exclusion order limited to products of named persons.

a. Pattern of Violation and Difficulty Identifying the Source of Infringing Products

The Commission finds that Hyperice has presented evidence of a widespread pattern of violation and that it is difficult, if not impossible, to identify the source of infringing products. RD at 43-48. The RD noted that the evidence shows that "a substantial number of percussive massage devices are available from multiple [online] retailers . . . including Amazon.com, Wish.com, Walmart.com, and Alibaba.com" and Hyperice argues that "sellers of like, infringing products can easily change names or online platforms and continue to sell infringing devices." *Id.* at 44 (citing Mem. at 37-38; Motion, Exs. 11-15). According to the RD, the practice of reselling "on different online platforms under different seller accounts mak[es] their detection difficult." *Id.* at 46.

The RD also found widespread infringement because there is evidence of "dozens, if not hundreds, of other infringing products sold online in the United States" by the Defaulting Respondents and numerous other entities. *Id.* at 47 (citing Mem. at 40; Ball Expert Report at 97-98, 103-105, 113-117, 120-125, 156-160 (attached as Ex. 21 to Hyperice Sub.)). Hyperice has supplied evidence that the Defaulting Respondents and numerous other entities appear when a search for "Hypervolt" is conducted on multiple online retail platforms. *Id.* (citing Compl., Exs. 22, 27, 34, 42 and 43; Motion, Exs. 11-15). Thus, the RD found the record evidence "demonstrates that many parties sell products that are substantially similar to the Accused Products through the relative anonymity of the internet." *Id.* at 46.

The evidence presented by Hyperice and cited in the RD also establishes that it is difficult to identify the source of infringing products that are being sold in the United States. *Id.* at 43 (citing Mem. at 35-40); *see generally* Compl., Exs. 51, 52, 54, 55, 59, 63, 65, 69, 70, 72, 73 and 76. Specifically, the RD found the evidence supports Hyperice's arguments that "multiple respondents have provided incorrect addresses online," "infringing products commonly fail to identify the manufacturer," and "are sold with generic markings that do not reveal the named manufacturer." RD at 44 (citing Mem. at 38 (citing Notice of Delivery Failures in Service of Complaint (Doc. ID No. 722854 (Oct. 22, 2020))); Compl., Exs. 24, 30, 33, 35 and 41), 45 (citing Compl., Exs. 51, 52, 54, 55, 59; Compl. ¶¶ 13-46 (including photos of Respondents' products that do not identify the manufacturer)), 46-47.

Based on the evidence in the record, the Commission finds that there is a pattern of violation of section 337 and a difficulty identifying the source of infringing products.

b. High Likelihood of Circumvention

The evidence cited in the RD with respect to the existence of a pattern of violation and a difficulty of identifying the source also establishes that a GEO is necessary to prevent

circumvention of an order limited to the products of the named Respondents. For instance, Hyperice argues that "numerous parties sell infringing devices online through the anonymity of the internet." *Id.* at 44 (citing Mem. at 37). Hyperice observes that sellers of like, infringing products can easily change names or online platforms and continue to sell infringing devices. *Id.* (citing Mem. at 37-38.). Hyperice further notes that "numerous companies rebrand essentially the same infringing products." *Id.* (citing Mem. at 38.). For example, Hyperice identifies Respondent Aijiu's practice of manufacturing five (5) different infringing products that are sold under different brand names. *Id.* at 45 (citing Mem. at 38; Motion, Ex. 19 (Chart of Infringing Products)). Hyperice also provided evidence that many percussive massage devices use similar components such as battery assemblies and battery assembly receiving trays and include nearly identical instruction manuals. *Id.* (citing Compl., Exs. 51, 52, 54, 55, 59, 63, 65, 69, 70, 72, 73 and 76). In addition, the RD found that the evidence shows that Hyperice's "attempts to restrict sales of allegedly infringing devices on Amazon have been challenging, subverted by fraud, and often unsuccessful." *Id.* at 47; *see id.* at 45-46 (citing Motion, Exs. 20-25).

Based on the evidence in the record, the Commission finds that there is a high likelihood of circumvention and a general exclusion order is necessary to prevent circumvention of a limited exclusion order. Indeed, in investigations with similar facts, the Commission has found the threat of circumvention sufficient to issue a GEO. *See, e.g.*, *Certain Earpiece Devices and Components Thereof* ("*Earpiece Devices*"), Inv. No. 337-TA-1121, Comm'n Op. at 35-36 (Nov. 8, 2019); *Certain Loom Kits for Creating Linked Articles* ("*Loom Kits*"), Inv. No. 337-TA-923, Comm'n Op. at 13 (June 26, 2015); *Certain Toner Cartridges and Components Thereof*, Inv. No. 337-TA-829, Comm'n Op. at 6-8 (July 29, 2013).

Based on this evidence, the Commission finds that the requirements of section 337(d)(2) have been met. Accordingly, the Commission determines that the appropriate remedy in this investigation is a GEO prohibiting the unlicensed importation of certain percussive massage devices that infringe one or more of claims 1-7, 9, 14, and 15 of the '574 patent.

2. Cease and Desist Order

The RD also recommends that the Commission issue a CDO against Kinghood because it is a domestic respondent and the "Commission 'has consistently inferred the presence of commercially significant inventories in the United States' for defaulting respondents located in the United States." RD at 51 (quoting *Certain Electric Skin Care Devices, Brushes and Chargers Therefore, and Kits Containing the Same*, Inv. No. 337-TA-959, Comm'n Op. at 28-29 (Feb. 13, 2017)). The RD found that Hyperice has not shown that a CDO is appropriate for Defaulting Respondents Manybo, Shenzen Infein, Hong Kong Yongxu, or Kula because "the Commission does not 'presume the presence of domestic inventories or other business operations in the United States' . . . for foreign defaulting respondents." *Id.* at 50-51 (quoting *Earpiece Devices*, Comm'n Op. at 42).

Hyperice submits that CDOs against all five Defaulting Respondents "are warranted as a deterrent to further violations, and to provide recourse to Hyperice and the Commission if those Defaulting Respondents continue to import and sell infringing devices." Hyperice Sub. at 21.

The Commission finds that the record supports the issuance of a CDO against Kinghood but not the other Defaulting Respondents.[12] For defaulting respondents located in the United

[12] Commissioners Karpel and Schmidtlein concur with the majority that a CDO directed to defaulting domestic respondent Kinghood should be issued but base their decision on grounds that differ from the majority view. Moreover, they would issue CDOs directed to each of the defaulting respondents. For the reasons noted in *Certain Powered Cover Plates*, Inv. No. 337-TA-1124, Comm'n Op. at 22-23 n.20 (June 11, 2020), *Certain Pocket Lighters*, Inv. No. 337-TA-1142, Comm'n Op. at 19-20 n.15 (July 13, 2020), and *Certain Footwear*, Inv. No. 337-TA-

States, the Commission has inferred the presence of commercially significant inventories in the United States based on the facts of record. *See, e.g.*, *Certain Arrowheads with Deploying Blades and Components Thereof and Packaging Therefor*, Inv. No. 337-TA-977, Comm'n Op. at 18 (Apr. 28, 2017) ("Due to the domestic presence and lack of participation, the Commission has historically granted a complainant's request for relief in the form of a cease and desist order regarding U.S. based activities for domestic respondents found in default."). Kinghood is the only domestic defaulting respondent found in violation based on infringement of the '574 patent.

The Commission finds that the record does not support the issuance of CDOs against the foreign defaulting respondents found in violation (*i.e.*, Manybo, Shenzhen Infein, and Hong Kong Yongxu) because Hyperice makes no factual showing of either commercially significant inventory or domestic operations. *See Certain Footwear Products*, Inv. No. 337-TA-936, Comm'n Op. at 118 (Sept. 24, 2020) ("With respect to defaulting foreign respondents, the

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936 (remand), Comm'n Op. at 120-21 n.66 (Sept. 9, 2020), Commissioners Karpel and Schmidtlein do not consider the Commission's determination to issue a GEO under section 337(d)(2) to direct that the requested CDOs with respect to the domestic defaulting respondent be considered under section 337(f)(1). Rather, they consider section 337(g)(1) is the appropriate authority for the issuance of CDOs as to both domestic and foreign defaulting respondents when the criteria for issuance of CDOs under subsection 337(g)(1)(A)-(E) are met. In the present investigation, each of the defaulting respondents was named in the complaint and each was served with the complaint and notice of investigation. *See* Order No. 17 (Dec. 17. 2020), *unreviewed by* Comm'n Notice (Jan. 5, 2021). The ALJ issued a show cause order ordering these respondents to show cause why they should not be held in default for failing to respond to the complaint and notice of investigation. *See id*. None of these respondents filed responses to the show cause orders. *Id*. These findings satisfy subsections 337(g)(1)(A)-(D). Hyperice requested CDOs limited to each of these defaulting respondents (Hyperice Sub. at 20-21), thus satisfying subsection 337(g)(1)(E). Given that subsections 337(g)(1)(A)-(E) are satisfied and Hyperice requested CDOs directed to these respondents, the statute directs the Commission to issue the requested CDOs, subject to consideration of the public interest. The public interest factors as detailed in Part III(B) *infra* do not support a finding that the remedial orders in this investigation would be contrary to the public interest. Accordingly, Commissioners Karpel and Schmidtlein would issue CDOs against Manybo, Shenzen Infein, Hong Kong Yongxu, Kula, and Kinghood under section 337(g)(1).

Commission has declined to presume the presence of domestic inventories or other business operations in the United States that would support the issuance of a cease and desist order."); *Certain Rolled-Edge Rigid Plastic Food Trays*, Inv. No. 337-TA-1203, Comm'n Notice (Feb. 25, 2021) (declining to issue a CDO against the defaulted foreign respondent because complainants did not establish even with circumstantial evidence that the respondent maintained a commercially significant inventory in the U.S. or engaged in significant commercial business operations in the United States). Accordingly, the Commission determines to only issue a CDO prohibiting respondent Kinghood from further importing, selling, and distributing infringing products in the United States.

B. The Public Interest

Before issuing any remedial order, the Commission must "consider[] the effect of such exclusion 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." 19 U.S.C. §§ 1337(d)(1), (f)(1), (g)(1).

The Commission did not ask the presiding ALJ to make findings regarding the public interest when it instituted this investigation, so the RD does not address that issue. *See* 85 Fed. Reg. 44322 (July 22, 2020). The Commission also received no responses to its request for comments from the public. *See* 86 Fed. Reg. 51380 (Sept. 15, 2021).

The record in this investigation contains no evidence that a GEO would adversely affect 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. OUII Sub. at 24-25. Hyperice submits that "the requested remedial orders would not have an adverse effect on public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in

the United States, or United States consumers." Hyperice Sub. at 21. On the contrary, Hyperice asserts that "[p]rotecting Hyperice's intellectual property rights and investment in domestic industry in the United States through the requested remedial orders will [] serve the public interest while having little or no adverse effect on the public interest." *Id*.

Hyperice also asserts "[t]here are no health, safety, or welfare concerns at issue in this investigation" because the "Accused Products in this matter are therapeutic handheld percussive massage device[s] for applying percussive massage to a person's body" and, thus, do not implicate such concerns. *Id.* at 22.

Hyperice states that it "makes like or directly competitive articles that are readily available and can replace all of the Accused Products if they were to be excluded." *Id.* at 23. Moreover, Hyperice submits that its competitors manufacture percussive massage devices that would remain available for purchase. *Id.* at 22-23 (citing Theragun and TimTam products). Hyperice "estimates that it has a market share of approximately [redacted] of the United States market for percussive massage devices, and that Theragun and TimTam have over [redacted] of the remaining market share." *Id.* at 23. Accordingly, Hyperice claims that U.S. consumers "would continue to have many options when choosing a percussive massage device, and would not be adversely impacted by any remedial order issued as to the Accused Products." *Id.* at 23-24. The availability of percussive massage devices from Hyperice as well as competitors Theragun and TimTam also support a finding that a remedial order would not adversely affect competitive conditions in the United States. Further, there is no indication that a remedial order would impact the production of like or directly competitive products in the United States.

Accordingly, based on the record of this investigation, the Commission determines that the public interest does not preclude the issuance of the remedial orders.

C. Bonding

During the 60-day period of Presidential review under 19 U.S.C. § 1337(j), "articles directed to be excluded from entry under subsection (d) . . . shall . . . be entitled to entry under bond prescribed by the Secretary in an amount determined by the Commission to be sufficient to protect the complainant from any injury." 19 U.S.C. § 1337(j)(3).

Hyperice argues that a bond of 100% of the value of the infringing products is appropriate in this case because the "evidence demonstrates that Respondents' products undercut Hyperice's prices by an average of at least 50%; *i.e.*, on average, they sell for about half the price." Hyperice Sub. at 24 (citing Compl. Exs. 38, 93 and 95). The RD found that "there is no consistent, reliable evidence on the average price of each of the Accused Products." RD at 52. The RD recommended a bond of 100% of the entered value of percussive massage devices "[g]iven that there is little evidence of the exact pricing or volume of sales of the Accused Products." *Id.* (citing, *e.g., Video Game Sys. & Wireless Controllers & Components Thereof*, Inv. No. 337-TA-770, Comm'n Op. at 5 (Oct. 28, 2013)). OUII agrees with the RD's recommendation to set the bond at 100% of the entered value of the imports. OUII Sub. at 23-24.

Given the state of the evidentiary record, and the fact that the only remaining Respondents have defaulted rather than provide any discovery, the Commission has determined to impose a bond of one hundred percent (100%) of the entered value of the imports, consistent with its past practice. *See, e.g.*, *Loom Kits*, Inv. No. 337-TA-923, Comm'n Op. at 19 (imposing a bond of 100% where "a large number" of infringing products were sold over the Internet at different prices, and the defaulting respondents provided no price discovery); *Certain Liquid Crystal Display Modules, Prods. Containing Same, and Methods Using the Same*, Inv. No. 337-TA-634, Comm'n Op. at 6-7 (Dec. 2010) (imposing a bond of 100% where a reliable price

comparison was not possible due to the large number of products sold and the variety of features involved). The Commission thus adopts the RD's recommendation to set the bond at one hundred percent (100%) of the entered value of infringing massage devices.

IV. CONCLUSION

For the reasons detailed above, the Commission determines to issue a GEO prohibiting the unlicensed importation certain percussive massage devices that infringe one or more of claims 1-7, 9, 14, and 15 of the '574 patent and a CDO prohibiting respondent Kinghood from further importing, selling, and distributing infringing products in the United States. The Commission also determines that the public interest will not be adversely affected by the issuance of the remedial orders. Finally, the Commission determines that the bond during the period of Presidential review pursuant to 19 U.S.C. § 1337(j) shall be in the amount of one hundred percent (100%) of the entered value of the imported articles.

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

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