



UNITED STATES INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1007; Investigation No. 337-TA-1021 (Consolidated)]

Certain Personal Transporters, Components Thereof, and Packaging and Manuals Therefor and Certain Personal Transporters and Components Thereof

Notice of a Commission Final Determination of Violation of Section 337; Issuance of Remedial Orders; Termination of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (“the Commission”) has determined that there is a violation of section 337 of the Tariff Act of 1930, as amended in the above-captioned investigation. The Commission has issued a limited exclusion order (“LEO”) directed to products of respondents Swagway LLC of South Bend, Indiana (“Swagway”) and Segaway of Studio City, California (“Segaway”); and a cease and desist order (“CDO”) directed to respondent Swagway. The investigation has been terminated.

FOR FURTHER INFORMATION CONTACT: Michael Liberman, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3115. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at

<https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted Inv. No. 337-TA-1007, *Certain Personal Transporters, Components Thereof, and Packaging and Manuals Therefor* under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 ("section 337"), on June 24, 2016, based on a complaint filed by Segway, Inc. of Bedford, New Hampshire; DEKA Products Limited Partnership of Manchester, New Hampshire; and Ninebot (Tianjin) Technology Co., Ltd. of Tianjin, China (collectively, "Complainants"). 81 FR 41342-43 (Jun. 24, 2016). The complaint alleges a violation of section 337 by reason of infringement of certain claims of U.S. Patent Nos. 6,302,230 ("the '230 patent"); 6,651,763 ("the '763 patent"); 7,023,330 ("the '330 patent"); 7,275,607 ("the '607 patent"); 7,479,872 ("the '872 patent"); and 9,188,984 ("the '984 patent"); and U.S. Trademark Registration Nos. 2,727,948 ("the '948 TM") and 2,769,942 ("the '942 TM"). The named respondents for Investigation No. 337-TA-1007 are ("Inventist"), Inc. of Camas, Washington; PhunkeeDuck, Inc. of Floral Park, New York; Razor USA LLC of Cerritos, California; Swagway; Segaway; and Jetson Electric Bikes LLC of New York, New York. The Commission's Office of Unfair Import Investigations ("OUII") was also named as a party to this investigation. 81 FR 41342 (Jun. 24, 2016).

On September 21, 2016, the Commission instituted Inv. No. 337-TA-1021, *Certain Personal Transporters and Components Thereof*, based on a complaint filed by the same Complainants. 81 FR 64936-37 (Sept. 21, 2016). The complaint alleges a violation of section

337 by reason of infringement of certain claims of the ‘230 and ‘607 patents. The named respondents for Investigation No. 337-TA-1021 are Powerboard LLC of Scottsdale, Arizona; Metem Teknoloji Sistemleri San of Istanbul, Turkey; Changzhou Airwheel Technology Co., Ltd. of Jiangsu, China; Airwheel of Amsterdam, Netherlands; Nanjing Fastwheel Intelligent Technology Co., Ltd. of Nanjing, China; Shenzhen Chenduoxing Electronic, Technology Ltd., China, a.k.a. C-Star of Shenzhen, China; Hangzhou Chic Intelligent Technology Co., Ltd. of Hangzhou, China; Hovershop of Placentia, California; Shenzhen Jomo Technology Co., Ltd., a.k.a. Koowheel of Shenzhen City, China; Guangzhou Kebye Electronic Technology Co., Ltd., a.k.a. Gotway of Shenzhen, China; and Inventist. OUII was also named as a party to this investigation. 81 FR 64936 (Sept. 21, 2016). The Commission directed the presiding ALJ to consolidate Inv. Nos. 337-TA-1007 and 337-TA-1021. *See id.* at 64937.

Subsequently, the Commission determined not to review an initial determination (“ID”) finding respondents PhunkeeDuck, Inc. and Segaway in default. Order No. 9 (Sept. 1, 2016) (*not reviewed* Oct. 3, 2016). The Commission further determined not to review an ID granting complainants’ corrected motion to amend the complaint and notice of investigation to assert the ‘763, ‘330, and ‘872 patents against respondent Jetson Electric Bikes LLC, and to terminate the investigation with respect to all asserted claims of the ‘984 patent as to all respondents. Order No. 17 (Nov. 14, 2016) (*not reviewed* Dec. 7, 2016). The Commission also determined not to review an ID terminating the investigation as to respondent Nanjing Fastwheel Intelligent Technology Co., Ltd. based on a Consent Order Stipulation. Order No. 18 (Nov. 15, 2016) (*not reviewed* Dec. 7, 2016). The Commission likewise determined not to review an ID granting a motion to terminate the investigation as to the ‘763 patent. Order No. 19 (Dec. 16, 2016) (*not*

reviewed Jan. 10, 2017). The Commission further determined not to review an ID finding respondents Shenzhen Chenduoxing Electronic, Technology Ltd., China, a.k.a. C-Star; Shenzhen Jomo Technology Co., Ltd., a.k.a. Koowheel; Guangzhou Kebye Electronic Technology Co., Ltd., a.k.a. Gotway; Metem Teknoloji Sistemleri San; and Airwheel Netherlands in default. Order No. 22 (Jan. 9, 2017) (*not reviewed* Feb. 7, 2017). The Commission also determined not to review an ID terminating this investigation with respect to all asserted claims of the ‘330 patent and the ‘872 patent as to all respondents. *See* Order No. 24 (Jan. 10, 2017) (*not reviewed* Feb. 7, 2017).

Furthermore, on January 17, 2017, Complainants and respondent Inventist filed a joint motion to terminate this investigation based on consent order stipulation and proposed consent order. On January 30, 2017, the ALJ issued an ID (Order No. 25) granting the joint motion. The Commission determined to review Order No. 25 because the proposed Consent Order contained express provisions that were mutually inconsistent, and multiple typographical and formatting errors. *See* Notice of Review dated February 22, 2017. The Commission requested corrections to be made in the proposed Consent Order. *See id.* at 2. The corrected proposed Consent Order was filed with the Commission on February 27, 2017. On October 12, 2017, the Commission determined to affirm Order No. 25 based on the corrected proposed Consent Order.

As a result, the following two patents (with 13 asserted claims) and two trademarks remain at issue in this investigation: claims 1, 3-5, and 7 of the ‘230 patent; claims 1-4 and 6 of the ‘607 patent; the ‘948 TM; and the ‘942 TM. *See* ID at 5.

The evidentiary hearing on the question of violation of section 337 was held from April

18 through April 21, 2017. The final ID finding a violation of section 337 was issued on August 10, 2017. On August 10, 2017, the ALJ issued his final ID finding a violation of section 337. The ID found that the accused products do not infringe the asserted claims of the '230 and '607 patents which were not found to be invalid. The ID also found that the technical prong of the domestic industry requirement was not satisfied for the '230 or '607 patents, and therefore the domestic industry requirement was not satisfied for those patents. The ID further found that the Swagway accused products infringe the '948 TM and '942 TM, for which the domestic industry requirement was satisfied. ID at 192-93; 82; 147.

The ALJ issued his recommended determination on remedy, the public interest and bonding on August 22, 2017. The ALJ recommended that if the Commission finds a violation of section 337 in the present investigation, the Commission should: (1) issue a GEO covering accused products found to infringe the asserted patents; (2) issue a LEO covering accused products found to infringe the asserted patents if the Commission does not issue a GEO; (3) issue an LEO covering accused products found to infringe the asserted trademarks; (4) issue CDOs; and (5) not require a bond during the Presidential review period. RD at 1-18.

On August 23, 2017, the Commission issued a Notice of Request for Statements on the Public Interest. No written submissions from the public were filed with the Commission. Complainants timely filed a public interest submission on September 21, 2017. 19 C.F.R. § 210.50(a)(4).

All parties to this investigation that participated in the evidentiary hearing (with the exception of respondent Powerboard LLC) filed timely petitions for review of various portions of the final ID. The parties likewise filed timely responses to the petitions.

The Commission determined to review various portions of the final ID and issued a Notice to that effect. 82 FR 48724-26 (Oct. 19, 2017) (“Notice of Review”). In the Notice of Review, the Commission also set a schedule for the filing of written submissions on the issues under review, including certain questions posed by the Commission, and on remedy, the public interest, and bonding. The parties have briefed, with initial and reply submissions, the issues under review and the issues of remedy, the public interest, and bonding.

Having examined the record in this investigation, including the parties’ submissions filed in response to the Notice of Review, the Commission has determined as follows:

(1) To affirm the ID’s determination that the claim term “maximum operating velocity” should be construed to mean “a variable maximum velocity where adequate acceleration potential is available to enable balance and control of the vehicle,” ID at 44;

(2) To affirm the ID’s determination that “nothing in the plain language of the disputed limitation [‘the motorized drive arrangement causing, when powered, automatically balanced operation of the system’] in claim 1 of the ‘230 patent requires the operation by a rider. The claim only requires the ‘motorized drive arrangement causing, when powered, automatically balanced operation of the system,’” *see* ID at 82;

(3) To affirm the ID’s infringement, validity, and domestic industry (technical prong) determinations pertaining to the ‘230 patent, with the exception of the ID’s findings and analysis pertaining to the discussion of the non-infringement determination regarding the ‘230 patent that are based on Complainants’ incorrect construction of the term “maximum operating velocity,” *see* ID at 51-77. The Commission takes no position on these findings and analysis. *See Beloit Corporation v. Valmet Oy*, 742 F.2d 1421, 1423 (Fed. Cir.1984);

(4) To modify, as detailed in the accompanying Commission Opinion, the ID's discussion and conclusion with respect to the "actual confusion" factor regarding the SEGWAY mark on pages 171-172 of the ID, to find that the "actual confusion" factor does not weigh in favor of a finding of a likelihood of confusion.

Having reviewed the submissions on remedy, the public interest and bonding filed in response to the Commission's Notice of Review, and the evidentiary record, the Commission has determined that the appropriate form of relief in this investigation is: (1) an LEO prohibiting the importation into the United States of (a) SWAGWAY-branded personal transporters, components thereof, and packaging and manuals thereof manufactured outside the United States that infringe one or more of the '948 TM and '942 TM and that are manufactured abroad by or on behalf of, or imported by or on behalf of, Respondent Swagway; and (b) personal transporters, components thereof, and packaging and manuals therefor manufactured outside the United States that infringe one or more of the '948 TM and '942 TM, which cover the "SEGWAY" marks, and that are manufactured by or on behalf of, or imported by or on behalf of, Respondent Segaway; and (2) a CDO directed against Respondent Swagway.

The Commission has further determined that the public interest factors enumerated in subsections (d)(l), (f)(1), and (g)(1) (19 U.S.C. 1337(d)(l), (f)(1), (g)(1)) do not preclude issuance of the above-referenced remedial orders. Finally, the Commission has determined to set the bond amount at zero (0) percent of the entered value of Respondent Swagway's accused products and at 100 percent of the entered value of defaulted Respondent Segaway's accused products during the Presidential review period (19 U.S.C. 1337(j)). The investigation is terminated.

The Commission's orders, opinion, and the record upon which it based its determination were delivered to the President and to the United States Trade Representative on the day of their issuance. The Commission has also notified the Secretary of the Treasury of the orders.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in Part 210 of the Commission's Rules of Practice and Procedure, 19 CFR Part 210.

By order of the Commission.

Issued: December 11, 2017.

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Supervisory Attorney.

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