

PUBLIC VERSION

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

In the Matter of

CERTAIN FOOTWEAR PRODUCTS

Investigation No. 337-TA-936

COMMISSION OPINION

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I. INTRODUCTION

On November 17, 2015, the presiding administrative law judge (“ALJ”) issued his final initial determination (“ID”) finding a violation of section 337 as to certain accused products of each active respondent and as to all accused products of each defaulting respondent. On February 3, 2016, the Commission determined to review the final ID in part. 81 *Fed. Reg.* 6886-89 (Feb. 9, 2016). The Commission now terminates the investigation and issues a general exclusion order with respect to U.S. Trademark Registration Nos. 3,258,103 (“the ’103 trademark”) and 1,588,960 (“the ’960 trademark”).

II. BACKGROUND

The Commission instituted this investigation on November 17, 2014, based on a complaint filed on behalf of Converse Inc. (“Converse”) of North Andover, Massachusetts. 79 *Fed. Reg.* 68482-83. The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, by reason of infringement of certain registered trademarks: U.S. Trademark Registration No. 4,398,753 (“the ’753 trademark”) and the ’103 and ’960 trademarks. The complaint further alleged violations of section 337 based upon unfair competition/false designation of origin, common law trademark infringement and unfair competition, and trademark dilution, the threat or effect of which is to destroy or substantially injure an industry in the United States. The Commission’s notice of investigation named numerous respondents including Wal-Mart Stores, Inc. (“Walmart”) of Bentonville, Arkansas; Skechers U.S.A., Inc. (“Skechers”) of Manhattan Beach, California; and Highline United LLC d/b/a Ash Footwear USA (“Highline”)

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of New York City, New York. The Office of Unfair Import Investigations (“OUII”) was also named as a party to the investigation. *Id.*

New Balance Athletic Shoe, Inc. (“New Balance”) of Boston, Massachusetts was subsequently added as a respondent-intervenor. *See* Order No. 36 (unreviewed, Comm’n Notice Feb. 19, 2015). Two models of New Balance’s accused footwear, *i.e.*, the CPT Hi and CPT Lo sneakers, were terminated from the investigation. *See* Order No. 83 (April 9, 2015; unreviewed, Comm’n Notice May 6, 2015). Only Walmart, Skechers, Highline, and New Balance remain active in the investigation. The following five respondents were found in default: Shenzhen Foreversun Industrial Co., Ltd. (a/k/a Shenzhen Foreversun Shoes Co., Ltd.) (“Foreversun”) of Shenzhen, China; Dioniso SRL of Perugia, Italy; Fujian Xinya I&E Trading Co. Ltd. of Jinjiang, China; and Zhejiang Ouhai International Trade Co. Ltd. and Wenzhou Cereals Oils & Foodstuffs Foreign Trade Co. Ltd., both of Wenzhou, China. *See* Order Nos. 58, 106 (Feb. 24 and May 8, 2015); Comm’n Notices (Mar. 12 and June 2, 2015). All other respondents have been terminated from the investigation based on settlement, consent order, or good cause. Complete details of the procedural history can be found in the final ID. *See* ID at 1-4.

The ALJ issued his final ID on November 17, 2015, finding a violation of section 337. Specifically, the ALJ found that the ’753 trademark is not invalid or diluted and that certain accused products of each active respondent, and all accused products of each defaulting respondent, infringe the ’753 trademark. *See* ID at 130-32. He also found that certain accused products of defaulting respondent Foreversun infringe both the ’103 and ’960 registered

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trademarks and that Converse satisfied both the economic and technical prongs of the domestic industry requirement with respect to all asserted registered trademarks. *Id.* The ALJ issued his recommended determination (RD) on remedy and bonding during the period of Presidential review on the same date. His recommended remedy included a general exclusion order directed to footwear products that infringe the asserted registered trademarks and cease and desist orders directed against each active, remaining respondent found to infringe the '753 trademark. *See RD* at 133-42.

On December 4, 2015, complainant, respondents, and the Commission investigative attorney ("IA") each filed a petition for review of the final ID. On December 14, 2015, each of these parties filed responses to the other petitions for review.

On February 3, 2016, the Commission determined to review the final ID and to request submissions from the parties on the issues under review. 81 *Fed. Reg.* 6886-89. The Commission also requested written submissions on the issues of remedy, the public interest, and bonding from the parties, interested government agencies, and other interested non-parties. *Id.* On February 17 and 24, 2016, respectively, Converse, respondents, and the IA each filed a brief and a reply brief on all issues for which the Commission requested written submissions.¹

¹ *See* Complainant Converse Inc.'s Written Submission to the Commission Regarding the Issues Under Review; Complainant's Submission on Remedy, Bonding, & Public Interest ("Converse's Remedy Resp."); Complainant Converse Inc.'s Reply Submission to the Commission Regarding the Issues Under Review; Complainant's Reply to Respondents' Response to the Commission Determination to Review the Final Initial Determination In Part and Written Submission on Remedy, Public Interest, and Bond; Respondents' Response to Request for Written Submissions Regarding Issues Under Review; Respondents' Response to the Commission Determination to

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Respondents' reply brief included a request for a Commission hearing to present oral argument under Commission rule 210.45(a). On February 29 and March 3, 2016, respectively, both Converse and the IA filed responses to respondents' request, along with a motion for leave to file a sur-reply to the request for oral argument. On March 1, 2016, respondents filed a motion for leave to submit a sur-reply to their request for oral argument.² The Commission grants all motions for leave to file sur-replies, and denies respondents' request for a Commission hearing to present oral argument.

A. Trademarks Asserted

Generally, the "anatomy" of a shoe is divided into three parts: (1) the "upper" portion, which is the material portion that more or less surrounds and covers the top of the foot; (2) the "midsole" portion between the upper and the bottom portion of the shoe that can provide cushioning and/or support structure to the shoe; and (3) the "outsole" portion which refers to the tread or bottom portion of the shoe ordinarily in contact with the ground. *See* ID at 10 (citing

Review the Final Initial Determination In Part and Written Submission on Remedy, Public Interest, and Bonding; Respondents' Response to Written Submissions by Converse and OUII Regarding Issues Under Review; Respondents' Reply Written Submission on the Issues of Remedy, Public Interest, and Bonding; Response of the Office of Unfair Import Investigations to the Commission's Request for Written Submissions Regarding the Issues Under Review and Remedy, Bonding, and the Public Interest ("IA's Resp."); Reply Submission of the Office of Unfair Import Investigations to the Private Parties' Written Submissions Regarding the Issues Under Review and Remedy, Bonding, and the Public Interest.

² *See* Complainant Converse Inc.'s Sur-Reply to Respondents' Request for Oral Argument; Response of the Office of Unfair Import Investigations to Respondents' Request for Oral Argument; Respondents' Response to Converse Inc.'s Motion for Leave to Submit a Sur-Reply to Respondents' Request for Oral Argument.

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CX-1 at ¶ 8 n.1).

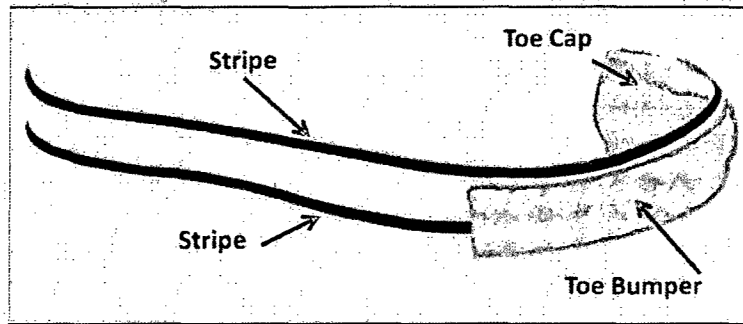
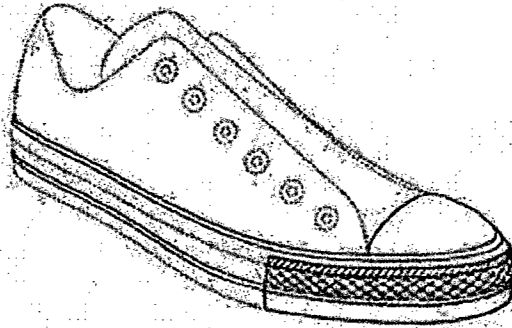
The '753 Federally-Registered Trademark (Converse Midsole Trademark)³

On August 6, 2012, Converse filed an application to register its midsole design with the U.S. Patent & Trademark Office (“PTO”). *Id.* (citing CX-226.0015). The PTO issued the '753 trademark for the midsole design on September 10, 2013. Converse asserts that its federally-registered rights, as well as its common law trademark rights, cover “the combination of the toe cap, multi-textured toe bumper, and two midsole stripes that Converse commonly uses in connection with its Chuck Taylor All Star (CTAS) high-top shoes, *i.e.*, [the Converse Midsole Trademark –] the ‘CMT’.” *Id.* (citing Converse’s Post-Hearing Br. at 6). The CMT as depicted in the '753 trademark, Converse’s depiction of the CMT from its complaint (*see* complaint at ¶ 10), and representative CTAS shoes bearing the CMT are depicted below in Figure 1. The asserted federally-registered and common law trademarks are co-extensive, *i.e.*, one and the same. The CTAS high-top shoes bearing some form of the CMT, have been marketed and sold by Converse for basketball/athletic use since the 1930s, and a low-top version of these CTAS shoes was introduced in the 1950s. *See* Complaint at ¶¶ 11-12, 18; CX-242C at QQ. 49-59; CX-243C at QQ. 51-102; CX-237C at QQ. 112-34.

³ The terms “'753 trademark,” “Converse Midsole Trademark,” “midsole trademark,” “CMT,” and “midsole-design” are used synonymously herein.

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Figure 1



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The '103 and '960 Federally-Registered Trademarks (Converse Outsole Trademark)

Converse also asserts its federally-registered and common law trademark rights with respect to its outsole design. Converse asserts that these rights cover “a distinct diamond pattern outsole” used in connection with the CTAS shoes. The asserted federally-registered and common law trademarks are co-extensive. Converse holds two federally-registered trademarks related to the Converse Outsole Trademark, *i.e.*, the “COT” – the '103 and '960 registrations. These registrations, along with representative CTAS shoes bearing the COT, are depicted below in Figure 2. The PTO issued the '103 and '960 trademarks for the outsole design on March 27, 1990 and July 3, 2007, respectively. Therefore, both trademarks have become incontestable. ID at 12; *see* 15 U.S.C. § 1065 (a registered mark becomes incontestable after 5 consecutive years of continuous use).

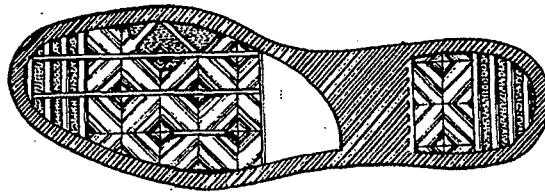
Figure 2

'103 Registration



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'960 Registration



B. The Commission's Determination of No Violation with Respect to the '753 Trademark

On February 3, 2016, the Commission determined to review: (1) the ID's finding that the '753 trademark is not invalid; (2) the ID's findings regarding infringement of the '753 trademark; (3) the ID's finding that the common law trademark asserted in the design depicted in the '753 trademark is invalid; and (4) the ID's finding that there is no violation of section 337 with respect to the common law trademarks asserted in the designs depicted in the '103 and '960 trademarks. The Commission requested written submissions from the parties on a number of issues. The Commission did not review the remainder of the final ID. *See* 81 *Fed. Reg.* 6886-89 (Feb. 9, 2016). On review, the Commission reverses the ID's contrary finding and determines that the '753

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trademark is invalid based on lack of secondary meaning, and affirms the ID's finding that the common law trademark depicted in the '753 trademark is invalid. The Commission has also affirmed the ID's finding that there is a likelihood of confusion with respect to the '753 trademark for specific accused footwear products if this trademark is not invalid, and has affirmed the ID's finding that there is no likelihood of confusion with respect to the '753 trademark for other specific accused footwear regardless of invalidity. Accordingly, the Commission has determined there is no violation of section 337 with respect to the '753 trademark.

The Commission has further determined to vacate the ID's finding of no violation of section 337 with respect to the common law trademarks asserted in the designs depicted in the '103 and '960 trademarks. The ID's finding of no violation with respect to these common law rights is moot in view of the ID's finding (unreviewed) of a violation with respect to the federally-registered rights in the '103 and '960 trademarks and the fact that the scope of the common law and federally-registered rights in these trademarks is co-extensive.

III. DISCUSSION AND FINDINGS

For the reasons set forth below, the Commission has determined to affirm-in-part, reverse-in-part, and vacate certain portions of the ID's findings that were under review. We adopt the ID's findings on the issues that are not inconsistent with this opinion.⁴ The Commission finds

⁴ The determinations made in the ALJ's final ID that were not reviewed became final determinations of the Commission by operation of rule. *See* 19 C.F.R. § 210.42(h)(2). The ID's findings that the Commission adopts which are not inconsistent with this opinion include, but are not limited to, the ID's finding that the '753 trademark is not invalid due to functionality or genericness. *See* ID at 57-64.

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no violation with respect to the '753 trademark and restates that there is a violation with respect to the federally-registered rights associated with the '103 and '960 trademarks by defaulting respondent Foreversun due to this previously unreviewed finding in the final ID. *See* 81 *Fed. Reg.* 6886-89 (Feb. 9, 2016). This opinion provides, *inter alia*, the Commission's analysis and reasoning for both its determination of no violation with respect to the '753 trademark and its determination on remedy, the public interest, and bonding for violation with respect to the '103 and '960 trademarks.

A. The ALJ's Finding of No Invalidity of the '753 Trademark With Respect to Secondary Meaning

1. Relevant Law

This case involves the assertion of a registered trademark on a specific trade dress, *i.e.*, the midsole design of the Converse shoe. The Lanham Act (U.S. Code, Title 15, Chapter 22, Trademarks) extends protection not only to traditional trademarks, *e.g.*, words and symbols, but also to "trade dress," defined as "the design and appearance of a product together with the elements making up the overall image that serves to identify the product presented to the consumer." *See Yankee Candle Co., Inc. v. Bridgewater Candle Co., LLC*, 259 F.3d 25, 37-38 (1st Cir. 2001) (citing *Chrysler Corp. v. Silva*, 118 F.3d 56, 58 (1st Cir. 1997) (quoting *Fun-Damental Too, Ltd. v. Gemmy Indus. Corp.*, 111 F.3d 993, 999 (2d Cir. 1997))). The primary purpose of trade dress protection is to protect that which identifies a product's source. *I.P. Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 35 (1st Cir. 1998). Courts recognize trade dress claims based both on product packaging and on "product design/configuration." *See, e.g., Wal-Mart Stores v. Samara Bros.*,

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Inc., 529 U.S. 205, 213-14 (2000). While "trade dress" historically referred to product packaging and labeling, modern definitions encompass the shape and design of a product itself, *i.e.*, product design or configuration. See *Elmer v. ICC Fabricating, Inc.*, 67 F.3d 1571, 1578 (Fed. Cir. 1995) (citing *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 980, 219 USPQ 515, 528 (11th Cir. 1983)).

In order for a trademark to be valid, it must be non-functional and distinctive (*i.e.*, has acquired "secondary meaning"). To establish a cause of action for trade dress infringement involving product configuration, which is the case here, the relevant trade dress must have acquired distinctiveness or secondary meaning. See 15 U.S.C. § 1052(f) (Sect. 2) ("except as expressly excluded . . . nothing herein shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce."); *Wal-Mart Stores*, 529 U.S. 205 at 216 ("in an action for infringement of unregistered trade dress . . . a product's design is distinctive, and therefore protect[a]ble, only upon a showing of secondary meaning."); see also *Tie Tech, Inc. v. Kinedyne Corp.*, 296 F.3d 778, 783 (9th Cir. 2002) ("[T]here can be no infringement of an invalid mark.").

Secondary meaning occurs when "in the minds of the public, the primary significance of a [mark or trade dress] is to identify the source of the product rather than the product itself." See *Certain Ink Markers & Packaging Thereof* ("Ink Markers"), Inv. No. 337-TA-522, Order No. 30 at 26-27 (July 25, 2005) (unreviewed) (quoting *Wal-Mart Stores*, 529 U.S. at 216). Secondary meaning also requires a showing that there is a "mental recognition in buyers' and potential

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buyers' minds that products connected with the mark are associated with the same source." *Adidas-Salomon AG v. Target Corp.*, 228 F.Supp.2d 1192, 1195 (D. Oregon 2002) (quoting *Japan Telecom, Inc. v. Japan Telecom America, Inc.*, 287 F.3d 866, 873 (9th Cir. 2002)). Whether or not a trademark has acquired secondary meaning is a question of fact. See *G.H. Mumm & Cie v. Desnoes and Geddes, Ltd.*, 917 F.2d 1292, 1294 (Fed. Cir. 1990).

Relevant Law Regarding Secondary Meaning Factors

The Commission considers evidence pertaining to seven factors to assess whether a mark or trade dress has acquired secondary meaning. One factor, consumer surveys, provides direct evidence of secondary meaning; the remaining six factors provide circumstantial evidence. These factors are: (1) the degree and manner of use; (2) the exclusivity of use; (3) the length of use; (4) the degree and manner of sales, advertising, and promotional activities; (5) the effectiveness of the effort to create secondary meaning; (6) deliberate copying; and (7) association of the trade dress with a particular source by actual purchasers (typically measured by consumer surveys). See *Certain Digital Multimeters, and Products with Multimeter Functionality* ("Digital Multimeters"), Inv. No. 337-TA-588, Order No. 22 at 8 (Feb. 4, 2008) (unreviewed); see also *Thompson Medical Co., Inc. v. Pfizer Inc.*, 753 F.2d 208, 217 (2d Cir. 1985). These factors are not weighed equally, but rather "the strongest and most relevant evidence regarding whether a mark has acquired secondary meaning . . . is evidence by a public opinion survey or poll [*i.e.*, factor (7)]." *Ink Markers*, Order No. 30 at 27; see also *Yankee Candle*, 259 F.3d at 43; *Echo Travel, Inc. v. Travel Associates, Inc.*, 870 F.2d 1264, 1269 (7th Cir. 1989).

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2. *The ID*

The ID found that the '753 registered trademark's (the CMT's) presumption of validity was the deciding factor to conclude that the midsole design possessed secondary meaning where four of the seven factors were in favor of secondary meaning even though the strongest factor, survey evidence, weighed against finding secondary meaning. ID at 56. Both respondents and the IA contend that the presumption is inapplicable here because Converse is asserting infringement against products that were in use prior to the CMT's registration. IA's Pet. at 10; Respondents' Pet. at 6-7 (citing *Aromatique, Inc. v. Gold Seal, Inc.*, 28 F.3d 836, 870 (8th Cir. 1994) (holding that the trademark owner was not entitled to the presumption that its registered trade dress had acquired secondary meaning because the owner alleged that infringement had begun three years prior to registration)). Based on *Aromatique*, respondents and the IA both asserted that the burden of proving secondary meaning by a preponderance of the evidence shifted to Converse, which failed to carry this burden.

The ID noted that Converse asserted both the common law and federally-registered rights in the CMT, which are co-extensive in scope. ID at 10, 14. The ID found that the only difference in the secondary meaning analysis, as applied to both rights, was the presumption of validity which applied to the registered midsole design only. *Id.* at 14 (citing *Wal-Mart*, 529 U.S. at 216). With the presumption of validity in mind, the ID then considered all seven factors regarding whether the CMT possessed secondary meaning. *Id.* at 14-56.

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The ID found that four factors weigh in favor of secondary meaning: factor (1) (degree and manner of use), factor (3) (length of use), factor (4) (degree and manner of sales, advertising, and promotional activities), and factor (6) (deliberate copying); one factor weighs against, factor (7) (survey evidence); and two factors are neutral, factor (2) (exclusivity of use) and factor (5) (effectiveness of efforts to create secondary meaning). Because the evidence concerning factor 7 (survey evidence) that weighs against secondary meaning provides the “strongest and most relevant” evidence, the ID found that the outcome here is a close call. *Id.* at 56. The ID ultimately determined that because the presumption of validity applies with respect to the registered ‘753 trademark, respondents and the IA did not meet their burden in overcoming this presumption by a preponderance of the evidence. The ID found therefore that the registered CMT possesses secondary meaning. *Id.*

However, with respect to the asserted common law rights associated with the design depicted in the ‘753 trademark, the ID determined that there was no secondary meaning possessed by the common law mark because there is no presumption of validity for such an unregistered mark and Converse did not meet its burden to overcome the lack of sufficient survey evidence. *Id.* at 56-57 (citing *Flynn v. Peters*, 377 F.3d 13, 19 (1st Cir. 2004)); *see also Wal-Mart*, 529 U.S. at 216.

3. Analysis

The Commission has determined that the ‘753 trademark is invalid as not distinctive based on the totality of the record evidence on secondary meaning. The Commission finds that the

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registration of the '753 trademark provides *prima facie* evidence of the validity of the '753 mark under Section 33(a) of the Lanham Act regardless of when infringement first began. The Commission affirms the ID's analysis as to factors 1 and 3-7. However, the Commission finds that the ID erred in concluding that factor 2 (exclusivity of use) is neutral in view of at least the substantial record evidence of longstanding, concurrent use of the CMT design by third parties. Based on the record evidence as a whole, the Commission reverses the ID's ultimate finding that the federally-registered '753 trademark had acquired secondary meaning, which is inconsistent with the ID's correct finding that the common law rights asserted in this mark had not acquired secondary meaning.

Parties' Respective Burdens Regarding Secondary Meaning

The Commission agrees with the ID that pursuant to Section 33(a) of the Lanham Act, the registration of the CMT design provides *prima facie* evidence of the validity of registered '753 mark, including secondary meaning, regardless of when infringement first began. Under the Lanham Act, federal registration is "*prima facie* evidence of the validity of the registered trademark...." 15 U.S.C. § 1115(a) (Sect. 33(a)). *See also Certain Handbags, Luggage, Accessories, & Packaging Thereof*, Inv. No. 337-TA-754, Order No. 16 at 6 (March 5, 2012) (unreviewed). This statutory "*prima facie* evidence" of validity has three facets, namely that the registered trademark: (1) possesses secondary meaning; (2) is not functional; and (3) is not generic. *See In re Cordua Restaurants, Inc.*, --- F.3d ---, 2016 WL 2786364 at *3 (May 13, 2016) (citing *B. & B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S.Ct. 1293, 1300 (2015)).

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The parties dispute whether the “*prima facie* evidence” language of Section 33(a) of the Lanham Act shifts the burden of production and/or the burden of persuasion to the respondents.⁵ The Commission recognizes that the law remains unsettled as to the burden-shifting effect of the “*prima facie* evidence” language of Section 33(a).⁶ The Commission need not resolve this legal issue because regardless of whether the “*prima facie* evidence” language shifts to the challenger the burden of persuasion or the burden of production, the record as a whole here warrants a finding that the asserted ‘753 trademark has not acquired secondary meaning.⁷

⁵ See IA’s Petition for Review at 5-13; Respondents’ Petition for Review at 4-12; Converse’s Response to Petitions for Review at 16-18; IA’s Response to the Commission’s Request for Written Submissions Regarding the Issues Under Review at 7-13; Respondents’ Response to the Commission’s Request for Written Submissions Regarding the Issues Under Review at 1-22; Converse’s Response to the Commission’s Request for Written Submissions Regarding the Issues Under Review at 13-18.

⁶ See, e.g., 6 McCarthy on Trademarks and Unfair Competition § 32:138 (4th ed.) (noting that the federal circuit courts are divided as to the burden-shifting effect of the “*prima facie* evidence” language of Section 33(a) of the Lanham Act). Compare *Apple Inc. v. Samsung Elecs. Co. Ltd.*, 786 F.3d 983, 995 (Fed. Cir. 2015) (noting that the *prima facie* evidence effect is to “shift the burden of production to the defendant.”); *Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d 225, 239 (5th Cir. 2010) (“The presumption of validity flowing from trademark registration ... has a burden-shifting effect, requiring the party challenging a registered mark to produce sufficient evidence to establish that the mark is [non-distinctive] by a preponderance of evidence.”) (citing *Retail Servs. Inc. v. Freebies Publ’g*, 364 F.3d 535, 542 (4th Cir. 2004)) with *Aluminum Fabricating Co. of Pittsburg v. Season-All Window Corp.*, 259 F.2d 314, 316 (2d Cir. 1958) (“there is a strong presumption of validity so that the party claiming invalidity has the burden of proof and in order to prevail it must put something more into the scales than the registrant.”).

⁷ Conversely, this *prima facie* effect derived from registration does not apply to asserted common law rights, e.g., unregistered trademarks, and therefore the owner at common law bears the burden of establishing that its common law marks have secondary meaning and are not functional. See *Wal-Mart Stores*, 529 U.S. at 216; 15 U.S.C. § 1125(a)(3) (Sect. 43).

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Secondary Meaning and Validity of the CMT Design

As stated *supra*, the ID correctly found, in consideration of the evidentiary record, that the asserted common law trademark in the design depicted in the federally-registered '753 trademark is invalid based on lack of secondary meaning. *See* ID at 56-57. The Commission also finds that the ID, consistent with this invalidity finding regarding the common law trademark, also should have found, in consideration of the totality of the evidentiary record, that the federally-registered '753 trademark is invalid based on lack of secondary meaning. *See, e.g., Mine Safety Appliances Co. v. Electric Storage Battery Co.*, 405 F.2d 901, 904 (C.C.P.A. 1969) (“It is our understanding of the Lanham Act that it is for the registration, not the creation, of trademarks. Its terminology – indeed, the history of federal trademark statutes – presupposes the preexistence of a trademark to be registered.”); *La Societe Anonyme des Parfums le Galion v. Jean Patou, Inc.*, 495 F.2d 1265, 1270 n.5 (2d Cir. 1974) (“The Lanham Act does not create the trademark right; it only recognizes the right acquired through use.”).

Specifically, the ID correctly found that factor 7 (survey evidence), which provides the “strongest and most relevant” evidence, weighs against a finding of secondary meaning. *See* ID at 16-36; *Ink Markers*, Order No. 30 at 27; *see also Yankee Candle*, 259 F.3d at 43 (“[survey evidence] is a valuable method of showing secondary meaning.”); *Echo Travel*, 870 F.2d at 1269 (the court teaching that a likelihood of success in establishing secondary meaning can be shown solely based on strong consumer survey evidence, newspaper advertising, and distribution of

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40,000 advertising posters in initial 10-month period of poster advertisement) (citing *Paramount Pictures Corp. v. Worldwide Entertainment Corp.*, 1977 WL 25613 (S.D.N.Y.1977)).

As to secondary meaning factor 2 (exclusivity of use), however, the ID erred in concluding that the evidence of third-party use and its effect on secondary meaning was neutral to Converse. *See ID at 37-46.* The Commission finds that the totality of the evidence as to this factor contradicts Converse's assertion that its use of the CMT design has been substantially exclusive. Rather, the evidence shows multiple third parties simultaneously used the CMT design nationally on the same types of footwear products promoted to the same consumer class. Accordingly, the Commission finds that factor 2 is negative to Converse (*i.e.*, weighs against a finding of secondary meaning) and, in combination with at least the ALJ's correct finding that factor 7 (survey evidence) was negative to Converse, weighs heavily against a finding of secondary meaning for the CMT.

We find that substantial record evidence of use of the CMT by multiple third parties from the 1920s to the present provides strong circumstantial proof that at least a significant percentage of the average consumers of CTAS shoes associated the midsole design with multiple sources other than (or in addition to) Converse.

The record evidence includes numerous examples of significant third-party use including, but not limited to, the following:

(a) Respondents' experts in a plurality of related fields (fashion/dress, shoes, and marketing),

Dr. Golder, Mr. Maeder, Dr. Hanssens, and Mr. Walford, provided abundant testimonial

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and record evidence of third-party use of the CMT from the 1930s to the present by a number of brands (*e.g.*, Skips, Pro Skips, Toughskins, Jeepers, Gamebusters, LA Gear, PF Flyers, Keds, Fortune Dynamics (in Fortune Dynamic Catalog), Calvin Klein, Guess, KangaRoos Rippers, McKids, etc.) including, but not limited to, as shown by yearly advertisements in three major catalog retailers (Sears, J.C. Penney, and Montgomery Ward) with circulation in the hundreds of millions and catalog and retail sales in the billions of dollars. *See* RX-3C (Golder WS) at QQ. 38, 51, 64, 74-94, 102-114; RX-202.002; RX-29.001; RX-2087C (Walford WS) at QQ. 16, 18, 23, 31-60, 80-115; RX-7698C (Maeder WS) at QQ. 19-27, 49-89; ; RX-2091C (Hanssens WS) at QQ. 29-46, 48-77, 81; RX-2208; RX-2479C.004, .008-.010; RX-0539; RX-2205; RX-2209; RX-2212; RX-2416-18; RX-9240.025, .030, .042; RX-9996C – 10001C; RX-2170; JX-426C.0037 at 124-25; JX-413C at 145-46, 166-67; RX-2307.003; RX-2474.016; RX-10042.011; RX-9827; RX-2217; RX-2390; RX-7881; RX-7883; RX-2213 at SKECH-ITC00026349; RX-10099; RX-2184; RX-2404; RX-2236; RX-23; RX-2212; RX-2195; RX-2324.001; RX-2409; RX-2393; RX-2416; RX-2221; RX-2235; RX-2209; RX-2168; RX-2170; RX-2339; RX-2526; RX-2340-41; RX-2273; RX-2277-78; RX-2299; RX-2314; RX-2331.

- (b) Separate advertisements showing Keds, Spalding, and PF Flyers shoes (shown in the Sept. 1958 and May and June 1959 Coach & Athlete, respectively) as well as La Crosse and Bata shoes all bearing the CMT. *See* RX-2302; RX-8202; RX-8545.003, .005, .013.

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- (c) In the 1988 Fall/Winter J.C. Penney catalog, which had a circulation of over 12 million copies and annual sales over 4 billion dollars, Converse's shoes were marketed immediately above an advertisement for Airwalk-branded sneakers bearing the CMT; and in that same year's Spring/Summer catalog, which also had similar circulation figures, J.C. Penney advertised CTAS shoes on the very same page as Nike-branded canvas sneakers bearing the CMT. *See* RX-2305.005; Tr. at 975-79; RX-2307.003; RX-2091C at Q. 64-69; RX-8815.
- (d) PF Flyers shoes, bearing a combination of a toe cap, toe bumper, and midsole stripe, have been sold and advertised since at least the 1940s to the present; Converse itself owned this brand and sold and advertised these shoes in the 1970s until it was forced to divest PF Flyers due to antitrust concerns. PF Flyers re-entered the market in the early 1990s, after being acquired by Leif J. Ostberg Inc. ("LJO"). *See* RX-7698C at Q. 66; RX-1C at QQ. 19-22, 25, 29, 42-163; RX-52-59; RX-61; RX-474; JX-81; RX-829C at 115-19, 124-25; RX-476-82; RX-523-27; RX-538-42; RX-655; RX-1352; RX-2301; RX-2785; RX-2890-91; RX-2893-95; RX-7862; RX-8292-94; RX-9910; RX-10036. Also, specifically, LJO represented to New Balance when it sold them the brand in 2001 that no other party has property interests in the PF Flyers and that property interests previously held by any other party have been effectively transferred to LJO (RX-495).
- (e) Expert testimony and catalog evidence of Keds sneakers bearing the CMT throughout the 1990s (RX-2091 at Q. 81; RX-2479C (Fall 1993 Keds' catalog); RX-9240 (Fall 1995

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Keds' catalog)). The ID discounted this evidence since it did not directly indicate sales (see ID at 45); however, there was at least circumstantial evidence of substantial promotion, advertisement, and sales of Keds sneakers bearing the CMT from this time period based on the alongside advertisement in the 1988 J.C. Penney Fall/Winter catalog (RX-2305) and the 2011 agreement between Converse and Collective Brands, Inc. ("CB" - owner of Keds) warranting that CB "exclusively advertised, promoted, distributed, and sold shoes bearing the" CMT. See JX-72C at 2 (¶ I.A.2) Accordingly the evidentiary record indicates at least 23 years of promotion, sales, and advertisement of Keds sneakers between 1988 and 2011; starting 24 years prior to Converse's application for PTO registration of the CMT in 2012.

(f) The 2011 agreement between Converse and CB resulted from [[

]]. See ID at 45-46; JX-72C at 2. The agreement also included a provision that [[

]]. See JX-72C at 4-5 (¶ II.B.1), 6-8 (¶ II.D). [[

]]. Id. at 4-5 (¶ II.B.1).

Also, this Historic Kicks Designs bearing the CMT (JX-72 at Exhibit B) included the Airwalk line of shoes shown in the alongside advertising in the 1988 J.C. Penney

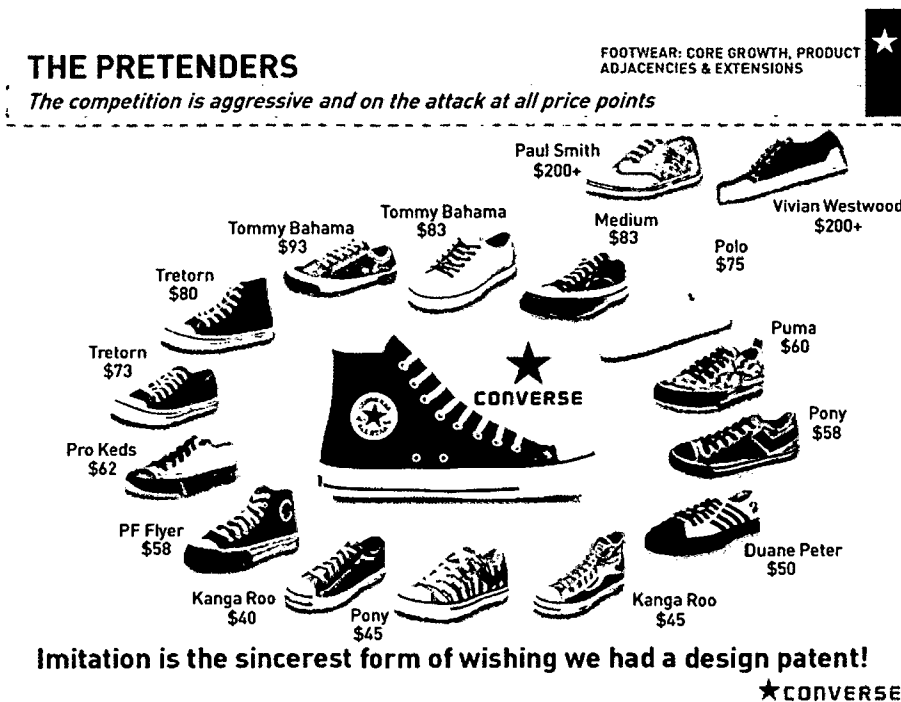
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Fall/Winter catalog (RX-2305).

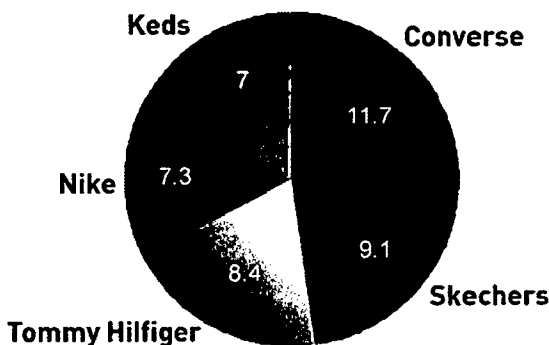
- (g) In 2001, Skechers introduced a slip-on retro-basketball sneaker bearing the CMT (RX-6601; RX-2092C at QQ. 50-56). The record evidence contains associated circulation and sales numbers for these shoes and advertisements (RX-2896C). Mr. Clark, Skechers' Vice President of Sourcing, testified that 36 different companies have made shoes bearing some form of the midsole design going "back to the 1890s." *See* CX-1555C (Clark Dep. Tr.) at 235-240; CX-801.
- (h) A 2005 internal Converse document/chart (*see* Figure 3 below) depicts a CTAS shoe surrounded by 16 competitive shoes, nearly all of which bear a combination of a toe cap, toe bumper, and midsole stripes including at least some of which bear the CMT. The subtitle reads: "The competition is aggressive and on the attack at all price points," and the bottom of the document says "Imitation is the sincerest form of wishing we had a design patent!" The chart describes Converse as "the leader in a fragmented marketplace," and indicates that it has just 11.7% market share, followed by Skechers (9.1%), Tommy Hilfiger (8.4%), Nike (7.3%), and Keds (7%). *See* CX-4032.0034, .0064; RX-7698C at Q. 71.

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Figure 3



★ Converse is the leader in a fragmented market place



★ CONVERSE

In addition, the evidence shows that the midsole design trade dress is commonplace in the

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market: (1) the 2000 edition of “The Complete Footwear Dictionary” illustrated, as the exemplary definition of a sneaker, a “classic Keds” sneaker bearing the CMT (*See* RX-2478.005); and (2) the Transportation Security Administration uses an advertisement showing a generic sneaker bearing the CMT to educate travelers that children 12 years old and younger do not have to take off their shoes for the security screening at the airport. *See* RX-7698C at Q. 89 (citing RX-8629).

Based on the foregoing evidence of extensive use by multiple third-parties of the CMT for the last eighty years, the Commission finds that the average consumer prior to the first alleged infringement in 2003 was likely aware of this third-party use, which would lead them to associate the CMT design with multiple sources, and therefore substantially diminishes any secondary meaning in Converse’s mark. Of particular note, Figure 3 above shows a market saturated with shoes bearing the CMT from multiple sources.

Similar to the facts of *Echo Travel*, the record evidence here does not just show random, irrelevant third-party use, but third-party use of the same mark to promote the same goods to the same consumer class. *See Echo Travel*, 870 F.2d at 1269 (third-party use of a substantially similar mark to promote the same goods or services to the same consumer class weighs against a finding that the consumer class associates the mark with one source); *see also Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 1403 (Fed. Cir. 1984) (“When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, . . . distinctiveness on which purchasers may rely is lacking under such circumstances.”); *Mana*

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Products, Inc. v. Columbia Cosmetics Manufacturing, Inc., 65 F.3d 1063, 1071 (2d Cir.1995) (holding that the color black does not identify the plaintiff as the source of the cosmetics because “countless numbers of cosmetics companies ... sell black compacts.”). When consumers of CTAS shoes have been inundated with images of third-party shoes bearing the CMT over at least the last eighty years as shown here by the record evidence, these consumers may well associate the CMT with more than one source as the “CBSC Only” survey indicates. *See* RX-1667 at QQ. 34-39.

Moreover, the Commission finds that the ID erroneously discounted the record evidence concerning all subfactors of factor 2 (exclusivity of use) including subfactors “private label” and “sales of shoes alongside competitors.” *See* ID at 47-48. Since evidence of third-party use from the 1980s and earlier is relevant to the date of first infringement in 2003 due to the longstanding, concurrent use by third parties here, we find relevant the record evidence that Converse in the 1970s and 1980s knowingly (1) made “The Winner” shoes bearing the CMT exclusively for Sears; and (2) permitted its CTAS shoes to be sold alongside third-party shoes bearing the CMT. *See* RX-2087C at Q. 109; RX-2091C at Q. 37; RX-2208 (1976 J.C. Penney Spring/Summer Catalog showing “The Winner” shoes bearing the CMT); RX-2274; RX-2784; RX-2305.005; RX-8815; RX-2307.003 (Nike shoes bearing the CMT alongside Converse advertisement); RX-2208; RX-2305; RX-2307; RX-2087 at Q. 109-10). The “Winner” shoes were promoted alongside advertisements for non-Converse shoes, *i.e.*, “the Gamebuster,” bearing the CMT. *See* RX-2091C at Q. 37; RX-2208. The record evidence also indicates that these private label and

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comparison ads were widespread across the country. *Id.* Thus any consumer seeing these private label and comparison images would likely associate the CMT with more than one source.

Based on the totality of record evidence, particularly with respect to secondary meaning factors 2 and 7, the Commission concludes that the '753 trademark is invalid.⁸ The Commission therefore reverses the ID's conclusion and determines that the '753 trademark is invalid based on lack of secondary meaning as proven by a preponderance of the evidence. As a result of this action, the Commission determines that there is no violation of section 337 with respect to the both the common law and registered CMT design.

B. The ALJ's Findings of Infringement

The Commission affirms the ID's finding that there is a likelihood of confusion with respect to the CMT for specific accused footwear products if the CMT is not invalid, and affirms that there is no likelihood of confusion with respect to the CMT for other specific accused footwear products, as set forth in the ID, regardless of invalidity. *See* ID at 64-104.

IV. CONCLUSION ON VIOLATION

For the reasons discussed herein, the Commission determines to reverse-in-part the ALJ's final ID such that the '753 trademark is invalid based on lack of secondary meaning. The Commission also affirms the ID's finding that the asserted common law rights associated with the federally-registered '753 trademark are invalid. The Commission also affirms the ID's finding

⁸ The Commission affords no weight to any survey evidence the ID found to be flawed and unreliable. *See* ID at 16-36. Accordingly, to the extent that the ALJ relied upon surveys that he discredited (ID at 46), the Commission gives those surveys no weight in determining whether there was exclusivity of use of the CMT design.

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that specific accused footwear products infringe the '753 trademark if the trademark is not invalid, and affirms the ID's finding that other specific accused footwear products do not infringe the '753 trademark regardless of invalidity. These actions result in a finding of no violation of section 337 with respect to the '753 trademark.

With respect to the COT marks, the Commission vacates the ID's finding that there is no violation of section 337 as to the asserted common law rights associated with the designs depicted in the federally-registered '103 and '960 trademarks due to invalidity. *See* ID at 129-32. The ID correctly found infringement as to the '103 and '960 trademarks, and previously granted summary determination of validity and enforceability of both the asserted common law and federally-registered rights in the designs depicted in the '103 and '960 trademarks. *See* Order No. 130, at 1 n.1 (July 15, 2015). The ID's finding of no violation with respect to these common law rights is moot, however, in view of the ID's finding (unreviewed) of a violation with respect to the federally-registered rights in the '103 and '960 trademarks by defaulting respondent ForeverSun since the scope of the common law and federally-registered rights in these trademarks is co-extensive.

V. REMEDY, PUBLIC INTEREST, AND BONDING

A. Remedy

In a section 337 proceeding, the Commission has "broad discretion in selecting the form, scope, and extent of the remedy." *Viscofan, S.A. v. United States Int'l Trade Comm'n*, 787 F.2d 544, 548 (Fed. Cir. 1986). Based on the record in this investigation, and for the reasons detailed

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below, the Commission has determined to issue a general exclusion order (“GEO”) pursuant to 19 U.S.C. § 1337(d)(2), prohibiting the unlicensed importation of certain footwear products covered by one or more of the ’103 and ’960 trademarks. We also find that this remedial order is not contrary to the public interest.

Under section 337, the Commission is authorized to issue a GEO excluding all infringing goods regardless of the source when the conditions of section 337(d)(2) or (g)(2) are met. *See* 19 U.S.C. §§ 1337 (d)(2), (g)(2). In the present investigation, some respondents appeared before the Commission to contest the allegations in the complaint, but other respondents failed to appear and therefore defaulted. ID at 1-10. Under these circumstances, section 337(d)(2) is the appropriate statutory provision governing issuance of a GEO. *See Certain Sildenafil or Any Pharmaceutically Acceptable Salt Thereof, such as Sildenafil Citrate, and Products Containing Same*, Inv. No. 337-TA-489, Comm’n Op. at 4 (July 23, 2004) (finding that the issuance of a GEO under section 337(d)(2), rather than 337(g)(2), was appropriate when not all respondents failed to appear to contest the investigation); *see also Certain Energy Drink Products*, Inv. No. 337-TA-678, USITC Pub. No. 4286, Comm’n Op. at 4-7 (Nov. 2011); *Certain Toner Cartridges and Components Thereof*, Inv. No. 337-TA-740, USITC Pub. No. 4376, Comm’n Op. at 24 (Feb. 2013).

Accordingly, under section 337(d)(2):

The authority of the Commission to issue 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 --

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(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). In determining whether either criterion is satisfied, the Commission may look not only to the activities of active respondents, but also to those of non-respondents as well as respondents who have defaulted or been terminated from an investigation. *See Certain Electronic Paper Towel Dispensing Devices and Components Thereof*, Inv. No. 337-TA-718, Comm'n Op. at 13-14, 16 (Dec. 1, 2011); *Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same*, Inv. No. 337-TA-650, Comm'n Op. at 59 (April 14, 2010).

As detailed below, the record in the present investigation warrants the issuance of a GEO under both subparagraph (A) and subparagraph (B) of subsection 337(d)(2). *See* 19 U.S.C. § 1337(d)(2).

1. Circumvention Of An LEO

The record shows a high likelihood that defaulting respondent Foreversun would circumvent an LEO, with respect to the '103 and '960 trademarks, by employing various practices, including selling and importing the infringing products using large business-to-business internet portals that enable third-party vendors and foreign agents or trading companies to operate as intermediaries between such a foreign manufacturer of knockoff

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products and U.S. distributors and retailers. RD at 135. For example, the record shows that the various trading companies that sell the infringing products are mostly selling agents or shell companies with a mail drop under fictitious names, emails, and phone numbers. *Id.*

Therefore, the record shows that absent a GEO, defaulting respondent ForeverSun could easily circumvent an LEO by shipping products to their customers from various third-party manufacturers and intermediaries using fictitious contact information. Therefore, the requirement of subsection 19 U.S.C. § 1337(d)(2)(A) is satisfied here.

2. Pattern Of Violation Of Section 337 Where It Is Difficult To Identify Source Of Infringing Products

The record in this investigation shows that there is a widespread pattern of importation and sale of infringing footwear products throughout the United States. Converse's complaint named thirty proposed respondents in this investigation. ID at 1-2. Moreover, the record shows that there are numerous potentially infringing footwear products manufactured and/or sold by third-parties not named as respondents. RD at 135-36 (citing CX-229C at QQ. 182-95, 261-89; CX-245C at QQ. 18-116); *see also* Complaint at ¶¶ 758-63, Exhibits 220-24. This record evidence also shows that the sources of the imported products are difficult to identify. Specifically, Converse's Senior Director of Brand Protection, Mr. Foley, described Converse's enforcement efforts as [[

]] *Id.* (citing CX-245C at Q. 58). Further, evidence of this nature indicating numerous online sales of infringing imported goods can

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constitute a widespread pattern of violation of section 337. *Id.*; *see also Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm'n Op. at 14 (June 26, 2015).

In sum, the record shows that a pattern of violation exists and that it is difficult to identify the source of infringing products, thus satisfying the requirements of 19 U.S.C. § 1337(d)(2)(B).

B. Public interest

Before issuing a remedy for a violation of section 337, the Commission must consider the effect of the remedy on certain public interest considerations: (1) the public health and welfare; (2) competitive conditions in the U.S. economy; (3) the U.S. production of articles that are like or directly competitive with those which are the subject of the investigation; and (4) U.S. consumers. 19 U.S.C. §§ 1337(d), (f), (g); *Certain Ink Jet Print Cartridges and Components Thereof*, Inv. No. 337-TA-446, Comm'n Op. at 14 (October 2002). Both the IA and Converse submit that the public interest factors do not weigh against the ALJ's recommended remedy in this investigation.

We find that the evidentiary record in this investigation does not indicate that any of the above-referenced factors raises public interest concerns that would preclude issuance of the remedial orders in this investigation. The record does not support a finding of any specific harm to the public health, safety, or welfare sufficient to preclude issuance of the proposed remedial order. As Converse points out, the subject products consist of casual shoes, bearing designs that cause consumer confusion with genuine Converse products bearing the COT designs. Converse's Remedy Resp. at 33. Furthermore, the competitive conditions are robust in the

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United States economy for footwear products. Based on the record, Converse and other third-parties in the United States appear to be able to replace the products at issue with their own like or directly competitive, non-infringing articles within a commercially reasonable time after the exclusion orders go into effect. *Id.* at 35. Therefore, U.S. consumers would have access to competitive products from at least Converse and these third-parties, and any exclusion order would have minimal impact on competitive conditions in the United States economy and the production of like or directly competitive articles in the United States.

Based on the foregoing, we find that entry of the remedial order sought by Converse would not be contrary to the public interest in this investigation.

C. Bonding

Upon the entry of the remedial orders, a respondent may continue to import and sell its products during the sixty (60) day period of Presidential review subject to posting a bond. 19 U.S.C. § 1337(j)(3). The amount of the bond is determined by the Commission and must be sufficient to protect a complainant from any injury. *Id.*; 19 C.F.R. § 210.50(a)(3). Both the IA and Converse agree that, given the state of the evidentiary record, the bond amount should be set at 100 percent of the entered value of the accused products as no reliable price differential can be determined for the defaulting respondent. *See* Converse's Remedy Resp. at 33; IA's Resp. at 45.

A 100 percent bond is often assigned when reliable pricing information is unavailable in the case of a defaulting respondent, which is the case here since Foreversun did not participate in discovery. *See Certain Oscillating Sprinklers, Sprinkler Components, and*

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Nozzles, Inv. No. 337-TA-448, Limited Exclusion Order at 4-6 (Mar. 4, 2002), *Certain Energy Drink Products*, Inv. No. 337-TA-678, Comm'n Op. at 9-10 (Sept. 8, 2010); *Certain Radio Control Hobby Transmitters and Receivers and Products*, Inv. No. 337-TA-763, Comm'n Notice (Sept. 30, 2011), *Certain Birthing Simulators and Associated Systems*, Inv. No. 337-TA-759, Comm'n Notice (Aug. 29, 2011); *Certain Automotive Vehicles and Designs Therefor*, Inv. No. 337-TA-722, Comm'n Notice (Mar. 10, 2011); H. REP. 100-40, Pts. 1-6. pp. 161-162 (1987). Accordingly, the ALJ recommended a bond of 100 percent of the entered value (per pair) of their accused footwear products during the 60-day period of Presidential review. RD at 142.

We agree that the record in the present investigation lacks sufficient pricing evidence with respect to accused footwear products bearing the COT designs because so many respondents settled or defaulted without providing such evidence. Accordingly, we have determined to set the bond at 100 percent of the entered value (per pair) of the infringing footwear products during the period of Presidential review.

VI. CONCLUSION

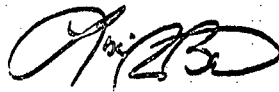
The Commission has determined that there has been a violation of section 337. Having considered the ALJ's recommended determination, the parties' submissions, and the evidentiary record, the Commission has determined to issue a general exclusion order prohibiting the unlicensed entry of footwear products that infringe the '103 or '960 trademarks. The Commission further has determined that the public interest factors enumerated in section

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337(d)(1) (19 U.S.C. § 1337(d)(1)) do not preclude the issuance of the general exclusion order.

Finally, the Commission has determined that there should be a bond in the amount of 100 percent of the entered value (per pair) of the covered products during the period of Presidential review.

By order of the Commission.

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Lisa R. Barton
Secretary to the Commission

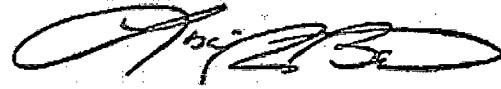
Issued: July 6, 2016

CERTAIN FOOTWEAR PRODUCTS

Inv. No. 337-TA-936

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, Sarah J. Sladic, Esq., and the following parties as indicated, on **July 7, 2016**.



Lisa R. Barton, Secretary
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CERTAIN FOOTWEAR PRODUCTS

Inv. No. 337-TA-936

Certificate of Service – Page 2

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