UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of	
CERTAIN WOVEN TEXTILE FABRICS AND PRODUCTS CONTAINING SAME	**Investigation No. 337-TA-976**

COMMISSION OPINION

I. BACKGROUND

The Commission instituted this investigation on December 18, 2015, based on a supplemented and twice-amended complaint filed by AAVN, Inc. of Richardson, Texas ("AAVN"). 80 *Fed. Reg.* 79094 (Dec. 18, 2015). The complaint 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 woven textile fabrics and products containing same, by reason of infringement of claims 1-7 of U.S. Patent No. 9,131,790 ("the '790 patent") and/or by reason of false advertising. The notice of investigation named fifteen respondents. In the course of the investigation, fourteen of the respondents were terminated from the investigation based upon settlement agreement or consent order. The last remaining respondent was Pradip Overseas Ltd. of Ahmedabad, India ("Pradip").

AAVN accused Pradip of false advertising, specifically alleging that Pradip misrepresented the thread count of sheets manufactured in India, imported into the United States, and sold in United States department stores. Second Am. Compl. ¶¶ 39-41, 80 (Nov. 12, 2015); *id.* at Ex. 46 ("800 Thread Count" sheets measured at 252.7 threads). Pradip was not accused of infringing the '790 patent, which relates to a fabric woven in a particular way from a certain blend of polyester yarns and non-polyester (*i.e.*, cotton) so-called "warp yarns." *See* '790 patent col. 12 lines 30-40 (claim 1); *id.* at col. 3 lines 49-64. Although Pradip responded to the

complaint, Pradip later terminated its relationship with its attorneys and represented that it would not participate in the remainder of the investigation. *See* Order No. 14 at 1 (Apr. 19, 2016); *see also* 19 C.F.R. § 210.17 (failures to act).

On September 2, 2016, AAVN moved for leave to file a motion for summary determination of violation out of time. The motion noted that, as a result of settlements and consent orders, Pradip was the last remaining respondent. Compl't AAVN, Inc.'s Motion [for] Leave to File a Summ. Determination Mot. Out of Time at 1. Consequently, the motion argued that it would be more efficient to resolve the investigation on summary determination than on final determination. *Id.* The summary determination motion that was appended argued, *inter alia*, that Pradip had violated section 337 by falsely advertising the thread count of its imported sheets, and that the false advertising was deceptive, material, and injurious to AAVN. Summ. Determination Mot. at 20-22. AAVN requested that the ALJ recommend the issuance of a general exclusion order. AAVN also sought a 100 percent bond during the Presidential review period. *Id.* at 24-25. On September 15, 2016, the Commission investigative attorney ("IA") responded in support of the motion for leave and the accompanying summary determination motion. IA Resp. at 1-2. The IA agreed that entry of a general exclusion order is appropriate, *id.* at 14-16, and that bond should be set at 100 percent of the entered value of accused products, *id.* at 16. Pradip did not respond. *See* 19 C.F.R. § 210.17(c).

On November 10, 2016, the ALJ granted the motion for summary determination as the subject initial determination and recommended determination on remedy ("ID/RD") (Order No. 21). The ALJ found that AAVN had shown a violation of section 337 by reason of false advertising under section 43 of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B). Order No. 21 at 7-9, 13-15. In connection with his analysis, he found that Pradip's packaging of its sheets with a falsely stated thread count was a false and misleading description of the sheets, *id.* at 13, that the

misdescription was deceptive, *id.* at 13-14, that it is material to consumers in determining the sheets' quality, *id.* at 14, that the advertised goods traveled in interstate commerce, *id.* at 14, and that there is a likelihood of injury to AAVN (*i.e.*, injury under the Lanham Act), *id.* at 14-15. The ALJ further found substantial injury to AAVN under section 337(a)(1)(A) "as a result of the false claims of Pradip and its competitors regarding the actual thread count of its products and their ability to sell their products to retailers at lower prices." *Id.* at 15. The ALJ also found that the importation requirement of section 337 had been satisfied, *id.* at 9-10, that Pradip had submitted to the Commission's jurisdiction (*i.e.*, in personam jurisdiction), *id.* at 11, and that the Commission has *in rem* jurisdiction over the imported articles, *id.*

The ALJ recommended the issuance of a general exclusion order. Citing section 337(d)(2), which sets forth the test for issuance of a general exclusion order, as well as the appropriate Commission precedent, *id.* at 16, the ALJ found that "the evidence shows a widespread pattern of violation of Section 337," *id.* at 17. The ALJ also found that "the evidence shows that it is difficult to identify the source and manufacturers of the falsely advertised products," because "U.S. retailers fail to identify the manufacturer, importer or seller of the textile products at the point of sale." *Id.* at 18. Nor do import records "reveal the names of the original manufacturers of the materials used to construct the imported products." *Id.* Accordingly, the ALJ found "that the evidence shows that it is difficult, if not impossible, to identify the source of the falsely advertised goods." *Id.* Based on these findings, the ALJ recommended the issuance of a general exclusion order. *Id.* (In the alternative, the ALJ recommended the issuance of a limited exclusion order. *Id.* at 19.) The ALJ recommended that bond be set at 100 percent of the entered value of the falsely advertised products. *Id.*

No petitions for review of the ID were filed, and on December 20, 2016, the Commission determined not to review the ID. *See* 81 *Fed. Reg.* 95195 (Dec. 27, 2016). The Commission

issued a notice that sought written submissions on remedy, the public interest, and bonding. *Id.* at 95196. On January 6, 2017, AAVN and the IA filed their submissions on remedy, the public interest, and bonding.[1] On January 13, 2017, the IA filed a response to AAVN's submission.[2]

Echoing the arguments it made to the ALJ, AAVN argues that the Commission should issue a general exclusion order because there has been a widespread pattern of unauthorized use and business conditions support issuance of a general exclusion order. AAVN Remedy Submission at 3-4. In the alternative, AAVN seeks a limited exclusion order against Pradip. *Id.* at 4. AAVN argues that the public interest considerations do not preclude the issuance of an exclusion order. *Id.* at 5-6. AAVN states that a 100 percent bond is appropriate during the Presidential review period. *Id.* at 6-7.

While the IA generally agrees with the relief sought by AAVN, IA Remedy Submission at 5-8, the IA believes that his proposed general exclusion order should issue rather than AAVN's. In particular, the IA explains that AAVN's proposed order should not be entered because:

> (i) the order includes a statement regarding a determination that was never made in this investigation, specifically, "[t]he Commission has determined that a general exclusion from entry for consumption is necessary to prevent *circumvention of an exclusion order limited to products of named persons* . . . ." *Id.*, p. 1) (emphasis added); and
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> (ii) the order includes a statement regarding service of the order upon entities that do not require it, specifically, "*the Department of Health and Human Services, the Department of Justice, [and] the Federal Trade Commission* . . . ." (*Id.*, p. 3) (emphasis added).

IA Remedy Reply Submission at 2.

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[1] Compl'ts Written Submission on Remedy, the Public Interest, and Bonding (Jan. 6, 2017) ("AAVN Remedy Submission"); Resp. of the Office of Unfair Import Investigations to the Commission's Req. for Written Submissions on Remedy, the Public Interest, and Bonding (Jan. 6, 2017) ("IA Remedy Submission").

[2] Reply of the Office of Unfair Import Investigations to Compl'ts Written Submissions on Remedy, the Public Interest, and Bonding (Jan. 13, 2017) ("IA Remedy Reply Submission").

II. DISCUSSION

A. Legal Standards

Under 19 U.S.C. § 1337(d)(2), the "authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that (A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products." 19 U.S.C. § 1337(d)(2); *see also* 19 C.F.R. § 210.50(c).

Before issuing a general exclusion 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." *See* 19 U.S.C. § 1337(d)(1). "[T]he statute does not require the Commission to determine that a remedial order would advance the public interest factors but rather requires the Commission to consider whether issuance of such an order will adversely affect the public interest factors." *Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm'n Op., 2015 WL 5000874, *9 (June 25, 2015) (citation omitted).

During the 60-day Presidential review period 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." *See* 19 U.S.C. § 1337(j)(3). "The Commission typically sets the bond based on the price differential between the imported infringing product and the domestic industry article or based on a reasonable royalty. However, where the available pricing or royalty information is inadequate, the bond may be set at one hundred (100) percent of

the entered value of the infringing product." *Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm'n Op., 2015 WL 5000874, *11 (citations omitted).

B. Analysis

As discussed in the Background, *supra*, AAVN, the IA, and the ALJ all agree that a general exclusion order is appropriate, that the public interest does not counsel otherwise, and that bond should be set at 100 percent of the entered value of the falsely advertised products. No cease and desist order was sought. The Commission finds that a general exclusion order is appropriate. 19 U.S.C. § 1337(d)(2)(B). The Commission further finds that the statutory public interest factors, *id.* § 1337(d), do not preclude the issuance of a general exclusion order. The Commission has determined to set the bond during the Presidential review period, *id.* § 1337(j)(3), at 100 percent of the entered value of the falsely advertised products.

1. General Exclusion Order

The Commission finds that a general exclusion order is appropriate pursuant to section 337(d)(2)(B), *i.e.*, that "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(a)(d)(2)(B). As to the pattern of violation, the ID/RD found:

> . . . AAVN argues that companies based out of India, Pakistan and China continue to manufacture and import "high thread count CVC [Chief Value Cotton] products" and points to several recently imported sheets that contain falsely advertised thread counts. (Mot. at 23.) Staff agrees . . . .
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> [T]he evidence shows a widespread pattern of violation of Section 337. Specifically, the evidence shows that respondents and non-respondents have imported and sold, in the United States, products that have claimed a higher thread count than actually contained in the products per testing performed under the [ASTM Standard D3775-12] standard. (Mot. at Exs. 14-17.) Indeed, as recently as August 2016, imported sheets purchased at Ross Stores advertised thread counts of 1000 TC and 750 TC, but had actual thread counts of 236 TC and 355 TC, respectively. (*Id.* at Ex. 16.)

ID/RD at 17. As to the difficulty of identifying the source of infringing products, the ALJ found:

> AAVN argues that a general exclusion order is warranted due to certain business conditions, namely difficulty in identifying sources; the ease with which prior companies are simply rebranded with a new name; and the ease of establishing new companies in countries such as India, Pakistan and China. (Mot. at 20-21.) Staff agrees that import records do not reveal the names of the manufacturers and that those manufacturers can be difficult to identify as evidenced by Mr. Agarwal's testimony and the actual imported products [may] lack any manufacturer information. (Staff Resp. at 15.)
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> [T]he evidence shows that it is difficult to identify the source and manufacturers of the falsely advertised products. Specifically, the evidence shows that U.S. retailers fail to identify the manufacturer, importer or seller of the textile products at the point of sale, which makes it difficult to trace back to the manufacturer. (Mot. at Ex. 1 Q&A 29-30.) The evidence further shows that import records do not reveal the names of the original manufacturers of the materials used to construct the imported products thereby making it difficult to identify the sources of the falsely advertised products. (Mot. at Ex. 14, 17, and 18.) The product packaging of imported bedding sheets purchased from Ross Stores similarly fails to identify the source of that product. (*Id.* at Ex. 16.)
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> Therefore, the ALJ finds that the evidence shows that it is difficult, if not impossible, to identify the sources of the falsely advertised goods.

Id. at 17-18.

The Commission has determined to issue a general exclusion order pursuant to 19 U.S.C. § 1337(d)(2) prohibiting entry into the United States of certain woven textile fabrics and products containing the same that falsely advertise their thread counts. The requirements of 19 U.S.C. § 1337(d)(2) are met. *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. on Remedy, the Public Interest, and Bonding 4-5 (July 23, 2004) (public version). In particular, no party contests, and the Commission finds, that "there is a pattern of violation of" section 337, "and it is difficult to identify the source of infringing products." 19 U.S.C. § 1337(d)(2)(B).

As noted earlier, both AAVN and the IA submitted proposed general exclusion orders, and the IA objected to the form of AAVN's proposal. The IA's proposed order is proper in form, AAVN did not object to it, and the Commission has determined to issue a general exclusion order consistent with that proposed by the IA.

2. The Public Interest

The ALJ found that there was no evidence that "a general exclusion order would place an undue burden on public health and welfare or competitive conditions in the United States or on U.S. consumers." ID/RD at 18. AAVN's submission explains that the public interest is not implicated in this investigation:

> First, the order would have no adverse effect on public health and welfare because high thread count cotton-polyester fabrics are not essential to the preservation of any public interest. Indeed, these products are relatively new to and make up a small portion of the overall market for bed linens. Second, the order would not adversely impact competitive conditions in the U.S. economy; to the contrary, it would have the beneficial effects of eliminating unfair competition and protecting consumers from falsely advertised products. Third, there is no evidence that the order would adversely affect production of woven textile fabrics, and, in all likelihood, the order would encourage domestic production to increase. Finally, U.S. customers will not be adversely affected because AAVN and its licensees have adequate capacity to meet the demand for high thread count cotton-polyester blend fabrics, and there are already numerous legitimate alternatives, such as 100% cotton bedding, in the fabrics market.

AAVN Remedy Submission at 5-6. The IA agreed, and also noted that AAVN's complaint included a declaration that it had the capacity to meet market demand after entry of a general exclusion order. IA Remedy Submission at 7. No other public interest submissions were received.

The Commission finds that this investigation does not implicate the Commission's public interest considerations. We are aware of no evidence that raises concerns regarding "the public health and welfare, competitive conditions in the United States economy," and "the production

of like or directly competitive articles in the United States." 19 U.S.C. § 1337(d)(1). As to the fourth public interest factor, "United States consumers," the Commission finds that consumers stand to benefit from removing falsely advertised products from the marketplace. Thus, based on the record of this investigation, the Commission has determined that the public interest does not preclude the issuance of a general exclusion order.

3. Bond During Presidential Review

AAVN sought, and the ALJ recommended, a bond of 100 percent during the Presidential review period. The ALJ explained:

> When reliable price information is available, the Commission has often set the bond to eliminate the differential between the domestic product and the imported, infringing product. (*See Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-336, Comm'n Op. at 24 (1995).) AAVN argues that the bond be set at 100%. (Mot. at 25.) Staff agrees that a bond of 100% is appropriate. (Staff Resp. at 16-17.)
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> The ALJ finds that without any information to set a bond based on price differential, a bond of 100% during the Presidential review period would be appropriate.

ID/RD at 19.

The Commission agrees with the ALJ's recommendation. When pricing information is inadequate or unavailable, as here because of Pradip's failure to provide discovery, Commission practice is to set the bond at 100 percent. *Loom Kits*, Comm'n Op., 2015 WL 5000874, *11 (citations omitted). Thus, the Commission has determined to set the Presidential review bond in the amount of 100 percent of the entered value of the infringing products.

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: March 20, 2017

CERTAIN WOVEN TEXTILE FABRICS AND PRODUCTS CONTAINING SAME **Inv. No. 337-TA-976**

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, Vu Q. Bui, Esq., and the following parties as indicated, on **March 20, 2017**.

Lisa R. Barton, Secretary
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