Public Version

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of **CERTAIN SOFT PROJECTILE LAUNCHING DEVICES, COMPONENTS THEREOF, AMMUNITION, AND PRODUCTS CONTAINING SAME**	**Inv. No. 337-TA-1325**

INITIAL DETERMINATION ON VIOLATION OF SECTION 337 AND RECOMMENDED DETERMINATION ON REMEDY AND BOND

Administrative Law Judge MaryJoan McNamara

(October 25, 2023)

SPIN MASTER 2007
Prime Time Toys et al. v. Spin Master, Inc.
IPR2023-01339

SELECTED SUMMARY FINDINGS

Pursuant to the Notice of Investigation, 87 Fed. Reg. 52595-96, dated May 14, 2021, this is the Initial Determination ("ID") of the Investigation in the Matter of Certain Soft Projectile Launching Devices, Components Thereof, Ammunition, and Products Containing the Same, United States International Trade Commission Investigation No. 337-TA-1325. *See* 19 C.F.R. § 210.42(a).

In response to a motion for summary determination filed by Complainants Hasbro, Inc. and Spin Master, Inc. ("Complainants"), an Initial Determination found, and the Commission affirmed, *inter alia*, that Prime Time Toys LLC, Prime Time Toys Ltd., and Easebon Services Ltd. (collectively, "Respondents"), i.e., the remaining respondents in this Investigation, infringe asserted claims 8, 19, and 20 of U.S. Patent No. 8,371,282 ("the '282 patent") and asserted claim 5 of U.S. Patent No. 8,640,683 ("the '683 patent"). Respondents also stipulated to infringement of asserted claim 14 of the '683 patent.

Given this context, it is a finding of this ID that with respect to: indirect infringement, the technical prong of the domestic industry requirement, invalidity, and the economic prong of the domestic industry requirement, Respondents have violated subsection (b) of Section 337 of the Tariff Act of 1930, in the importation into the United States, in the sale for importation, and the sale within the United States after importation of certain soft projectile launching devices, components thereof, ammunition, and products containing the same.

Moreover, it is a finding of this ID that the asserted claims of the '282 and '683 patents are not invalid.

It is a finding of this ID that Complainants' domestic industry products practice one or more of the asserted claims of the '282 and '683 patents and thus, satisfy the technical industry

prong of the domestic industry requirement.

Additionally, it is a finding of this ID that Complainants have not satisfied the economic prong of the domestic industry requirement under Section 337(a)(3)(B) (employment of labor or capital) or (C) (investment in exploitation of asserted patents). However, it is a finding of this ID that Complainants have satisfied the economic prong of the domestic industry requirement under Section 337(a)(2) (domestic industry in the process of being established).

Accordingly, this decision recommends: (1) a Limited Exclusion Order with a standard certification provision and service and repair exception; (2) a Cease and Desist Order; and (3) that a bond of 5% be entered during the Presidential Review Period.

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ABBREVIATIONS

The following shorthand references to the parties, related U.S. agencies, and related proceedings are used in this Initial Determination:

Complainants	Hasbro, Inc. and Spin Master, Inc., collectively
Hasbro	Hasbro, Inc.
Spin Master	Spin Master, Inc.
Respondents or PTT Respondents	Prime Time Toys LLC; Prime Time Toys, Ltd.; and Easebon Services Ltd., collectively
Splat-R-Ball Respondents	Splat-R-Ball, LLC; Daisy Manufacturing Co. (d/b/a Daisy Outdoor Products); and S-Beam Precision Products Ltd., collectively
Gel Blaster Respondents	Gel Blaster, Inc.; Shenzhen Yi Jin Electronics Science; Guangdong Yu Lee Technology Corporation; and Yu Lee Company Ltd., collectively
Staff	Commission Investigative Staff
CBP	U.S. Customs and Border Protection
USPTO or PTO	U.S. Patent and Trademark Office
PTAB	Patent Trial and Appeal Board

The following abbreviations for pleadings, exhibits, briefs, transcripts, and Orders are used in this Initial Determination:

Compl.	Complaint
Resp.	Response of Respondents to the Notice of Investigation and Complaint Under Section 337 of the Tariff Act of 1930, as Amended
CX	Complainants' exhibit
CDX	Complainants' demonstrative exhibit
CPX	Complainants' physical exhibit
CPBr.	Complainants' Pre-Hearing Brief

CBr.	Complainants' Initial Post-Hearing Brief
CRBr.	Complainants' Post-Hearing Reply Brief
CPSt.	Complainants' Pre-Hearing Statement
JX	Joint exhibit
RX	Respondents' exhibit
RDX	Respondents' demonstrative exhibit
RPX	Respondents' physical exhibit
RPBr.	Respondents' Pre-Hearing Brief
RBr.	Respondents' Initial Post-Hearing Brief
RRBr.	Respondents' Post-Hearing Reply Brief
RPSt.	Respondents' Pre-Hearing Statement
SPBr.	Staff's Pre-Hearing Brief
SBr.	Staff's Initial Post-Hearing Brief
SRBr.	Staff's Post-Hearing Reply Brief
SPSt.	Staff's Pre-Hearing Statement
Tr.	Evidentiary hearing transcript (Doc. ID Nos. 797119, 797125, 797126, 797164, 797165 (May 24, 2023)); Doc. ID Nos. 797196, 797197 (May 25, 2023))
Dep. Tr.	Deposition transcript
CMBr.	Complainants' *Markman* Brief
RMBr.	Respondents' *Markman* Brief
SMBr.	Staff's *Markman* Brief
Joint CC Chart	Joint Post-Hearing Claim Construction Chart (Doc. ID No. 785045 (November 22, 2022))

***Markman* Order** Order No. 28 (March 27, 2023)

The following shorthand references to certain products and patents at issue are used in this Initial Determination:

'282 patent U.S. Patent No. 8,371,282

'683 patent U.S. Patent No. 8,640,683

Asserted Patents '282 patent and '683 patent, collectively

Accused Products

Accused Blasters with Accused Ammunition	Accused Ammunition
HydroStrike Nebula Pro ("Nebula Pro") HydroStrike Pulsar Pro ("Pulsar Pro") Gel Zone Pro Stormer Spring-Powered Gel Bead Blaster ("Stormer") Gel Zone Pro Hydrax Motorized Gel Bead Blaster ("Hydrax")	HydroStrike Gel-Tek Beads (including Gel-Tek Beads Refill Pack)

Representative Accused Products Nebula Pro and Stormer, and Pulsar Pro and Hydrax, collectively

DI Products

GelFire Blasters	GelFire Rounds (Refills / Hoppers)
F7267 Mythic F7979 Legion F8672 Mythic Beast [redacted]	F7265 Refill Orange F7266 Hopper Refill Orange [redacted]

Representative DI Products

Representative DI Product	Variant
Mythic	
Legion	
F7265 GelFire Refill Orange and F7266 GelFire Hopper Refill Orange	

I. INITIAL DETERMINATION ON VIOLATION OF SECTION 337, AND RECOMMENDED DETERMINATION ON REMEDY AND BOND

A. Overview

The issue of whether the products Complainants Hasbro, Inc. ("Hasbro") and Spin Master, Inc. ("Spin Master," and with Hasbro, "Complainants") accused of directly infringing U.S. Patent No. 8,371,282 ("the '282 patent") and U.S. Patent 8,640,683 ("the '683 patent," and with the '282 patent, the "Asserted Patent") was ruled upon in an Initial Determination that issued prior to the evidentiary hearing ("Hearing") in this Investigation. (*See* Order No. 37 (Apr. 27, 2023).).

The Initial Determination granted Complainants' motion for summary determination ("MSD ID") that the accused products ("Accused Products") practice the asserted claims of the Asserted Patents, which the Commission affirmed with respect to, *inter alia*, the remaining respondents in this Investigation, i.e., Respondents Prime Time Toys LLC; Prime Time Toys, Ltd.; and Easebon Services Ltd. ("Respondents"). Respondents also stipulated that: (i) the Accused Products practice the asserted claims of the Asserted Patents; and (ii) the domestic industry products ("DI Products") practice one or more of the asserted claims of the Asserted Patents. Accordingly, direct infringement and the technical prong of the domestic industry requirement are briefly discussed in this Initial Determination ("ID").

The remaining issues in this Investigation that are addressed in this ID are as follows: (i) indirect infringement; (ii) invalidity; (iii) economic prong of the domestic industry requirement; and (iv) remedy and bond.

B. Summary of Findings

A summary of findings in this decision is provided below.

Table No. 1: Summary of Findings

Products	Patent	Claims	Determination
Accused Products	'282 patent	Claims 8, 19, and 20	Violation
	'683 patent	Claims 8, 19, and 20	Violation
DI Products	'282 patent	Claims 5 and 14	Satisfied
	'683 patent	Claims 5 and 14	Satisfied

II. BACKGROUND

A. Institution and Selected Procedural History

On July 21, 2022, Complainants Hasbro, Inc. ("Hasbro") and Spin Master, Inc. ("Spin Master," and with Hasbro, "Complainants") filed a complaint ("Complaint") under Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337. (Doc. ID Nos. 775940 (public), 775942 (confidential) (July 21, 2022).). Complainants supplemented the Complaint three (3) times. (Doc. ID Nos. 776594, 776595 (July 29, 2022) (First Supplement); Doc. ID No. 776598 (July 29, 2022) (Second Supplement); Doc. ID No. 776978 (Aug. 3, 2022) (Third Supplement).). The Complaint, as supplemented, alleged infringement of certain claims of U.S. Patent No. 8,371,282 ("the '282 patent")[1] and U.S. Patent 8,640,683 ("the '683 patent").[2] (*See, e.g.*, Compl. at ¶ 3.).

On August 25, 2022, the Commission instituted this Investigation pursuant to subsection (b) of Section 337 of the Tariff Act of 1930, as amended, to determine:

> whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of

[1] Herein JX-0001.

[2] Herein JX-0002.

> infringement of one or more of claims 1-15 and 17-21 of the ’282 patent and claims 1-6 and 10-15 of the ’683 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337[.]

87 Fed. Reg. 52595 (Aug. 26, 2022).

The Notice of Investigation (“NOI”) names as complainants: Hasbro, Inc. of Pawtucket, RI and Spin Master, Inc. of Los Angeles, CA (collectively, “Complainants”). *Id.* The NOI names as respondents: (i) Shenzhen Yi Jin Electronics Science of Shenzhen City, Guangdong Province, China; Guangdong Yu Lee Technology of Dongguan City, Guangdong Province, China; Yu Lee Company Ltd of Hong Kong; and Gel Blaster, Inc. of Austin, TX (“Gel Blaster Respondents”); (ii) S-Beam Precision Products Ltd. of Zhongshan City, Guangdong Province, China; Daisy Manufacturing Company of Rogers, AK; and Splat-R-Ball, LLC or Rogers, AK (“Splat-R-Ball Respondents”); and (iii) Prime Time Toys Ltd. of Hong Kong SAR; Prime Time Toys LLC of Pompton Lakes, NJ; and Easebon Services Ltd. of Hong Kong SAR (“PTT Respondents” or “Respondents,” and with Gel Blaster Respondents, Splat-R-Ball Respondents, and Complainants, the “Private Parties”). *Id.* Commission Investigative Staff (“Staff,” and with the Private Parties, the “Parties”) is also a party in this Investigation. *Id.* at 52595-96.

On September 26, 2022, the following groups of respondents responded to the Complaint: (i) Gel Blaster Respondents (Doc. ID No. 781065 (Sept. 26, 2022)); (ii) Splat-R-Ball Respondents (Doc. ID No. 781061 (Sept. 26, 2022)); and (iii) PTT Respondents (Doc. ID No. 781048 (Sept. 26, 2022) (“Response”).).

On November 2, 2022, Respondent Gel Blaster, Inc. filed a motion for entry into the Commission’s interim initial determination pilot program, which was denied. (*See* Motion Docket No. 1325-006 (Nov. 2, 2022); Order No. 13 (Nov. 23, 2022).).

Pursuant to Order No. 12, a *Markman* hearing was held on November 17, 2022

("*Markman* Hearing"). (Order No. 12 (Nov. 10, 2022); *see also* Doc. ID No. 784788 (Nov. 18, 2022).). A *Markman* order construing certain claim terms for the Asserted Patents issued on March 27, 2023. (*See* Corrected Order No. 28 (Apr. 4, 2023) ("*Markman* Order").).

On March 16, 2023, Complainants moved for a summary determination that certain Accused Products infringe: (i) claims 6, 8, 19 and 20 of the '282 patent; and (ii) claims 1, 5 and 11 of the '683 patent ("Complainants' MSD"). (Motion Docket No. 1325-017 (Mar. 16, 2023).). Complainants' MSD was granted ("MSD ID").[3] (*See* Order No. 37 (Apr. 27, 2023).). The Splat-R-Ball, Gel Blaster, and PTT Respondents petitioned for review of the MSD ID ("Respondents' MSD ID Petition"). (Doc. ID No. 796018 (May 9, 2023).).

The Splat-R-Ball, Gel Blaster, and PTT Respondents also moved for a summary determination of non-infringement and invalidity ("Splat-R-Ball, Gel Blaster, and PTT Respondents' MSD") on March 16, 2023. (Motion Docket No. 1325-019 (Mar. 16, 2023).). The Splat-R-Ball, Gel Blaster, and PTT Respondents' MSD was denied. (*See* Order No. 36 (Apr. 18, 2023).).

On April 14, 2023, Complainants filed one (1) motion *in limine* ("MIL"). (Motion Docket No. 1325-026 (Apr. 14, 2023).). On the same day, the Splat-R-Ball, Gel Blaster, and PTT Respondents, as a group, also filed one (1) MIL. (Motion Docket No. 1325-027 (Apr. 14, 2023).). Both MILs, and the rulings on these motions, are summarized in Table No. 2 below.

Table No. 2: Private Parties' MILs

MIL No.	Issue	Ruling
Complainants' MIL	Motion requesting confirmation that, for the	Granted. (Order No. 38 (May 1,

[3] Asserted claim 14 of the '683 patent was not at issue in Complainants' MSD or addressed in the MSD ID. (Order No. 37 at 3 n.3.).

MIL No.	Issue	Ruling
(Motion Docket No. 1325-026)	reasons substantially set forth in Order No. 31, Splat-R-Ball, Gel Blaster, and PTT Respondents should be precluded from contending that any Hasbro product design incorporates Gel Blaster confidential information	2023).). "As Complainants and Staff point out, Order No. 31 found that 'Gel Blaster Respondents did not disclose during fact discovery any contention that Hasbro misappropriated Gel Blaster's trade secrets, copied any of Gel Blaster's designs, or that the Gel Blaster Respondents intended to rely on any comparison between any Hasbro product and any proprietary Gel Blaster technology.'" (*Id.* at 2 (quoting Complainants' MIL at 1-2; Staff Resp. at 1-2).). "Thus, the paragraphs in Dr. Guerry Grune's expert report that discuss this issue were stricken and Respondents were precluded from introducing any testimony during the evidentiary hearing ('Hearing') in this Investigation about the allegedly untimely undisclosed facts and theories therein."[4] (*Id.* (citing Order No. 31 at 1, 4 (Apr. 4, 2023).). "Respondents are (again) precluded from presenting evidence or argument during the Hearing that relate to the improper allegation that any Hasbro product design incorporates or uses any purported Gel Blaster technology or information." (*Id.*).
Splat-R-Ball, Gel Blaster, and PTT Respondents' MIL (Motion Docket No. 1325-027)	Motion seeking to preclude Complainants from presenting any argument or evidence regarding: (i) Hasbro's subjective beliefs as to the strength, validity,	Granted. (Order No. 39 (May 2, 2023).). "Because Complainants used privilege to block Respondents from learning the details of Hasbro's subjective beliefs

[4] The Gel Blaster Respondents retained Dr. Guerry Grune, Ph.D. as an expert to provide opinions and analysis on certain issues related to the Asserted Patents, and "the Gel Blaster Surge blasters, the Nerf Mythic blaster, and certain close similarities between the blasters." (Motion Docket No. 1325-015, Ex. 1 (Grune Rpt.) at ¶ 2.). At the time he signed his expert report on December 19, 2022, Dr. Grune was Founder and CTO for CPS Biofuels and Founder and CEO for 3rd Rock Essentials. (*Id.* at Ex. A.).

MIL No.	Issue	Ruling
	and practice/infringement of the Asserted Patents, or (ii) the reason Hasbro licensed the Asserted Patents from Spin Master	about the patents and the reason Hasbro licensed the [A]sserted [P]atents from Spin Master, they cannot offer those beliefs during the evidentiary hearing . . . ." (*Id.* at 3-4 (citation omitted).). "Complainants are precluded from presenting any evidence or argument regarding Hasbro's alleged belief in the strength, validity, enforceability, or alleged practice/infringement of the Asserted Patents, as well as any evidence or argument concerning why Hasbro elected to license the Asserted Patents. Complainants' arguments and evidence are: (i) limited to and must be consistent with the Complainants' fact deposition testimony in this Investigation; and (ii) limited to the existence of the patent license agreement between Hasbro and Spin Master." (*Id.* at 4.).

The Private Parties also filed pre-hearing[5] and post-hearing[6] motions to strike, which are summarized in Table No. 3 below.

Table No. 3: Private Parties' Motions to Strike

Motion No.	Issue	Ruling
Complainant Hasbro's Motion to Strike (Motion Docket No.	Motion seeking to strike the expert report of Guerry Grune, Ph.D. (filed only on behalf of the Gel Blaster Respondents) in its entirety	Granted in-part, denied in-part.[7] (Order No. 31 (Apr. 4, 2023).).

[5] Motion Docket No. 1325-015 (Mar. 13, 2023).

[6] Motion Docket Nos. 1325-035 (May 26, 2023), 1325-037 (July 3, 2023).

[7] Because the Gel Blaster Respondents are no longer a party in this Investigation, the issues raised in the motion and addressed in Order No. 31 are not relevant to any issue discussed in this ID.

Motion No.	Issue	Ruling
1325-015)	and to preclude the Gel Blaster Respondents from introducing any testimony during the evidentiary hearing in this Investigation about the allegedly untimely undisclosed facts and theories therein, i.e., (i) Dr. Grune's opinions concerning certain trade secret misappropriation theories; and (ii) his allegedly new opinions concerning the construction of the claim term "super absorbent polymer"	
Complainants' Motion to Strike (Motion Docket No. 1325-035)	Motion seeking to strike the Hearing testimony and demonstratives of Respondents' expert Ms. Julia Rowe regarding a comparative analysis of Hasbro's labor investments to the cost of goods sold ("COGS") for the domestic industry products	Denied. (Order No. 48 (Sept. 18, 2023.).
Respondents' Motion to Strike (Motion Docket No. 1325-037)	Motion seeking to strike a validity argument allegedly raised for the first time in Complainants' Post-Hearing Reply Brief	Denied. (Order No. 49 (Sept. 18, 2023.).

Following a series of Orders granting the partial termination of certain asserted claims, pending in this Investigation are claims 8, 19, and 20 of the '282 patent and claims 5 and 14 of the '683. (*See* Order No. 10 (Oct. 25, 2022), *unreviewed*, Comm'n Notice, Doc. ID No. 784624 (Nov. 16, 2022); Order No. 21 (Jan. 18, 2023), *unreviewed*, Comm'n Notice, Doc. ID No. 790359 (Feb. 14, 2023); Order No. 44 (May 17, 2023), *unreviewed*, Comm'n Notice, Doc. ID

No. 797421 (May 30, 2023).).

Additionally, as a result of two (2) Orders granting the termination of the Gel Blaster Respondents and Splat-R-Ball Respondents based on settlement, the remaining respondents are the PTT Respondents, i.e., referred to as "Respondents" in this ID. (*See* Order No. 42 (May 17, 2023), *unreviewed*, Comm'n Notice, Doc. ID No. 797421 (May 30, 2023); Order No. 45 (May 19, 2023), *unreviewed*, Comm'n Notice, Doc. ID No. 797421 (May 30, 2023).).

On May 17, 2023, during the pre-hearing conference, in view of the settlement of the Splat-R-Ball Respondents on the eve of the Hearing,[8] the PTT Respondents requested to delay the start of the Hearing.[9] (Doc. ID No. 797119 at 11:9-12:1 (May 24, 2023).). The start of Hearing was delayed by two (2) days and commenced on May 19, 2023. (*Id.* at 29:15-18.). Accordingly, the Hearing was held on May 19, 22, and 23, 2023. (*See* Doc. ID Nos. 797125, 797126, 797164, 797165 (May 24, 2023); Doc. ID Nos. 797196, 797197 (May 25, 2023).).

The Commission reviewed the MSD ID granting Complainants' MSD (Order No. 37) and vacated as moot the findings with respect to the Gel Blaster Respondents, the Splat-R-Ball Respondents, and the terminated claims ("Comm'n Notice to Review Order No. 37"). (Doc. ID

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[8] Complainants moved to terminate the Splat-R-Ball Respondents on May 17, 2023. (Motion Docket No. 1325-032 (May 17, 2023); *see also* Doc. ID No. 797119 at 9:13-16 ("JUDGE MCNAMARA: I understand Splat R Ball Respondents settled within the last 24 hours. MR. CORDELL: That's correct, Your Honor.").).

[9] In their Initial Post-Hearing Brief, Respondents described the morning of the Hearing as follows:

> The hearing was slated to begin on May 17, 2023. The morning of the hearing, the Splat-R-Ball Respondents and Complainants announced that they settled their dispute. Hearing Tr. at 9:12-16. This left just the PTT Respondents. As explained to the Court, counsel for the Splat-R-Ball Respondents had taken the lead in preparing for and trying this case. *Id.* at 14:10-17. Counsel for the PTT Respondents had taken on an advisory and supporting role. *Id.* Under these circumstances, it was necessary to seek a continuance so that the PTT Respondents' counsel could proceed to try the case on their own. *Id.* at 14:10-15:13.

(RBr. at 23.).

No. 797418 (May 30, 2023).). The Commission affirmed the remainder of the Initial Determination. (*Id.*).

B. The Parties

1. Complainants

a) Hasbro, Inc.

Hasbro, Inc. ("Hasbro") is a Rhode Island corporation with a principal place of business at 1027 Newport Avenue, Pawtucket, Rhode Island 02861. Hasbro holds an exclusive license to the Asserted Patents. (*See* CX-0699C (Spin Master/Hasbro Patent License); CX-1569C (Carla Mulhern Revised Rpt.)[10] at ¶¶ 17-20; CX-1573C (Mulhern Ex. 4); CX-1574C (Mulhern Ex. 5).).

b) Spin Master, Inc.

Spin Master, Inc. ("Spin Master") is a Delaware corporation with a principal place of business at 5880 W. Jefferson Blvd., Los Angeles, CA 90016. Spin Master is the owner of the Asserted Patents. (*See* CX-0699C (Spin Master/Hasbro Patent License Agreement); CX-1569C (Mulhern Revised Rpt.) at ¶¶ 15-16; CX-1572C (Mulhern Ex. 3).).

2. Respondents

a) Prime Time Toys LLC

Prime Time Toys LLC is a New Jersey corporation with its principal place of business in Pompton Lakes, New Jersey. (*See* Doc. ID No. 781048 (Resp.) at ¶ 23.). Respondents' accused products are manufactured outside of the United States. (*Id.* at ¶ 46.). Prime Time Toys LLC

[10] When she signed her revised expert report on December 23, 2022 and testified during the Hearing on May 23, 2023, Ms. Carla Mulhern was a Managing Principal of Analysis Group, Inc. (CPSt. at Ex. C.). Complainants identified Ms. Mulhern as an expert to testify about "the existence and/or development of a domestic industry in the United States; the scope of such domestic industry; and the appropriate remedy or form of relief in this Investigation and bonding." (CPSt. at 3.). Ms. Mulhrn was accepted as an expert on the topics for which she was called to testify.

imports and sells after importation certain accused products. (*Id.* at ¶ 23.).

b) Prime Time Toys Ltd.

Prime Time Toys Ltd. is a Hong Kong corporation with its principal place of business in Hong Kong SAR. (*Id.* at ¶ 24.). It sells for importation and imports certain accused products. (*Id.*).

c) Easebon Services Ltd.

Easebon Services Ltd. is a Hong Kong corporation with the same principal place of business in Hong Kong SAR as Prime Time Toys Ltd. (*Id.* at ¶ 25.). Easebon Services Ltd. is involved in quality control and licensing of trademarks that appear on the Respondents' accused products. (*Id.*).

C. Products at Issue

1. The Accused Products

Complainants have accused Respondents of importing, selling for importation, and/or selling after importation into the U.S.: (i) blaster kits that include one or more blasters and ammunition, where the ammunition comes in a form that requires an end user to soak the ammunition in water before use ("Accused Blasters"); and (ii) the ammunition provided with the Accused Blasters, as well as refill ammunition sold separately from the blaster kits (the "Accused Ammunition") (collectively, the "Accused Products"). (CPBr. at 7-8; CBr. at 5.). The Accused Products are listed below in Table No. 4.

Table No. 4: Accused Products

Accused Blasters with Accused Ammunition	Accused Ammunition
HydroStrike Nebula Pro ("Nebula Pro") HydroStrike Pulsar Pro ("Pulsar Pro") Gel Zone Pro Stormer Spring-Powered Gel Bead Blaster ("Stormer") Gel Zone Pro Hydrax Motorized Gel Bead Blaster ("Hydrax")	HydroStrike Gel-Tek Beads (including Gel-Tek Beads Refill Pack)

(CPBr. at 7; CBr. at 5; RPBr. at 11; Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 5.).

Respondents stipulated that the Accused Products shown below in Table No. 5 have the same mechanical design and firing mechanism and are representative of each other for purpose of infringement analysis ("Representative Accused Products").[11] (Doc. ID No. 793625 (Respondents' Corrected Resp. to Complainants' SMF) at ¶¶ 2-3; Doc. ID No. 786358 (Suppl. Joint Stip.) at ¶ 3.). Thus, all discussions relating to one product applies equally to the other. The Representative Accused Products are listed below in Table No. 5.

Table No. 5: Representative Accused Products

Representative Products	Citation
Nebula Pro and Stormer Pulsar Pro and Hydrax	EDIS No. 793625 (RRSMF) ¶¶ 2, 3; EDIS No. 786358 (PTT Stipulation) ¶ 3

(CPBr. at 7; CBr. at 5; Doc. ID No. 786358 (Suppl. Joint Stip.) at ¶ 3.).

2. The Domestic Industry Products

Like the Accused Products, Complainants identified two (2) categories of Hasbro products that allegedly practice one or more of the Asserted Patents: (i) GelFire blaster kits that

[11] Respondents stipulated that the Nebula Pro and Stormer are representative of each other; and the Pulsar Pro and Hydrax are representative of each other. (Doc. ID No. 786358 (Suppl. Joint Stip.) at ¶ 3.).

include one or more blasters and ammunition, where the ammunition comes in a form that requires an end user to soak the ammunition in water before use ("GelFire Blasters"); and (ii) refill ammunition sold separately from the blaster kits in the form of refills and/or extra hoppers ("GelFire Rounds (Refills / Hoppers)") (collectively, the "DI Products").[12] (CBr. at 6-7.). The DI Products are listed below in Table No. 6.

Table No. 6: DI Products

GelFire Blasters	GelFire Rounds (Refills / Hoppers)
F7267 Mythic F7979 Legion F8672 Mythic Beast	F7265 Refill Orange F7266 Hopper Refill Orange

(CPBr. at 8; CBr. at 7.).

[12] "GelFire Rounds" is used interchangeably herein to refer to the ammunition that comes in the box with the GelFire Blasters, as well as the ammunition that comes with the separately-sold refills and/or hoppers.

Specifically, Complainants' DI Products include products Hasbro began commercially selling at the time of the Complaint ("Commercialized DI Products").[13] (CPBr, at 8; CBr. at 7.). The Commercialized DI Products are listed below in Table No. 7.

Table No. 7: Commercialized DI Products

Commercialized DI Products	
Blasters	**Ammunition/Accessories**
• F7267 GelFire Mythic ("Mythic") • F7979 GelFire Legion ("Legion")	• F7265 GelFire Refill Orange • F7266 GelFire Hopper Refill Orange

(SBr. at 11; CPBr, at 8; CBr. at 7.).

Complainants also alleged that Hasbro is in the process of developing the following products ("In-Development DI Products"), which include: (i) variants of the Commercialized DI Products, and (ii) . (SBr. at 12; CPBr. at 8-10.). The In-Development DI Products are listed below in Table No. 8.

[13] The first production runs of the Mythic and Legion occurred on August 2, 2022, and September 21, 2022, respectively, after the filing of the Complaint. (CPBr. at 111; CX-1569C (Mulhern Revised Rpt.) at ¶ 120; SBr. at 12.).

Table No. 8: In-Development DI Products

In-Development DI Products	
("Mythic Variants") • F8672 GelFire Mythic Beast	

(SBr. at 12; CPBr. at 8-10; CBr. at 7; Doc. ID No. 796608 (Stip. Regarding DI Products) (May 16, 2023).).

Complainants asserted that certain DI Products are not materially different. According to Complainants, the DI Products have only minor changes among them that do not affect the analysis ("Representative DI Products"). (CPBr. at 9; CBr. at 8.). Therefore, the conclusion is not different. The Representative DI Products are listed below in Table No. 9.

Table No. 9: Representative DI Products

Representative DI Product	Variant
Mythic	
Legion	
F7265 GelFire Refill Orange and F7266 GelFire Hopper Refill Orange	

(CPBr. at 9; CBr. at 8.).

III. JURISDICTION, IMPORTATION, AND STANDING

A. The Commission Has Jurisdiction

To have the authority to decide a case, a court or agency must have both subject matter jurisdiction and jurisdiction over either the parties or the property involved. *See Certain Steel Rod Treating Apparatus and Components Thereof*, Inv. No. 337-TA-97, Comm'n Op., 215 U.S.P.Q. 229, 231 (U.S.I.T.C. 1981). For the reasons discussed below, the facts support a finding that the Commission has jurisdiction over this Investigation.

1. Personal Jurisdiction

The Commission has *in personam* jurisdiction over respondents that have been served with the Complaint and NOI, have appeared, responded to the complaint and NOI, and participated in the investigation. *See, e.g.*, *Certain Windshield Wiper Devices and Components Thereof*, Inv. No. 337-TA-881, Initial Determination at 5 (May 8, 2014) (unreviewed in-relevant-part) ("*Wiper Devices*"); *Certain Liquid Crystal Display Modules, Prods. Containing Same, & Methods for Using the Same*, Inv. No. 337-TA-634, Initial Determination at 3 (June 12, 2009) (unreviewed).

Here, Respondents have appeared and fully participated in this Investigation. Moreover, Respondents did not dispute that the Commission has personal jurisdiction over each Respondent. (*See* RPBr. at 11.). Thus, the Commission has personal jurisdiction over Respondents.

2. *In Rem* Jurisdiction and Importation

The Commission has *in rem* jurisdiction over infringing articles that are imported into the United States, sold for importation, or sold within the United States after importation by the owner, importer, or consignee. 19 C.F.R. § 1337(a)(1)(B); *Wiper Devices*, Inv. No. 337-TA-881, Initial Determination at 5 (*in rem* jurisdiction exists when importation requirement is satisfied); *Certain Optical Disc Drives, Components Thereof, and Prods. Containing the Same*, Inv. No. 337-TA-897, Order No. 101 at 3 (Sept. 22, 2014) (a single instance of importation is sufficient to satisfy the importation requirement of Section 337) (citations omitted); *Sealed Air Corp. v. Int'l Trade Comm'n*, 645 F.2d 976, 985-86 (C.C.P.A. 1981) (noting the Commission has jurisdiction over imported goods).

Here, Respondents stipulated that certain Accused Products have been imported into the United States. (CX-0085C (PTT Respondents' Suppl. Stip. Regarding Importation) at ¶ 2.). Respondents also did not contest that the importation requirement has been satisfied with respect to the Accused Products. (*Id.* at ¶ 5.).

Furthermore, Respondents did not dispute that the Commission has *in rem* jurisdiction over the Accused Products. (*See* RPBr. at 11-12.). Accordingly, the Commission has *in rem* jurisdiction over the Accused Products.

B. Complainants Have Standing in the Commission

In addition to subject matter jurisdiction and *in rem* jurisdiction, a complainant must also

have standing to bring suit. *See SiRF Technology, Inc. v. Int'l Trade Comm'n*, 601 F.3d 1319, 1326 (Fed. Cir. 2016) (standing to bring an infringement suit is the same under Commission Rules as it would be in a Federal District Court case); *Certain Optical Disc Drives, Components Thereof and Prods. Containing Same*, Inv. No. 337-TA-897, Op. Remanding the Investigation at 4 (Jan. 7, 2015). Commission Rule 210.12 requires that intellectual property-based complaints filed by a private complainant "include a showing that at least one complainant is the owner or exclusive licensee of the subject intellectual property[.]" 19 C.F.R. § 210.12(a)(7).

Ownership of a patent initially vests in the inventor(s) as a matter of law. *Regents of the University of New Mexico v. Knight*, 321 F.3d 1111, 1118-19 (Fed. Cir. 2003). Inventors, however, can assign all or part of their interests in a patent to another person or entity by means of a written assignment. *Id*. "Ownership depends upon 'the substance of what was granted' through assignment." *Israel BioEng'g Project v. Amgen Inc.*, 475 F.3d 1256, 1265 (Fed. Cir. 2007). Moreover, "a court must carefully consider the intention of the parties and the language of the grant" in order to construe the substance of an assignment. *Id*. Although interpretation of contracts is generally governed by state law, a patent assignment is interpreted pursuant to federal law when it is intimately related to the issue of standing. *Abraxis Bioscience, Inc. v. Navinta LLC*, 625 F.3d 1359, 1364 (Fed. Cir. 2010).

As current assignee, i.e., Spin Master, and exclusive licensee, i.e., Hasbro, of the Asserted Patents, Complainants have standing to bring this suit. (*See* CX-1444 (inventor assignment to Hobbeezone, Inc.); CX-1445 (same); CX-1446 (same); CX-1447(same); CX-1448 (Hobbeezone, Inc. merger with Maya Group, Inc.); CX-1451 (Maya Group, Inc. assignment of patents to Spin Master, Inc.); CX-1452 (same); CX-0699C (Spin Master/Hasbro Patent License Agreement) at ¶¶ 2(a), 6(b); *see also* CX-1449; CX-1450; CX-1453; CX-1454; CX-1455; CX-

1456; CX-1457; CX-1458.). Respondents did not contest that Complainants have standing to bring the present suit. (RPBr. at 4 ("Spin Master owns the Asserted Patents . . . .").).

Accordingly, Complainants have standing to bring suit for infringement under Section 337.

IV. LEVEL OF ORDINARY SKILL IN THE ART

The Parties proposed the following definitions:

- Complainants proposed that a person of ordinary skill in the art would have "a bachelor's degree in mechanical engineering, industrial design, or equivalent, with at least one year of relevant experience designing projectile launching systems but would also be a member of a team, which would include an person with a bachelor's in materials science, chemistry, or equivalent (e.g., chemical engineering), or has at least one year experience working with materials for use in consumer products." (CMBr. at 4.). Complainants also stated that "equivalent work experience may substitute for educational experience, and vice versa." (*Id.*).

- Respondents proposed that a person of ordinary skill in the art would be "(i) an individual with a Bachelor's degree in Industrial Design or Mechanical Engineering or (ii) a toy designer with at least five years' experience designing toys (including launchers), with both of (i) and (ii) having access to a chemist knowledgeable regarding super absorbent polymers." (RMBr. at 14.).

- Staff proposed that "[a] person of ordinary skill in the art would have (i) a Bachelor's degree in Mechanical Engineering, Industrial Design, or the equivalent, with at least one year of experience designing toys (including projectile launching systems), or (ii) at least five years of experience designing toys (including projectile launching systems), with both of (i) and (ii) having experience collaborating with individuals with material science or chemistry backgrounds. (SMBr. at 4.).

As explained in the *Markman* Order, the Parties' proposed definitions were all accepted as appropriate for the level of ordinary skill in the art for both the '282 and '683 patents. (*Markman* Order at 8.).

V. U.S. PATENT NO. 8,371,282

A. Overview of the '282 Patent

The '282 patent, entitled "Soft-Projectile Launching Device," was filed on May 10, 2010,

as U.S. Patent Application Serial No. 12/777,134 ("the '134 application"). (JX-0001 ('282 patent) at (21), (22), (54).). The '282 patent issued on February 12, 2013, and names Keith G. Meggs, Ronald Brawer, Michael G. Hoeting, and Neil Hamilton as the inventors. (*Id.* at (45), (75).). Spin Master, Inc. is the current valid assignee of the '282 patent. (*See, e.g.*, Compl. at ¶ 29; *see also id.* at Ex. 3 (assignments).). Hasbro, Inc. is the exclusive licensee of the '282 patent. (*Id.* at ¶ 29; *see also id.* at Ex. 5 (license agreement).).

The '282 patent is generally directed to ammunition for a projectile launching device that is made from hydrated super absorbent polymers ("SAP"). (JX-0001 at cl. 1; *see also* Compl. at ¶ 31.). SAPs are polymers that can absorb an extremely large amount of water relative to their own mass. (JX-0001 at 3:41-44; *see also* Compl. at ¶ 31.). The '282 patent describes that properly designed SAPs are more suitable ammunition in projectile launching devices (e.g., to improve conventional NERF® "blasters" as discussed in the patent) and have advantages compared to projectiles for gaming projectile launching devices that were previously known, such as paint balls, plastics, and foams. (JX-0001 at 1:13-60, 1:64-66; *see also* Compl. at ¶ 31.).

The '282 patent describes the safety benefits of SAP ammunition as compared to paint balls and plastics (e.g., as found in "airsoft" guns). (JX-0001 at 3:3-6; *see also* Compl. at ¶ 32.). For example, the '282 patent describes that certain SAP projectiles have beneficial characteristics for use in a projectile launcher used for gaming, in part because SAPs break down at different pressures based on their composition. (JX-0001 at 3:62-65; *see also* Compl. at ¶ 32.). In one claimed improvement, hydrated SAP projectiles have sufficient cross-linking density such that they are projected from a projectile launching device without breaking apart. (JX-0001 at 3:67-4:11; *see also* Compl. at ¶ 32.). At the same time, because hydrated SAP projectiles rupture when subjected to excessive pressure, such as when impacting a target after

being launched from a projectile launcher, the force at impact is spread over a much wider surface area, thus reducing the likelihood of injury when the target is a person. (*See, e.g.*, JX-0001 at 3:45-4:17.).

1. Asserted Claims

As noted above, at issue in this Investigation are dependent claims 8, 19, and 20 of the ’282 patent, which are reproduced below. Because claims 8, 19, and 20 ultimately depend from independent claim 1, claim 1 is also reproduced below.

> **1.** Ammunition configured for use with a projectile launcher comprising:
>
> a plurality of soft-projectiles having the same shape, each soft projectile being formed from hydrated super absorbent polymer.
>
> **8.** A projectile launcher including the ammunition of claim 1 disposed within a feed chamber of the projectile launcher, and wherein the projectile launcher is adapted to load a soft projectile from the feed chamber to a firing position.
>
> **19.** The projectile launcher of claim 8, further comprising:
>
> an air compression chamber;
>
> a piston disposed within and axially aligned with the air compression chamber, and
>
> a spring operatively arranged to bias the piston toward a rest position from a cocked position within the air compression chamber.
>
> **20.** The projectile launcher of claim 19, further comprising a smaller diameter tube in communication with the air compression chamber, and wherein a biasing force of the spring is sufficient to cause the piston to move from the cocked position to the rest position to force air from the air compression chamber into the smaller diameter tube and cause a soft-projectile located at the firing position to accelerate and be launched from the projectile launcher.

(JX-0001 at cls. 1, 8, 19-20.).

2. Claim Construction[14]

Table No. 10: Constructions of Disputed Claim Terms[15]

Claim Term(s)	Adopted Construction
"super absorbent polymer" (claim 1)	Plain and ordinary meaning, i.e., "polymer that can absorb an extremely large amount of liquid relative to its own mass" (*Markman* Order at 8-9.).
"ammunition configured for use with a projectile launcher" (claim 1, preamble)	Limiting (*Markman* Order at 14.).

B. Infringement

1. Direct Infringement

a) The Commission Has Found that the Accused Products Directly Infringe the Asserted Claims of the '282 Patent

On summary determination, it was found that the Accused Blasters (i.e., blaster kits with blasters and ammunition) directly infringe claims 8, 19, and 20 of the '282 patent. (*See* MSD ID.). The Commission affirmed the summary determination finding. (Comm'n Notice to Review Order No. 37 at 3 (May 30, 2023).). In addition, Respondents stipulated that the Accused Products "meet all limitations of Claims 1, 8, 19, and 20 of the '282 Patent . . . as

[14] The Parties did not agree on any claim terms for the '282 patent.

[15] In Respondents' MSD ID Petition, *see* Section II.A, *supra*, in addition to petitioning for review of the MSD ID with respect to infringement of claims 6, 8, 19, and 20 (which all dependent from claim 1), petitioners also petitioned for review of the adopted construction of "super absorbent polymer." (Respondents' MSD ID Petition at 1, 26-27.). However, the petitioners did not dispute that the preamble of claim 1 is limiting. (*Id.*). Other than vacating as moot the findings with respect to the Gel Blaster Respondents, Splat-R-Ball Respondents, and withdrawn claims, the Commission affirmed the remainder of the MSD ID. (Comm'n Notice to Review Order No. 37 at 3 (May 30, 2023).). Thus, the Commission affirmed the adopted construction of "super absorbent polymer" and the finding with respect to the preamble of claim 1. (*Id.*).

construed by the ALJ." (Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 5.).[16] In sum, the MSD ID found, the Commission upheld, and Respondents stipulated that the Accused Products directly infringe asserted claims 8, 19, and 20 of the '282 patent.

2. Indirect Infringement

a) Legal Standards

i. Induced Infringement

"Whoever actively induces infringement of a patent shall be liable as an infringer." 35 U.S.C. § 271(b). A patentee asserting a claim of inducement must show (i) that there has been direct infringement and (ii) that the alleged infringer "knowingly induced infringement and possessed specific intent to encourage another's infringement." *Minnesota Mining & Mfg. Co. v. Chemque, Inc.*, 303 F.3d 1294, 1304-05 (Fed. Cir. 2002). With respect to the direct infringement requirement, the patentee "must either point to specific instances of direct infringement or show that the accused device necessarily infringes the patent in suit." *ACCO Brands, Inc. v. ABA Locks Mfrs. Co., Ltd.*, 501 F.3d 1307, 1313 (Fed. Cir. 2007) (citation omitted). This requirement may be shown by circumstantial evidence. *Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1326 (Fed. Cir. 2009). "[A] finding of infringement can rest on as little as one instance of the claimed method being performed during the pertinent time period." *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1317 (Fed. Cir. 2009); *Toshiba Corp. v. Imation Corp.*, 681 F.3d 1358, 1364 (Fed. Cir. 2012) (citing *Lucent Techs.*, 580 F.3d at 1317).).

The specific intent requirement for inducement necessitates a showing that the alleged

[16] With respect to the separately sold Accused Ammunition, Respondents stipulated that the Accused Ammunition meets the relevant claim requirements when used with an Accused Blaster. As discussed in the text, Complainants have alleged that Respondents induce indirect infringement by encouraging and providing instructions on the use of the Accused Ammunition.

infringer was aware of the patent, induced direct infringement, and that he knew that his actions would induce actual direct infringement. *Commil USA, LLC v. Cisco Sys., Inc.*, 720 F.3d 1361, 1367 (Fed. Cir. 2013), *aff'd and vacated in-part on other grounds*, 135 S. Ct. 1920, 1926-28 (2015); *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068-70 (2011). Specific intent can be shown by, for example: (1) changes in importation practices effectuated to shift infringement liability; (2) the infringer's copying of patented technology; and (3) the infringer's willful blindness of the underlying direct infringement. *Certain Network Devices, Related Software and Components Thereof (I)*, Inv. No. 337-TA-944, Initial Determination at 82; *see also Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1924-25 (2015) ("It was not only knowledge of the existence of [the asserted] patent that led the Court to affirm the liability finding but also it was the fact that [the accused infringer] copied 'all but the cosmetic features of the [patented product],' demonstrating [the accused infringer] kn[ew] it would be causing customers to infringe [the asserted] patent.") (quoting *Global-Tech*, 131 S. Ct. at 2071).

Willful blindness, which also constitutes "knowledge," has two basic requirements: "(1) the defendant must subjectively believe that there is a high probability that a fact exists"; and "(2) the defendant must take deliberate actions to avoid learning of that fact." *Global-Tech*, 131 S. Ct. at 2070.

The intent to induce infringement may be proven with circumstantial or direct evidence and may be inferred from all the circumstances. *Commil*, 720 F.3d at 1366; *Global-Tech*, 131 S. Ct. 2071-72.

ii. Contributory Infringement

35 U.S.C. § 271(c) sets forth the rules for contributory infringement:

Whoever offers to sell or sells within the United States or imports into the United

> States a component of a patented machine, manufacture, combination, or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.

35 U.S.C. § 271(c).

Specifically with respect to Section 337 investigations, the Federal Circuit has held that "to prevail on contributory infringement in a Section 337 case, the complainant must show inter alia: (1) there is an act of direct infringement in violation of Section 337; (2) the accused device has no substantial non-infringing uses; and (3) the accused infringer imported, sold for importation, or sold after importation within the United States, the accused components that contributed to another's direct infringement." *Spansion, Inc. v. Int'l Trade Comm'n*, 629 F.3d 1331, 1353 (Fed. Cir. 2010).

"[N]on-infringing uses are substantial when they are not unusual, far-fetched, illusory, impractical, occasional, aberrant, or experimental." *Vita-Mix*, 581 F.3d at 1327. To determine whether a use is substantial, an Administrative Law Judge may evaluate "the use's frequency, . . . the use's practicality, the invention's intended purpose, and the intended market." *i4i Ltd. Partnership v. Microsoft Corp.*, 598 F.3d 831, 851 (Fed. Cir. 2010). Section 271(c) also requires knowledge of the existence of the patent that is infringed. *Global-Tech*, 131 S. Ct. at 2068.

To satisfy the accused's contributory infringement's knowledge requirement, it is necessary to establish that "the accused contributory infringer knows that its component is included in a combination that is patented and infringing." This requires knowledge of the patent. *Id.* In addition, the Federal Circuit has held that it is not sufficient to know of the patent and the relevant acts, but must also know that "these acts constituted infringement." *Fujitsu Ltd.*

v. LG Elecs., 620 F.3d 1321, 1320 (Fed. Cir. 2010). For purposes of contributory infringement, such knowledge is inferred where the article at issue has no substantial non-infringing uses. *See Certain Semiconductor Chips with Minimized Chip Package Size and Prods. Containing Same*, Inv. No. 337-TA-605, 2009 WL 8144934, at *28, Comm'n Determination (June 3, 2009).

Where infringement allegations address a "separate and distinct" feature of a product, the contributory infringement analysis (for example, with respect to the existence of non-infringing uses) may address the particular feature in question rather than the product as a whole. *See i4i Partnership v. Microsoft Corp.*, 598 F.3d 831, 849 (Fed. Cir. 2010); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1320-21 (Fed. Cir. 2009); *Ricoh Co. Ltd. v. Quanta Comput. Inc.*, 550 F.3d 1325, 1338 (Fed. Cir. 2008).

b) Indirect Infringement Overview

The remaining infringement issues with respect to the '282 patent relate to indirect infringement, which Respondents did not dispute. (CPBr. at 29; CBr. at 11.). Because Respondents did not challenge that indirect infringement is met in their Pre-Hearing Brief, any argument on this issue is deemed abandoned or withdrawn under Ground Rule 7.2. (*See* RPBr. at 15-19.).

As discussed above in Section V.B.1, the Commission has found that the Accused Blasters meet every limitation of claims 8, 19, and 20 of the '282 patent when used as instructed by the user manuals, and such use indisputably occurs in the U.S, to which Respondents have stipulated. (Doc. ID No. 786358 (Suppl. Joint Stip. Regarding Domestic Use) at ¶¶ 6-8 (Dec. 14, 2022).).

Each of the Accused Blasters (Nebula Pro, Pulsar Pro, Stormer, and Hydrax) is sold with a user manual that contains step-by-step instructions for hydrating the Gel-Tek beads and

operating the blasters after the ammunition has been hydrated. (*See* CX-0323 (Nebula Pro); CX-0324 (Pulsar Pro); CX-0341C (Hydrax, Stormer); *see also, e.g.*, CX-1638C (Veronica Wong Dep. Tr.)[17] at 76:2-77:13; CX-0087 (Nebula Pro); CX-0088 (Pulsar Pro); CX-0090 (Stormer); CX-0091 (Hydrax).).

The referenced manuals demonstrate the use of the infringing Accused Products within the U.S. because the products have no use other than to launch hydrated ammunition, which is the infringing use and the one that Respondents instruct in their cited manuals. (Doc. ID No. 786358 (Suppl. Joint Stip. Regarding Domestic Use) at ¶¶ 6-8; *see also* CX-1638C (Wong Dep. Tr.) at 52:1-53:22, 55:7-56:3, 59:11-17, 64:9-12, 64:17-66:4, 67:12-18, 67:19-68:10, 76:9-7:13.). *GlaxoSmithKline LLC v. Teva Pharms. USA, Inc.*, 7 F.4th 1320, 1334 (Fed. Cir. 2021) ("[W]hen a product is sold with an infringing label or an infringing instruction manual, such a label is evidence of intent to induce infringement.").

Furthermore, Respondents directly infringe the '282 patent through their own demonstrations, marketing, and promotions. (*See, e.g.*, CX-0092; CX-1638C (Wong Dep. Tr.) at 78:8-79:16, 80:5-16, 100:6-12; CX-1639C (Francis Chia Dep. Tr.)[18] at 56:5-20.).

Moreover, as discussed in the subsections immediately below, the evidence undisputedly shows, and Respondents did not dispute, that there is no substantial non-infringing use of the

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[17] At the time of her deposition on December 14, 2022, Ms. Veronica Wong was President of Prime Time Toys Ltd. (CX-1638C (Wong Dep. Tr.) at 32:7-10; RPSt. at 3.). Ms. Wong was also Manager of Easebon Services, Ltd. (CX-1638C (Wong Dep. Tr.) at 32:20-33:6.). Respondents identified Ms. Wong as a fact witness to testify about, *inter alia*, "importation, and financial aspects of the PTT Respondents' accused products and prior art products." (RPSt. at 3.).

[18] At the time of his deposition on December 15, 2022, Mr. Francis Chia was the Chief Executive Officer of Prime Time Toys Ltd., owner of Prime Time Toys LLC, and owner of Easebon Services, Ltd. (CX-1639C (Chia Dep. Tr.) at 25:12-26:4; RPSt. at 3.). Respondents identified Mr. Chia as a fact witness to testify about, *inter alia*, "the design and operation of the PTT Respondents' accused products and prior art products." (RPSt. at 3.).

Accused Products, and the Accused Products are material parts of the invention covered by the claims at issue. Respondents' experts did not offer opinions to the contrary.

c) Respondents Induced and Continues to Induce Users to Infringe the '282 Patent

With respect to inducement, Respondents stipulated that: (i) Respondents knew of the '282 patent prior to this Investigation; (ii) before and after such knowledge, Respondents provided and provides instructions and intended and intends customers to use the Accused Products in accordance with the instructions; (iii) third parties use, and have used, the Accused Products in accordance with the instructions; and (iv) Respondents are aware, and has been aware, that the third parties use the Accused Products in accordance with the provided/published instructions. (Doc. ID No. 785372 (Joint Stip. Regarding Domestic Use) at ¶¶ 5-8; Doc. ID No. 786358 (Suppl. Joint Stip. Regarding Domestic Use) at ¶¶ 6-8; *see also* CX-1638C (Wong Dep. Tr.) at 46:13-50:7, 65:12-69:2, 73:16-74:1; CX-1639C (Chia Dep. Tr.) at 35:3-10, 44:8-45:10, 46:7-47:18.). *Certain Beverage Brewing Capsules*, Inv. No. 337-TA-929, Comm'n Op., 2016 WL 9751230, at *10 (Apr. 6, 2016) (knowledge requirement for induced and contributory infringement satisfied based on service of complaint).

Respondents also have stipulated that the Accused Products infringe the asserted claims of the '282 patent. (Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 5.). Thus, in addition to the pre-Investigation notice, Respondents knew or should have known that these induced acts constituted patent infringement.

Respondents' user manuals instruct the users to "[a]llow at least 4 hours for the Beads to hydrate into Rounds, with a correct size of about 7.5mm." (CX-0323.0001; CX-0324.0001; CX-0341C.0001, .0003 (user manuals).). Respondents' user manuals also advise the users to "follow

the manufacturer's recommend use in the instruction sheet at all times," and "not use projectiles other than those supplied or approved to be used with this product." (CX-0323.0002; CX-0324.0004; CX-0341C.0001, .0004 (user manuals).). Accordingly, upon hydration, Respondents' Gel-Tek beads will become soft rounds with a size of about 7.5mm in diameter, which indisputably satisfy the limitations concerning the ammunition in the asserted claims. (CX-1639C (Chia Dep. Tr.) at 36:4-37:10.).

Additionally, the Respondents' user manuals provide a step-by-step instruction guidance on how to use the ammunition with the blasters in order to use the Accused Products. (CX-0323; CX-0324; CX-0341C (user manuals describing "loading . . . rounds," etc.).). *GlaxoSmithKline*, 7 F.4th at 1334 ("infringing instruction manual . . . is evidence of intent to induce infringement").

Therefore, the evidence confirms, and there is no dispute, that Respondents induced, and continues to induce direct infringement of claims 8, 19 and 20 of the '282 patent. *See Bio-Rad Labs., Inc. v. Int'l Trade Comm'n*, 998 F.3d 1320, 1335 (Fed. Cir. 2021) ("Induced infringement under 35 U.S.C. § 271(b) requires proof of underlying direct infringement, as well as proof that (1) 'the defendant knew of the patent,' (2) the defendant knew or should have known that 'the induced acts constitute patent infringement,' and (3) the defendant 'possessed specific intent to encourage another's infringement.'") (citation omitted).

d) Respondents Contributed to and Continue to Contribute to Users' Direct Infringement of the '282 Patent

As noted above in Section V.B.2(c) with regard to inducement, Respondents had knowledge of the '282 patent and knowledge of their patent infringement prior to the filing of the Complaint (Doc. ID No. 786358 (Suppl. Joint Stip. Regarding Domestic Use) at ¶ 5), and also by the service of the Complaint. *See, e.g.*, *Certain Beverage Brewing Capsules*, Inv. No. 337-TA-

929, Comm'n Op., 2016 WL 9751230, at *10 (Apr. 6, 2016) (knowledge requirement for induced and contributory infringement satisfied based on service of complaint). Respondents did not contest that the Accused Products are material parts of the invention claimed in the '282 patent. (Doc. ID No. 786358 (Suppl. Joint Stip. Regarding Domestic Use) at ¶ 10.).

Moreover, the Accused Products do not have any substantial non-infringing use. The evidence demonstrates that the Accused Blasters are designed specifically to launch the Accused Ammunition. (*See, e.g.*, CX-0323; CX-0324; CX-0341C.). The Respondents' published/provided instruction manuals that they provide with the Accused Products explicitly advise against the use of the Accused Blasters with any ammunition other than the properly hydrated Accused Ammunition (i.e., Gel-Tek rounds). (*See, e.g.*, CX-0323.0003 ("DO NOT USE PROJECTILES OTHER THAN THOSE SUPPLIED OR APPROVED TO BE USED WITH THIS PRODUCT."); CX-0324.0004; CX-0341C.0001, .0004.).

Respondents' user manuals also emphasize the importance of using the Accused Ammunition with the Accused Blasters by stating that "tampering or modification will void the product's warranty" and "may cause the blaster to malfunction, or make it unsafe to use." (CX-0323.0003; CX-0324.0004; CX-0341C.0001, .0004; CX-1639C (Chia Dep. Tr.) at 47:6-8 ("Q. Does PTT advertise using blasters for use with airsoft BBs? A. No.").).

Respondents have acknowledged that the Accused Ammunition (i.e., Gel-Tek beads) are "intended to be used with" the Accused Blasters. (Doc. ID No. 793625 (Respondents' Corrected Resp. to Complainants' SMF) at ¶ 36.). Respondents do not instruct users of the Accused Ammunition on any non-infringing use. (CX-1639C (Chia Dep. Tr.) at 44:13-45:10, 46:7-10, 47:6-8, 47:16-21.).

Accordingly, the evidence confirms, and there is no dispute, that Respondents contributed

to, and continue to contribute to, the direct infringement of claims 8, 19 and 20 of the '282 patent. *See Bio-Rad Labs.*, 998 F.3d at 1335 ("Contributory infringement under 35 U.S.C. § 271(c) requires proof that (1) the defendant had 'knowledge of the patent in suit,' (2) the defendant had 'knowledge of patent infringement,' and (3) the accused product is not a staple article or commodity of commerce suitable for a substantial noninfringing use.") (citation omitted).

C. Technical Prong of Domestic Industry Requirement

1. Legal Standard

A complainant in a patent-based Section 337 investigation must demonstrate that it is practicing or exploiting the patents at issue. *See* 19 U.S.C. § 1337(a)(2) and (3); *Certain Microsphere Adhesives, Process for Making Same, and Prods. Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Op. at 8, Pub. No. 2949 (U.S.I.T.C. Jan. 16, 1996) ("*Microsphere Adhesives*"). "In order to satisfy the technical prong of the domestic industry requirement, it is sufficient to show that the domestic industry practices any claim of that patent, not necessarily an asserted claim of that patent." *Certain Ammonium Octamolybdate Isomers*, Inv. No. 337-TA-477, Comm'n Op. at 55 (U.S.I.T.C. Jan. 5, 2004) ("*Certain Isomers*").

The test for claim coverage for the purposes of the technical prong of the domestic industry requirement is the same as that for infringement. *Certain Doxorubicin and Preparations Containing Same*, Inv. No. 337-TA-300, Initial Determination at 109, 1990 WL 710463 (U.S.I.T.C. May 21, 1990), *aff'd*, Views of the Commission at 22 (Oct. 31, 1990) ("*Doxorubicin*"). "First, the claims of the patent are construed. Second, the complainant's article or process is examined to determine whether it falls within the scope of the claims." *Id.*

The technical prong of the domestic industry can be satisfied either literally or under the doctrine of equivalents. *Certain Dynamic Sequential Gradient Devices and Component Parts Thereof*, Inv. No. 337-TA-335, Initial Determination at 44, Pub. No. 2575 (U.S.I.T.C. Nov. 1992).

2. Technical Prong Overview

There is no dispute that Complainants' DI Products satisfy the technical prong of the domestic industry requirement. Respondents stipulated that ***all*** of the DI Products, i.e., the Commercialized DI Products and the In-Development DI Products, practice claims 8, 19 and 20 of the '282 patent. (Doc. ID No. 796608 (Stip. Regarding DI Products) at ¶ 1 ("For purposes of this Investigation only, Respondents stipulate that the DI Products meet all limitations of Claims 1, 8, 19, and 20 of the '282 Patent . . . under the ALJ's Claim Constructions in Order No. 28.").).[19] Additionally, for the reasons discussed below, the evidence demonstrates that the DI Products practice these claims. (CPBr. at 42-54; CBr. at 15-18; CX-1480C (Barry Kudrowitz Op. Rpt.)[20] at ¶¶ 473-479; SBr. at 18-19.).

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[19] As Staff noted, "the stipulation somewhat confusingly indicates that the Private Parties 'make the following statements solely for purposes of simplifying and narrowing the scope of the forthcoming evidentiary hearing in this Investigation, and ***without admitting they are true***[.]'" (SBr. at 18 n.5 (emphasis in original) (citing Doc. ID No. 796608 (Stip. Regarding DI Products) at ¶ 1).). Like Staff, this ID understands this language to mean that the Private Parties agreed to not admit that the statements contained in the stipulation are true outside of this Investigation (e.g., in a parallel court case). (*Id.* (citations omitted).). Thus, the evidence that demonstrates that the DI Products practice claims 8, 19, and 20 of the '282 patent is discussed below in Sections V.C.3(a)-(c).

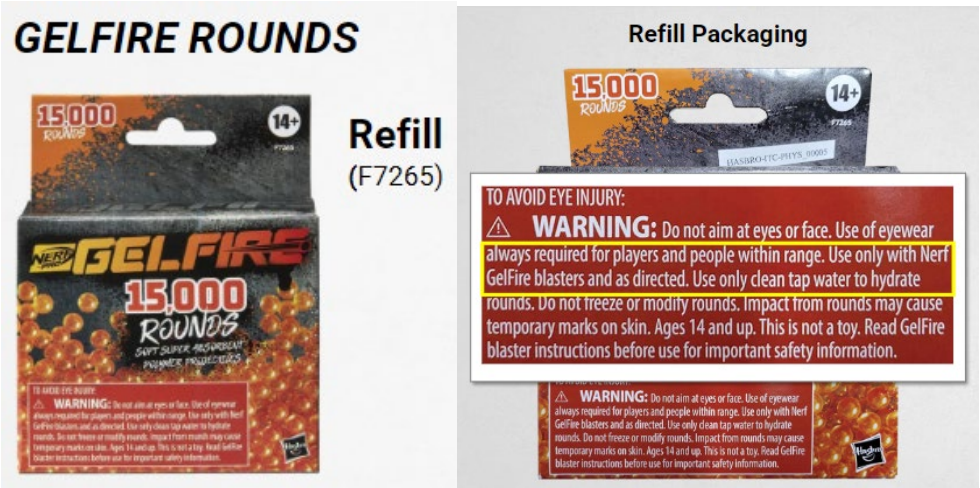
[20] When he signed his opening expert report on December 20, 2022 and testified during the Hearing on May 22, 2023, Dr. Barry Kudrowitz was a Professor of Product Design and the Department Head of Graphic Design, Product Design, Apparel Design, & Retail Merchandising at the University of Minnesota. (CPSt. at Ex. B.). Complainants identified Dr. Kudrowitz as an expert to testify about "technical matters in this case, including, without limitation, toy design and operation," as well as "the technical background of the Asserted Patents; the interpretation and scope of the asserted claims of the Asserted Patents; the design, structure, function, and operation of relevant products, including the accused or domestic industry products; the knowledge of a person of ordinary skill in the art; the scope of the prior art and the design, structure, function and operation of any prior art products and designs; and matters relating to infringement and validity of the Asserted Patents." (CPSt. at 2-3.). Dr. Kudrowitz was

3. The DI Products Practice Claims 8, 19, and 20 of the ’282 Patent

a) Claim 8

Claim 8 depends from claim 1, which recites “[a]mmunition configured for use with a projectile launcher comprising: a plurality of soft-projectiles having the same shape, each soft projectile being formed from hydrated super absorbent polymer.” (JX-0001 at cl. 1.). These limitations are met because the DI Products use ammunition, i.e., GelFire rounds, formed from a hydrated super absorbent polymer, which are configured for use with the Hasbro DI Products (i.e., GelFire Blasters). (CX-1480C (Kudrowitz Op. Rpt.) at ¶¶ 481-503 (Mythic), 527-40 (Legion), [redacted] 770-84 (GelFire Refills/Hoppers).). Shown below in Figure 1 are photographs of the GelFire rounds, i.e., Representative DI Product F7265 GelFire Refill Orange.

Figure 1: GelFire Rounds (Representative DI Product F7265)



accepted without objection as an expert to testify on the subject matter for which he was called to testify. Dr. Kudrowitz satisfies the definition of a person of ordinary skill in the art as described in the *Markman* Order.

(CDX-0007C.0008, 0024.).

The GelFire rounds are sold and configured to be used with the GelFire Blaster, which is undisputedly a projectile launcher. (*See, e.g.*, CX-1480C (Kudrowitz Op. Rpt.) at ¶¶ 483-89, 530-35, 565-67, 598-601, 634-37, 671-74, 706-09, 739-42; RX-0131C (Nicholas Tino Dep. Tr.)[21] at 220:8-221:7 (testifying about the selected hardness of the GelFire rounds).). Hasbro has specifications for the GelFire rounds for use with the DI Products. (Tr. (Tino) at 138:23-139:8. The packaging directs, encourages, and instructs the users to "[u]se [the GelFire rounds] only with Nerf GelFire blasters and as directed." (CPX-0005; CPX-0006; Tr. (Tino) at 139:12-19, 140:9-15.).

The packaging, user manuals, and functional requirements documents ("FRD") also direct, encourage, and instruct the users to hydrate the GelFire rounds before using them with a GelFire Blaster. (*See, e.g.*, CX-1480C (Kudrowitz Op. Rpt.) at ¶¶ 487-88, 533-34, 566, 600, 636, 673, 708, 741; CX-0322; CX-0321.0002; CPX-0005; CPX-0006; [redacted]; Tr. (Tino) at 140:9-15.).

Moreover, the GelFire rounds are "a plurality of soft-projectiles having the same shape, each soft projectile being formed from hydrated super absorbent polymer" and when hydrated as instructed, become soft-projectiles that break upon impact. (CX-1480C (Kudrowitz Op. Rpt.) at ¶¶ 491-92.). The intended and promoted use of the DI Products is for users to hydrate the

[21] When he provided his deposition testimony on December 14, 2022, and testified during the Hearing on May 19, 2023, Mr. Nicholas Tino was an Engineering Manager at Hasbro, Inc. (CPSt. at 2.). Complainants identified Mr. Tino as a fact witness to testify about "the design, development, and operation of the domestic industry products, as well as Hasbro's investments with respect to the domestic industry products." (*Id.*).

GelFire rounds for use with GelFire Blasters. (*Id.*). It is clear that users of Hasbro's DI Products hydrate the GelFire rounds in connection with their use of the GelFire Blasters, as doing so is required to use the GelFire rounds. (*See, e.g.*, CX-0321; CX-0322; CX-0432; CX-0433; CX-0440; CX-0441; CX-0445-CX-0447; CX-0455; CX-0479; CX-0480; CX-0483; CX-0487 to CX-0491; CX-0477.).

Additionally, claim 8 recites "[a] projectile launcher including the ammunition of claim 1 disposed within a feed chamber of the projectile launcher, and wherein the projectile launcher is adapted to load a soft-projectile from the feed chamber to a firing position." (JX-0001 at cl. 8.). These limitations are satisfied because each DI Product has a feed chamber (e.g., hopper), and is adapted to load the ammunition (soft-projectiles) from the feed chamber to a firing position. (CX-1480C (Kudrowitz Op. Rpt.) at ¶¶ 509-13 (Mythic), 545-50 (Legion), [redacted], 791-93 (GelFire Refill/Hopper Refill Orange).). Shown below in Figure 2 are photographs of the Representative DI Products GelFire Mythic, Legion, and Raid.

Figure 2: Representative DI Products GelFire Mythic, Legion and [redacted]

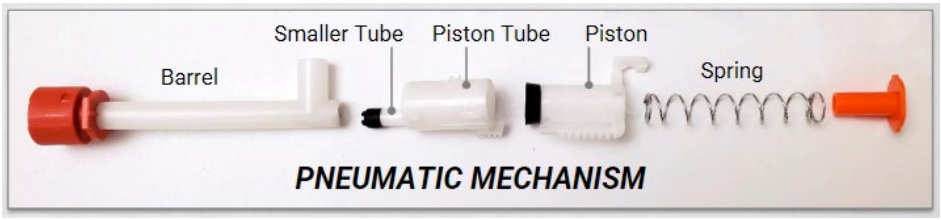
(CDX.0007C.0005, 0007.).

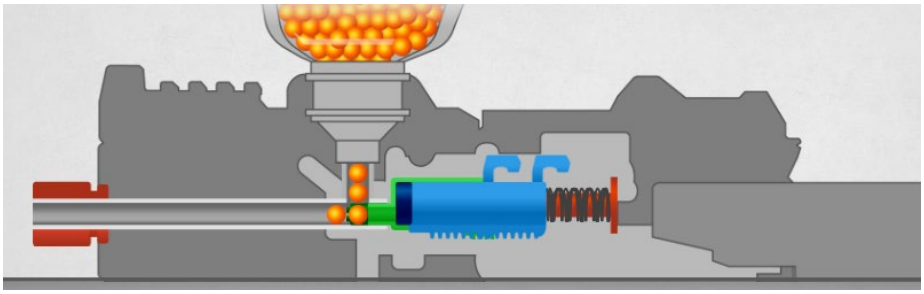
For these reasons, Complainants have proven by a preponderance of evidence that the DI Products practice claim 8 of the ’282 patent.

b) Claim 19

Claim 19 depends from claim 8 and further requires “an air compression chamber; a piston disposed within and axially aligned with the air compression chamber; and a spring operatively arranged to bias the piston toward a rest position from a cocked position within the air compression chamber.” (JX-0001 at cl. 19.). These limitations are met because the DI Products include these components (an air compression chamber, spring, piston) configured as in the claim. (CX-1480C (Kudrowitz Op. Rpt.) at ¶¶ 514-17 (Mythic), 551-54 (Legion), 585-88 [redacted], 794 (GelFire Refill/Hopper Refill Orange).). A photograph and schematic of the pneumatic mechanism of the Representative DI Product GelFire Mythic are shown below in Figure 3.

Figure 3: Pneumatic Mechanism of GelFire Mythic





(CDX-0007C.0021-22.).

For the reasons discussed above, Complainants have proven by a preponderance of evidence that the DI Products practice claim 19 of the ’282 patent.

c) Claim 20

Claim 20 depends from claim 19 and further requires “a smaller diameter tube in communication with the air compression chamber, and wherein a biasing force of the spring is sufficient to cause the piston to move from the cocked position to the rest position to force air from the air compression chamber into the smaller diameter tube and cause a soft-projectile located at the firing position to accelerate and be launched from the projectile launcher.” (JX-0001 at cl. 20.). These limitations are met because the DI Products include the smaller diameter tube in communication with the air compression chamber configured as in the claim. (CX-1480C (Kudrowitz Op. Rpt.) at ¶¶ 518-25 (Mythic), 555-61 (Legion), [redacted], 795 (F7265 GelFire Refill/Hopper Refill Orange).).

Accordingly, Complainants have proven by a preponderance of evidence that the DI Products practice claim 20 of the ’282 patent.

VI. U.S. PATENT NO. 8,640,683

A. Overview of the ’683 Patent

The ’683 patent, also entitled “Soft-Projectile Launching Device,” was filed on February 6, 2013, as U.S. Patent Application Serial No. 13/761,082 (“the ’082 application”). (JX-0002 (’683 patent) at (21), (22), (54).). The ’683 patent issued on February 4, 2014, and like the ’282 patent, names Keith G. Meggs, Ronald Brawer, Michael G. Hoeting, and Neil Hamilton as the

inventors. (*Id.* at (45), (72).). The ’082 application is a divisional of the ’134 application, which issued as the ’282 patent. (*Id.* at (62).). Like the ’282 patent, Spin Master, Inc. is the current valid assignee of the ’683 patent. (*See, e.g.*, Compl. at ¶ 37; *see also id.* at Exs. 4 and 3A-3E (assignments).). Hasbro, Inc. is the exclusive licensee of the ’683 patent. (*Id.* at ¶ 37; *see also id.* at Ex. 5 (license agreement).).

Similar to the ’283 patent, the’683 patent is generally directed to a projectile launching system including ammunition made from a hydrated SAP. (*Id.* at ¶ 39.). The ’683 patent shares the same specification as the ’282 patent and, thus, contains the same disclosures as the ’282 patent. (*Id.* at ¶ 40; *see also id.* at ¶¶ 41-42.).

1. Asserted Claims

As noted above, at issue in this Investigation are dependent claims 5 and 14 of the ’683 patent, which are reproduced below. Because claims 5 and 14 depend from independent claim 1, claim 1 is also reproduced below.

> **1.** A projectile launching system, comprising: ammunition comprising a plurality of substantially spherical soft-projectiles formed from hydrated super absorbent polymer; and a projectile launcher for launching the ammunition in free flight.
>
> **5.** The system of claim 1, wherein the projectile launcher includes a feed chamber for loading the soft-projectiles within projectile launcher.
>
> **14.** The system of claim 1, wherein the projectile launcher comprises a firing mechanism that directly applies a force to the ammunition.

(JX-0002 at cls. 1, 5, 14.).

2. Claim Construction

Table No. 11: Constructions of Disputed Claim Terms[22]

Claim Term(s)	Adopted Construction
"super absorbent polymer" (claim 1)	Plain and ordinary meaning, i.e., "polymer that can absorb an extremely large amount of liquid relative to its own mass" (*Markman* Order at 19-20.).
"a firing mechanism that directly applies a force to the ammunition" (claim 14)	Plain and ordinary meaning, i.e., "a firing mechanism that directly applies a force to the ammunition" (*Markman* Order at 20.).

B. Infringement

1. Direct Infringement

a) The Commission Has Found that the Accused Products Directly Infringe the Asserted Claims of the '683 Patent

Like the asserted claims of the '282 patent, it was found on summary determination that the Accused Blasters (i.e., blaster kits with blasters and ammunition) directly infringe claim 5 of the '683 patent. (*See* MSD ID.). The Commission affirmed the summary determination finding. (Comm'n Notice to Review Order No. 37 at 3 (May 30, 2023).). In addition, Respondents stipulated that the Accused Products "meet all limitations of . . . Claims 1, 5, and 14 of the '683 Patent, as construed by the ALJ." (Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 5.). In sum, the MSD ID found, the Commission upheld, and/or Respondents stipulated that the Accused Products directly infringe asserted claims 5 and 14 of the '683 patent. Although Respondents stipulated that the Accused Products directly infringe claim 14, for purposes of a

[22] The Parties did not agree on any claim terms for the '683 patent.

complete record, Complainants presented evidence supporting their contention that the Accused Products practice claim 14.

Claim 14 recites "[t]he system of claim 1, wherein the projectile launcher comprises a firing mechanism that directly applies a force to the ammunition." (JX-0002 at cl. 14.). Complainants presented compelling evidence that the Accused Products' firing mechanisms generate air pressure, which is a direct force applied to the ammunition. (*See, e.g.*, CX-1480C (Kudrowitz Op. Rpt.) at ¶¶ 331-37, 344-50; CPX-0094 (Nebula Pro); CPX-0095 (Pulsar Pro).). Respondents' fact witness, Mr. Chia, also confirmed the Accused Products directly apply air pressure to the ammunition. (CX-1639C (Chia Dep. Tr.) at 129:17-130:1, 130:21-133:4, 135:5-10 (testifying that Respondents' Gel-Tek rounds are "launched as a direct result of air pressure").). Staff agreed that the evidence supports a finding that the Accused Products infringe claim 14. (SBr. at 46 (citing CX-1480C (Kudrowitz Op. Rpt.) at ¶¶ 335-37 (HydroStrike Nebula Pro), 348-50 (HydroStrike Pulsar Pro).).

2. Indirect Infringement

a) Indirect Infringement Overview

The remaining infringement issues with respect to the '683 patent relate to indirect infringement, which Respondents did not dispute. (CPBr. at 103; CBr. at 49.). Because Respondents did not challenge that indirect infringement is met in their Pre-Hearing Brief, any argument on this issue is deemed abandoned or withdrawn under Ground Rule 7.2. (*See* RPBr. at 110-12.).

Additionally, as discussed above in Section VI.B.1, the Accused Blasters meet every limitation of claims 5 and 14 of the '683 patent when used as instructed by the user manuals.

Moreover, as explained in Section VI.B.2 above regarding Respondents' indirect

infringement of the ’282 patent, Respondents conceded that: (i) they had knowledge of the ’683 patent; (ii) they intend and have intended for third parties to use the Accused Products in accordance with the user manuals; (iii) there is no substantial non-infringing use of the Accused Products, and (iv) the Accused Products are material parts of the invention covered by the claims at issue.

Respondents’ experts did not offer any opinions to the contrary.

b) Respondents Induced and Continue to Induce Users to Infringe the ’683 Patent

For the same reasons as described above in Section V.B.2(c) for the ’282 patent, Respondents have induced direct infringement of claims 5 and 14 of the ’683 patent. As explained above in Section VI.A, the asserted claims, both of which depend from claim 1, require a system comprising the claimed plurality of soft-projectiles formed from “hydrated super absorbent polymer” along with a projectile launcher. (JX-0002 at cl. 1.).

Respondents’ user manuals and marketing materials support a finding that Respondents instruct, encourage, and recommend that users hydrate and use the ammunition in an infringing manner. (*See* Section V.B.2, *supra*.). As discussed above in Section V.B.2(c) with respect to the ’282 patent, Respondents induce the users of the Accused Products to use the hydrated ammunition with the Accused Blasters in the manner claimed. (*Id.* (collecting evidence, including CX-0323; CX-0324; CX-0341C (user manuals)).).

Accordingly, Respondents induced and continue to induce users to infringe the asserted claims of the ’683 patent.

c) Respondents Contributed to and Continues to Contribute to Users’ Direct Infringement of the ’683 Patent

Respondents also have contributed to users’ direct infringement of claims 5 and 14 of the

’683 patent for the same reasons as for the ’282 patent, as explained above. (*See* Section V.B.2(d), *supra*.). In summary, the evidence confirms, and Respondents did not dispute, that: there is no substantial non-infringing use of the Accused Products; the Accused Products are material parts of the claimed inventions; and that Respondents became aware of the Asserted Patents prior to this Investigation. (*See* Section V.B.2, *supra*.).

Respondents have continued to contribute to the direct infringement of the ’683 patent by the users of the Accused Products. Respondents stipulated that even the new products that they released during the pendency of this Investigation or that became part of this Investigation, infringe the asserted claims of the ’683 patent. (Doc. ID No. 786298 at ¶ 2 (Respondents’ Suppl. Stip. and Waiver Regarding Importation) (adding Hydrax and Stormer); Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 5.). Thus, Respondents have contributed to and continue to contribute to users’ direct infringement of the claims at issue.

Accordingly, Respondents contributed to and continue to contribute to the direct infringement the asserted claims of the ’683 patent.

C. Technical Prong of Domestic Industry Requirement

1. Technical Prong Overview

There is no dispute that Complainants’ DI Products satisfy the technical prong of the domestic industry requirement. Respondents stipulated that ***all*** of the DI Products, i.e., the Commercialized DI Products and the In-Development DI Products, practice claims 5 and 14 (both of which depend from claim 1) of the ’683 patent. (Doc. ID No. 796608 (Stip. Regarding DI Products) at ¶ 1 (“For purposes of this Investigation only, Respondents stipulate that the DI Products meet . . . all limitations of Claims 1, 5, and 14 of the ’683 Patent under the ALJ’s Claim

Constructions in Order No. 28.”).).[23] Additionally, for the reasons discussed below, the evidence demonstrates that the DI Products practice these claims. (CPBr. at 105-108; CBr. at 50-52.).

2. The DI Products Practice Claims 5 and 14 of the ’683 Patent

a) Claim 5

For the same reasons discussed in Section V.C.3 above with respect to the ’282 patent, the GelFire Blasters practice every limitation of claim 5 of the ’683 patent and the GelFire Refills/Hoppers practice every limitation of claim 5 the ’683 patent when used with the GelFire Blasters as directed.

Claim 5 depends from claim 1. Claim 1 requires a “projectile launching system, comprising: ammunition comprising a plurality of substantially spherical soft-projectiles formed from hydrated super absorbent polymer; and a projectile launcher for launching the ammunition in free flight.” The DI Products are projectile launching systems with GelFire ammunition. (*See* Section II.C.2, *supra*; *see also* CX-1480C (Kudrowitz Op. Rpt.) at ¶¶ 798-813 (Mythic), 829-44 (Legion), [redacted], 1012-16 (GelFire Refills/Hoppers).).

With respect to the requirement that the ammunition be “substantially spherical,” Dr. Kudrowitz evaluated the hydrated GelFire rounds and concluded they each have the same spherical shape. (CX-1480C (Kudrowitz Op. Rpt.) at ¶¶ 492, 505, 507; CPX-0005 (F7265 GelFire Refill Orange); CPX-0006 (F7266 GelFire Hopper Refill Orange).). Respondents did not dispute Dr. Kudrowitz’s observations and opinions.

[23] *See* n.19, *supra*.

The DI Products also include (or for the separately-sold ammunition are designed and intended for use with) a projectile launcher for launching the ammunition in free flight. (*See* Section V.C.3, *supra* (addressing the "projectile launcher" limitation of claim 1 and the "accelerate and be launched from the projectile launcher" limitation of claim 20 of the '282 patent).).

With respect to claim 5, which recites "wherein the projectile launcher includes a feed chamber for loading the soft-projectiles within projectile launcher," the DI Products either include (or for the separately-sold ammunition are designed and intended for use with) a projectile launcher with a feed chamber for loading the soft-projectiles within the projectile launcher. (*See* Section V.C.3, *supra* (addressing "the ammunition of claim 1 disposed within a feed chamber of the projectile launcher" limitation of claim 8 of the '282 patent); *see also* CX-1480C (Kudrowitz Op. Rpt.) at ¶¶ 814-18 (Mythic), 845-50 (Legion), [redacted], 1017-19 (GelFire Refills/Hoppers).).

For the foregoing reasons, Complainants have proven by a preponderance of evidence that the DI Products practice claim 5 of the '683 patent.

b) Claim 14

Similar to claim 5, claim 14 depends on claim 1 and further requires "wherein the projectile launcher comprises a firing mechanism that directly applies a force to the ammunition." The DI Products' firing mechanisms directly apply a force to the GelFire rounds to launch the ammunition as this claim requires. (*See* CX-1480C (Kudrowitz Op. Rpt.) at ¶¶ 823-28 (Mythic), 855-60 (Legion), [redacted]

, 1022-25 (GelFire Refills/Hoppers).).

Moreover, as discussed in Section VI.B.2 above, Hasbro uses, directs, encourages, and instructs uses of its DI products in the United States through product literature and marketing.

Accordingly, Complainants have proven by a preponderance of evidence that the DI Products practice claim 14 of the ’683 patent.

VII. INVALIDITY UNDER 35 U.S.C. § 103

A. Legal Standard

Under 35 U.S.C. § 103(a), a patent is valid unless “the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made” to a person having ordinary skill in the art. 35 U.S.C. § 103(a). The ultimate question of obviousness is a question of law, but “it is well understood that there are factual issues underlying the ultimate obviousness decision.” *Richardson-Vicks*, 122 F.3d 1476, 1479 (Fed. Cir. 1997) (citing *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17 (1966)).

After claim construction, “[t]he second step in an obviousness inquiry is to determine whether the claimed invention would have been obvious as a legal matter, based on underlying factual inquiries including: (1) the scope and content of the prior art, (2) the level of ordinary skill in the art, (3) the differences between the claimed invention and the prior art, and (4) secondary considerations of non-obviousness.” *Smiths Indus. Med. Sys., Inc. v. Vital Signs, Inc.*, 183 F.3d 1347, 1354 (Fed. Cir. 1999) (citing *Graham*, 383 U.S. at 17). The existence of secondary considerations of non-obviousness does not control the obviousness determination; a court must consider “the totality of the evidence” before reaching a decision on obviousness. *Richardson-Vicks*, 122 F.3d at 1483.

The Supreme Court clarified the obviousness inquiry in *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 389 (2007). The Supreme Court stated:

> When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability. For the same reason, if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill. *Sakraida* and *Anderson's-Black Rock* are illustrative–a court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.
>
> Following these principles may be more difficult in other cases than it is here because the claimed subject matter may involve more than the simple substitution of one known element for another or the mere application of a known technique to a piece of prior art ready for the improvement. Often, it will be necessary for a court to look to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, all in order to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue. To facilitate review, this analysis should be made explicit.
>
> * * *
>
> The obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation, or by overemphasis on the importance of published articles and the explicit content of issued patents. The diversity of inventive pursuits and of modern technology counsels against limiting the analysis in this way. In many fields it may be that there is little discussion of obvious techniques or combinations, and it often may be the case that market demand, rather than scientific literature, will drive design trends. Granting patent protection to advances that would occur in the ordinary course without real innovation retards progress and may, in the case of patents combining previously known elements, deprive prior inventions of their value or utility.

KSR, 550 U.S. at 417-19.

The Federal Circuit has since held that when a patent challenger contends that a patent is invalid for obviousness based on a combination of several prior art references, "the burden falls on the patent challenger to show by clear and convincing evidence that a person of ordinary skill in the art would have had reason to attempt to make the composition or device, or carry out the

claimed process, and would have had a reasonable expectation of success in doing so."

PharmaStem Therapeutics, Inc. v. ViaCell, Inc., 491 F.3d 1342, 1360 (Fed. Cir. 2007) (citations omitted).

> The TSM[24] test, flexibly applied, merely assures that the obviousness test proceeds on the basis of evidence--teachings, suggestions (a tellingly broad term), or motivations (an equally broad term)--that arise before the time of invention as the statute requires. As *KSR* requires, those teachings, suggestions, or motivations need not always be written references but may be found within the knowledge and creativity of ordinarily skilled artisans.

Ortho-McNeil Pharm., Inc. v. Mylan Labs., Inc., 520 F.3d 1358, 1365 (Fed. Cir. 2008).

B. Invalidity Overview

Respondents asserted that claims 8, 19, and 20 of the '282 patent and claims 5 and 14 of the '683 patent are invalid under 35 U.S.C. § 103. Specifically, Respondents contended that a person of ordinary skill in the art would have been motivated to combine references disclosing spherical SAP ammunition with references disclosing airsoft guns. (RPBr. at 20, 112; RBr. at 29-30.).[25]

Respondents identified the following as SAP ammunition prior art: (i) Spit Balls products ("Spit Balls") (RX-0001; RX-0002; RPX-0002; RPX-0003) sold by DuneCraft, Inc. ("DuneCraft"); and (ii) the Clear Spheres product ("Clear Spheres") (RX-0005; RX-0021) as

[24] TSM is an acronym that stands for teaching, suggestion, motivation.

[25] Respondents dropped contentions that the Clear Spheres Launcher or Spit Balls in view of the general knowledge of one of ordinary skill in the art render obvious claims 8, 19, and 20. (*See* Doc. ID 797012 (Respondents' Amended Invalidity Allegations) (May 23, 2023); *see also* SBr. at 20.). Respondents also dropped initial arguments that the asserted claims are invalid under §§ 102, 112, or 102(f). (*See* Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶¶ 5-6; *see also* SBr. at 20.).

launched by Steve Spangler[26] at the Science in the Rockies conference.[27] (RBr. at 7.). Respondents identified the following as airsoft gun prior art: (i) Bulgarian Application No. BG110343A to Peev ("Peev") (RX-0008); and (ii) Japanese Patent Publication No. 2006-234191A to Nagayoshi ("Nagayoshi") (RX-0009). (RBr. at 7.).

Thus, Respondents asserted that the following combinations render obvious the asserted claims of the '282 and '683 patents: (i) Peev in combination with Clear Spheres Launcher or Split Balls; and (ii) Nagayoshi in combination with Clear Spheres Launcher or Spit Balls. (RPBr. at 20; RBr. at 29.).

For the reasons discussed below, Respondents failed to prove by clear and convincing evidence that the asserted claims of the '282 and '683 patents are invalid as obvious.

C. Description of the Prior Art

1. SAP Ammunition Prior Art

a) Spit Balls

Complainants stipulated that Spit Balls qualify as prior art under pre-AIA 35 U.S.C. § 102(b). (Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 3 ("Complainants will stipulate that Spit Balls . . . are prior art under pre-AIA 35 U.S.C. § 102(b)."); RX-0001 (Front of Spit Balls Package); RX-0002 (Back of Spit Balls Package).). The evidence is/provides undisputed proof that the Spit Balls were sold in the United States as early as 2008, before the critical date of

[26] Mr. Steve Spangler was the founder of Steve Spangler Science. (RX-0110 (Spangler Dep. Tr.) at 14:17-19.). He was also a science teacher by trade and a television personality who had a science-based television show on NBC. (*Id.* at 13:2-15.).

[27] On July 10, 2008, Mr. Spangler hosted a conference in Colorado called "Science in the Rockies," where he launched hydrated SAP Clear Spheres from a tube. (RX-0110 (Spangler Dep. Tr.) at 45:15-48:21, 49:1-4, 49:8-18, 50:2-3; *see also* RBr. at 13-14.). Mr. Spangler did this by taking hydrated Clear Spheres, placing them in an elongated cylindrical tube, and blowing into the tube. (RX-0110 (Spangler Dep. Tr.) at 46:16-48:21, 49:1-4, 49:8-18, 50:2-3.).

May 10, 2009. (RX-0001; RX-0002; RX-0116C (Grant Cleveland Dep. Tr.)[28] at 212:8-218:8; RX-0012 (2008 Newbury Comics Sale).).

Complainants also stipulated that Spit Balls, depicted below in Figure 4, were SAPs. (Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 3 ("Complainant[s] stipulate that . . . Spit Balls toys are formed from 'super absorbent polymer' as required by '282 Patent Claim 1 and '683 Patent Claim 1, as construed by the ALJ.").).

Figure 4: Front (Left) and Back (Right) of Split Balls Package

(RX-0001; RX-0002.).

b) Clear Spheres

Complainants stipulated that the Clear Spheres (also marketed as Jelly Marbles), from the

[28] Mr. Grant Cleveland was deposed on December 7, 2022. (RX-0116C (Cleveland Dep. Tr.).). He is the founder of DuneCraft. (RPSt. at 4.). Respondents identified Mr. Cleveland as a fact witness to testify about, *inter alia*, "the prior art including super absorbent polymer spheres." (*Id.*).

Clear Spheres Launcher, qualify as prior art under pre-AIA 35 U.S.C. § 102(b). (Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 3 ("Complainants will stipulate that . . . Clear Spheres are prior art under pre-AIA 35 U.S.C. § 102(b)."); RPX-0002 (Jelly Marbles); RPX-0003 (Clear Spheres).). The evidence indicates that they were offered for sale in the United States before the critical date of the Asserted Patents. (RX-0813 (stevespanglerscience.com Archive Website); RX-0122 (Jeff Brooks Dep. Tr.)[29] at 92:14-96:1; RX-0023 (Spangler Science Product Orders) at 1, 7, 25, 33, 47, 58. RX-1770 (Purchases Orders).).

Complainants also stipulated that Clear Spheres, depicted below in Figure 5, were SAPs. (Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 3 ("Complainant[s] stipulate that Clear Spheres . . . are formed from 'super absorbent polymer' as required by '282 Patent Claim 1 and '683 Patent Claim 1, as construed by the ALJ.").).

Figure 5: Photograph of Clear Spheres

[29] Mr. Jeff Brooks was deposed on December 9, 2022. (RX-0122 (Brooks Dep. Tr.). Mr. Brooks is the former Chief Operating Officer of Steve Spangler Science. (RPSt. at 4.). Respondents identified Mr. Brooks as a fact witness to testify about, *inter alia*, "the design, development, operation, and public use of super absorbent polymer spheres and launchers for same." (*Id.*).

(RX-0801.).

Additionally, the evidence includes undisputed proof that Clear Spheres grow from around 3 mm to approximately 20 mm in diameter, and even to 22 mm in diameter. (*See* Tr. (Joel Delman)[30] at 249:15-250:11; RX-0812 (stevespanglerscience.com Archive Website) at 3 ("They start out as only a 3 mm pebble and grow to approximately 20 mm!").).

2. Airsoft Gun Prior Art

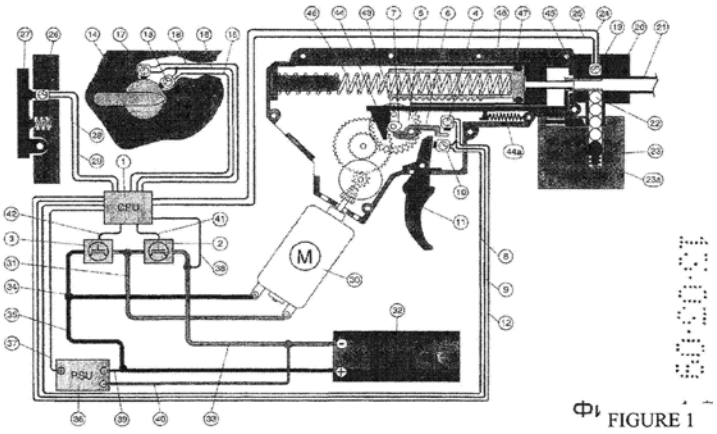
a) Peev

Bulgarian Patent Application No. BG110343A ("Peev") was published on July 31, 2009, less than one year before the priority date of the Asserted Patents. (RX-0008 (Peev).). Thus, Peeve qualifies as prior art under pre-AIA 35 U.S.C. § 102(a), to which Complainants stipulated. (Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 2 ("Complainants stipulate that BG110343A ('Peev') is prior art under pre-AIA 35 U.S.C. § 102(a).").).

Peev discloses an electric airsoft gun "that provides improved operational performance as well as bringing the way of functioning and manipulation of the electric airsoft gun as close as possible to the way of functioning and manipulation of the real firearm." (RX-0008.0006.). Figure 1 of Peev is reproduced below (Figure 6).

[30] When he testified during the Hearing on May 19, 2023, Mr. Joel Delman was a Design Director of Informed Innovation Inc. (RPSt. at Ex. B.). Respondents identified Mr. Delman as an expert to testify about, *inter alia*, "the background of the technology, non-infringement of the accused products, Complainants' alleged technical domestic industry, and invalidity of the asserted patents." (RPSt. at 6.). Mr. Delman was accepted during the Hearing as an expert without objection on the subjects for which he was called to testify. Mr. Delman qualifies as a person of ordinary skill in the art as described in the *Markman* Order.

Figure 6: Figure 1 of Peev



(RX-0008 at Fig. 1.).

Peev indicates that "[e]lectric airsoft guns find application in the sporting gun industry and are used for military emulations or training or for fun when conducting airsoft games." (*Id.* at .0003.). Furthermore, Peev identified a number of disadvantages of existing airsoft guns that "makes handling electric airsoft guns quite different from handling real firearms." (*Id.* at .0006.). Further, "[t]he electric airsoft gun control system of the invention can replace the existing electrical installation of existing electric airsoft guns requiring no modification to the gun." (*Id.* at .0015.). Peev also indicates that "airsoft guns . . . externally represent a copy of real firearms but instead of cartridges, polymer balls with a diameter of 6 mm are fired by compressed air." (*Id.* at .0003.).

b) Nagayoshi

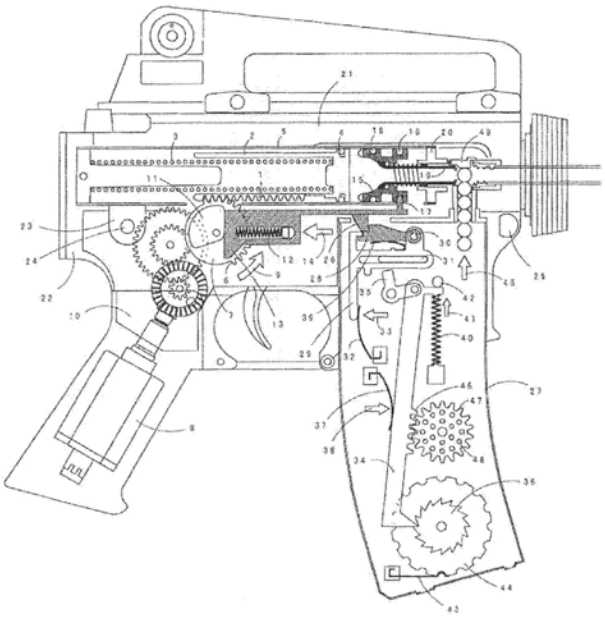
Japanese Patent Application No. 2006-234191 ("Nagayoshi") was published on September 7, 2006, more than one year before the critical date of the Asserted Patents. (RX-0009 (Nagayoshi).). Thus, Nagayoshi qualifies as prior art under pre-AIA § 102(b), to which Complainants stipulated. (Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 1 ("Complainants stipulate that JP2006-234191 ('Nagayoshi') is prior art under pre-AIA 35 U.S.C.

§ 102(b).”).).

Nagayoshi, entitled “Magazine Having Continuous Bullet Supply Mechanism and Toy Gun Having Continuous Shooting Function,” is directed to “a toy gun having a function for continuously shooting spherical bullets a magazine used attached to the toy gun and the structure of dedicated parts used in the toy gun and the magazine . . . .” (RX-0009.0194.). Nagayoshi indicates that the “current level of technology in the toy gun industry can be seen in the advertisements of specialized journals,” such as “Combat Magazine” and “ARMS MAGAZINE.” (*Id.* at .0197-98.). Additionally, Nagayoshi “addresses the problem of providing a freely attachable detachable magazine for continuous high speed shooting of multiple bullets with no internal driving force source . . . .” (*Id.* at .0189.).

Figure 8 of Nagayoshi, reproduced below (Figure 7), “is a drawing for explaining the structure of an electric toy gun using as a model a gun officially adopted by the American army such as the M16 series or the M4 series.” (*Id.* at .0201.).

Figure 7: Figure 8 of Nagayoshi



(RX-0009 at Fig. 8.).

Although Nagayoshi does not disclose the composition or diameter of the spherical bullets described, one of ordinary skill in the art would understand such ammunition to be airsoft ammunition, i.e., 6 mm in diameter. (Tr. (Delman) at 273:15-17 ("Q. Now Nagayoshi . . . is also a realistic-looking airsoft gun, correct? A. Yes, in the patent it is disclosed as such."); Tr. (Kudrowitz) at 430:7-8 ("Nagayoshi also . . . is a way of making an Airsoft gun behave more like a real firearm."); Tr. (Delman) at 287:24-288:2 (plastic ammunition used in the airsoft gun are 6 millimeters); Tr. (Kudrowitz) at 431:4 ("the standard size for Airsoft guns is 6mm").).

D. Complainants' Stipulations with Respect to Certain Claim Limitations of the Asserted Claims

1. Spit Balls and Clear Spheres

As noted above in Section VII.C.1, Complainants stipulated that Spit Balls and Clear Spheres "are formed from 'super absorbent polymer' as required by '282 Patent Claim 1 and '683 Patent Claim 1, as construed by the ALJ." (Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 3.).

2. Peev and Nagayoshi

Complainants stipulated that Peev discloses:

> (i) "A projectile launcher" as required by '282 Patent Claims 8, 19, and 20, and "a projectile launcher for launching [] ammunition in free flight" as required by '683 Patent Claims 1, 5, and 14.
>
> (ii) Ammunition "disposed within a feed chamber of the projectile launcher," and "wherein the projectile launcher is adapted to load a [] projectile from the feed chamber to a firing position" as required by '282 Patent Claims 8, 19, and 20.
>
> (iii) "the projectile launcher includes a feed chamber for loading . . . projectiles within projectile launcher" as required by '683 Patent Claim 5.
>
> (iv) "wherein the projectile launcher comprises a firing mechanism that directly applies a force to the ammunition" as required by '683 Patent Claim 14.

> (v) The projectile launcher comprises "an air compression chamber; a piston disposed within and axially aligned with the air compression chamber; and a spring operatively arranged to bias the piston toward a rest position from a cocked position within the air compression chamber" as required by '282 Patent Claims 19 and 20, and the projectile launcher "further comprising a smaller diameter tube in communication with the air compression chamber, and wherein a biasing force of the spring is sufficient to cause the piston to move from the cocked position to the rest position to force air from the air compression chamber into the smaller diameter tube and cause a [] projectile located at the firing position to accelerate and be launched from the projectile launcher" as required by '282 Patent Claim 20.

(Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 2 (internal footnote omitted).).

In its Initial Post-Hearing Brief, Staff provided annotated recitations of the asserted claims of the '282 patent (Figure 8, below) and '683 patent (Figure 9, below), including claim 1 from which the asserted claims depend, that indicate in highlighting the claim limitations to which Complainants stipulated.

Figure 8: Claim Limitations of the '282 Patent to Which Complainants Stipulated Are Disclosed by Peev

1. Ammunition configured for use with a projectile launcher comprising:
   a plurality of soft-projectiles having the same shape, each soft projectile being formed from hydrated super absorbent polymer.

8. A projectile launcher including the ammunition of claim 1 disposed within a feed chamber of the projectile launcher, and wherein the projectile launcher is adapted to load a soft-projectile from the feed chamber to a firing position.

19. The projectile launcher of claim 8, further comprising:
   an air compression chamber;
   a piston disposed within and axially aligned with the air compression chamber; and
   a spring operatively arranged to bias the piston toward a rest position from a cocked position within the air compression chamber.

20. The projectile launcher of claim 19, further comprising a smaller diameter tube in communication with the air compression chamber, and wherein a biasing force of the spring is sufficient to cause the piston to move from the cocked position to the rest position to force air from the air compression chamber into the smaller diameter tube and cause a soft-projectile located at the firing position to accelerate and be launched from the projectile launcher.

(SBr. at 26 (citing JX-0001 at cls. 1, 8, 19, and 20; Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 2.).

Figure 9: Claim Limitations of the '683 Patent to Which Complainants Stipulated Are Disclosed by Peev

1. A projectile launching system, comprising: ammunition comprising a plurality of substantially spherical soft-projectiles formed from hydrated super absorbent polymer; and a projectile launcher for launching the ammunition in free flight.

5. The system of claim 1, wherein the projectile launcher includes a feed chamber for loading the soft-projectiles within projectile launcher.

14. The system of claim 1, wherein the projectile launcher comprises a firing mechanism that directly applies a force to the ammunition.

(SBr. at 27 (citing JX-0002 at cls. 1, 5, and 14); *see also* Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 1.).

As Complainants and Staff pointed out, and as captured above in Figures 8 and 9, Complainants did not stipulate that Peev discloses "soft-projectiles" (required in all claims of the Asserted Patents listed above) and any other language not highlighted above. (Doc. ID No. 796787 (Stip. Regarding Prior Art) at 2 n.2; SBr. at 6 (not highlighted limitations).).

Complainants stipulated that Nagayoshi discloses:

(i) "A projectile launcher" as required by '282 Patent Claims 8, 19, and 20, and "a projectile launcher for launching [] ammunition in free flight" as required by '683 Patent Claims 1, 5, and 14.

(ii) Ammunition "disposed within a feed chamber of the projectile launcher," and "wherein the projectile launcher is adapted to load a [] projectile from the feed chamber to a firing position" as required by '282 Patent Claims 8, 19, and 20.

(iii) "the projectile launcher includes a feed chamber for loading . . . projectiles within projectile launcher" as required by '683 Patent Claim 5.

(iv) "wherein the projectile launcher comprises a firing mechanism that directly applies a force to the ammunition" as required by '683 Patent Claim 14.

> (v) The projectile launcher comprises "an air compression chamber; a piston disposed within and axially aligned with the air compression chamber; and a spring operatively arranged to bias the piston toward a rest position from a cocked position within the air compression chamber" as required by '282 Patent Claims 19 and 20, and the projectile launcher "further comprising a smaller diameter tube in communication with the air compression chamber, and wherein a biasing force of the spring is sufficient to cause the piston to move from the cocked position to the rest position to force air from the air compression chamber into the smaller diameter tube and cause a [] projectile located at the firing position to accelerate and be launched from the projectile launcher" as required by '282 Patent Claim 20.

(Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 1 (internal footnote omitted).).

As Staff noted, with respect to the asserted claims of the Asserted Patents, Complainants stipulated that Nagayoshi discloses the same limitations as Peev, as highlighted above in Figures 8 and 9. (*Id.*; *see also* Tr. (Delman) at 193:3-4 ("Yes, just like Peev, Nagayoshi teaches everything but the soft SAP projectiles.").).

E. Peev or Nagayoshi in Combination with Clear Spheres Launcher or Spit Balls

1. The Combination of Airsoft References (Peev/Nagayoshi) with Spherical SAPs (Clear Spheres and Spit Balls) Disclose the Claim Elements of the Asserted Patents

There is no dispute that both Peeve and Nagayoshi disclose the structures related to the "projectile launcher" limitations of the asserted claims of the '282 and '683 patents. (*See* Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶¶ 1, 2; Tr. (Delman) at 193:3-4 ("Yes, just like Peev, Nagayoshi teaches everything but the soft SAP projectiles.").). It is also undisputed that the Clear Spheres and Spit Balls are SAPs as required by the asserted claims of the '282 and '683 patents. (*See* Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 3.). Thus, the only issue is whether the combination of the airsoft references (i.e., Peev and Nagayoshi) with spherical SAPs (i.e., Clear Spheres Launcher and Spit Balls) disclose all of the recited claim limitations.

Complainants argued that to combine the airsoft references with Clear Spheres or Spit

Balls, the SAPs would have to be approximately 6 mm in diameter in order to work with an airsoft gun. (CPBr. at 59; CBr. at 22-23.). Complainants contended that when hydrated as instructed, Clear Spheres and Spit Balls expanded to around 20 mm and 18 mm in diameter, respectively. (CPBr. at 59 (citations omitted); CBr. at 22 (citations omitted).). According to Complainants, to achieve something close to a 6 mm diameter, the Clear Spheres and Spit Balls had to be soaked for less than the instructed time, which resulted in projectiles that were "quite firm" and "exhibit[ed] irregular shapes, contrary to the claim requirements." (CBr. at 23 (citations omitted); *see also* CPBr. at 59 (citations omitted).). Complainants thus asserted that such SAPs fail to satisfy the following claim limitations: (i) ammunition "configured for use" with a projectile launcher, as recited in claim 1 of the '282 patent; (ii) "soft-projectiles," as recited in claim 1 of the '282 patent and claim 1 of the '683 patent; (iii) soft-projectiles "having the same shape," as recited in claim 1 of the '282 patent; and (iv) soft-projectiles "substantially spherical," as recited in claim 1 of the '683 patent. (CPBr. at 59; CBr. at 22-23.).

With respect to the "configured for use" limitation, Complainants interpreted the claim term to include a subjective intent that the ammunition be used with the launcher:

- "Respondents have also admitted that the Accused Ammunition (i.e., Gel-Tek beads), are 'intended to be used with' the Accused Blasters." (CBr. at 15.).
- "The GelFire rounds are 'configured for use with a projectile launcher.' They are sold and are configured to be used with the GelFire Blaster . . . ." (*Id.* at 17.).
- "Clear Spheres and Spit Balls were never ***intended for use*** as ammunition in airsoft guns." (*Id.* at 21 (emphasis added).).

Contrary to Complainants' interpretation, reading a particular intent or subjective element

into this claim term is rejected by Federal Circuit precedent.[31] *Cf. Cochlear Bone Anchored Sols. AB v. Oticon Med. AB*, 958 F.3d 1348, 1356 (Fed. Cir. 2020) (Federal Circuit has not introduced a subjective element into the construction of the phrase "adapted to" which means "configured to"). "In determining whether the subject matter of a patent claim is obvious, neither the particular motivation nor the avowed purpose of the patentee controls. What matters is the objective reach of the claim." *KSR*, 550 U.S. at 419.

Here, interpreting "configured for use" to including the patentee's intent that the ammunition must be subjectively intended for use with the launcher would improperly preclude the application of obviousness to such claim terms. Moreover, the front side of the Spit Balls packaging depicts a person holding a tubular launcher. (RX-0001 (Front of Spit Balls Package).). One of ordinary skill in the art would understand such disclosure to represent spit balls (or ammunition) "configured for use" with a projectile launcher. (Tr. (Delman) at 213:19-214:12.).

With regard to the "soft-projectiles," "having the same shape," and "substantially spherical" limitations, evidence adduced in this Investigation demonstrates persuasively that one of ordinary skill in the art at the time of the invention would have had access to a chemist, for example, who knew how to produce substantially spherical SAPs having different sizes—that is,

[31] In their Post-Hearing Reply Brief, Complainants attempted to address Staff's identification of "intent" language in Complainant's Pre-Hearing Brief. (CRBr. at 9.). Complainants claimed that the language "was not meant to suggest a subjective requirement, such that ammunition must be subjectively intended by the manufacturer, at the time of its manufacture, to be used as ammunition for a projectile launcher." (*Id.* (citing Doc. ID No. 793950 (Complainants' Mot. for Leave to Submit a Limited Reply to Respondents' Opp'n to Complainants' MSD), Ex. A at 6-8).). According to Complainants, "the Asserted Claims of the '282 patent require the ammunition to be 'configured for use with a projectile launcher' . . . [and] Clear Spheres and Spit Balls are not so configured[.]" (CRBr. at 9.). Complainants' assertions have been considered but have been found to be unpersuasive.

sized for the Peev or Nagayoshi airsoft guns—such that the final hydrated SAP would be a "soft" projectile having the "same shape" and being "substantially spherical." (Tr. (Maureen Reitman)[32] at 398:20-23 ("a chemist knowledgeable about super absorbent polymers, or SAPs, would have known how to adjust shape, size, softness and strength prior to 2010"); *see also id.* at 398:16-412:8; Section VII.E.3, *infra*.). As the Federal Circuit noted, "we do not ignore the modifications that one skilled in the art would make to a device borrowed from the prior art." *In re ICON Health & Fitness, Inc.*, 496 F.3d 1374, 1382 (Fed. Cir. 2007) ("One skilled in the art would size the components from [the prior art reference] appropriately for Icon's application, therefore producing an embodiment meeting Icon's claims."). Thus, the evidence demonstrates clearly and convincingly, and it is a finding, that all of the limitations of the asserted claims existed, in one form another, in the prior art.

Nonetheless, as discussed below in Section VII.E.2, Respondents have failed to adduce clear and convincing evidence of a motivation to combine Peev or Nagayoshi with (Clear Spheres or Spit Balls). Even if there was evidence that a person of ordinary skill in the art would have been motivated to combine the offered prior art and would have had a reasonable expectation of success in doing so, as discussed below in Section VII.F, sufficient objective evidence of non-obviousness exists to rebut such a finding.

[32] When she testified during the Hearing on May 22, 2023, Dr. Maureen Reitman was the Group Vice President and Principal of Exponent Engineering & Scientific Consulting. (RPSt. at Ex. A.). Respondents identified Dr. Reitman as an expert to testify about, *inter alia*, "the background of the technology, non-infringement of the accused products, Complainants' alleged domestic industry products, and invalidity of the asserted patents." (RPSt. at 5.). Dr. Reitman was accepted without objection during the Hearing as an expert for the topics upon which she was called to testify. She is a person of ordinary skill in the art as described in the *Markman* Order.

2. Respondents Failed to Show that One of Ordinary Skill Would Be Motivated to Combine Peev or Nagayoshi with Clear Spheres or Spit Balls

Respondents argued that as of the priority date, a person of ordinary skill in the art in reviewing Peev and Nagayoshi "knew about the injury problem caused by airsoft guns." (RBr. at 48.). Respondents contended that in order to make airsoft guns safer, one of ordinary skill would have been motivated to make the ammunition softer, and would have had the technical ability to combine available SAP ammunition (Spit Balls and Clear Spheres) with Peev and Nagayoshi. (*Id.* at 2, 48.). Despite the finding that each of the limitations of the asserted claims was disclosed in the prior art, as discussed above in Section VII.E.1, Respondents' analysis with respect to a motivation to combine the prior art is problematic for the following reasons.

First, *KSR* assumes a starting reference point or points in the art, prior to the time of invention, from which one of ordinary skill in the art might identify a problem and pursue potential solutions. Here, it is not clear from the record that a person of ordinary skill would even likely start with an airsoft gun (or reference). For example, Complainants' expert, Dr. Kudrowitz, provided the following testimony during the Hearing:

> From how I understand this, Mr. Delman says that these claims are not valid and it would be obvious based on combining two patents related to Airsoft ***guns***, Peev and Nagayoshi, with two science ***toys*** [Spit Balls and Clear Spheres]. And I don't agree with that obviousness assessment. Peev and Nagayoshi are both about taking Airsoft guns and trying to make them ***more*** like real firearms. And if you put SAP in Airsoft guns, it makes them ***less*** like Airsoft guns.

(Tr. (Kudrowitz) at 455:22-456:5 (emphases added).).

Moreover, Respondents' expert, Mr. Delman, agreed that projectile launchers could take many other forms that do not include airsoft gun firing mechanisms. (Tr. (Delman) at 268:12-269:12 (concurring that a projectile launcher could be many things, including a spoon, catapult,

sling shot, bow and arrow, a ping pong racket, a Jai Alai Cesta, or a human hand).).

Second, Respondents have not proven that there was aa motivation to combine the cited prior art even with the assumed starting point of an airsoft gun (or reference). Mr. Delman identified the following two "safety" concerns as providing the alleged motivation to combine prior art that identifies harder projectiles with those that are softer: (i) risk of eye injury (Tr. (Delman) at 282:16-19); and (ii) the possible breakage of skin when muzzle velocity exceeds 350 feet per second ("FPS") (*id.* at 274:20-275:23).[33] Neither concern is adequate.

Respondents did not provide any evidence that shooting SAP projectiles instead of plastic airsoft ammunition would reduce the risk of eye injury. Indeed, Mr. Delman acknowledged that persons familiar with airsoft guns would have recognized that it is unsafe to use airsoft guns without protective eyewear. (Tr. (Delman) at 280:14-23.). Respondents also failed to explain why SAP ammunition would reduce the risk of eye injury compared to airsoft ammunition, if persons using airsoft guns are already wearing protective eyewear. Even if airsoft users were not wearing protective eyewear, there is no evidence that SAP ammunition would provide a safety improvement: the Accused Products themselves include protective eyewear and legal disclaimers that recommends the use of protective eyewear. (Tr. (Delman) at 283:9-21; CX-0323.0003 (Nebula Pro Instructions stating that, in all caps, "EYE PROTECTION SHOULD BE WORN DURING PLAY, WHETHER SHOOTING OR OBSERVING").).

Additionally, the proposed combinations do not solve the "breakage of skin" problem that Respondents alleged. Articles Mr. Delman cited state that the breakage of skin occurs at a

[33] Mr. Delman defined "muzzle velocity," at a high level, as "the speed at which the ammunition exits the muzzle of the gun." (Tr. (Delman) at 275:24-276:2.).

muzzle velocity of ***350 FPS or higher***. (Tr. (Delman) at 275:9-19; CX-0584.0003.). Low powered, youth-focused airsoft guns, such as the Daisy AirStrike 470 that Mr. Delman tested, have a much lower maximum muzzle velocity, e.g., 160 FPS.[34] (Tr. (Delman) at 279:21-280:6; CX-1169.0001 (Daisy AirStrike 470 Manual).). He agreed that "the Daisy AirStrike 470 operates similarly to the Peev and Nagayoshi references." (Tr. (Delman) at 280:7-10.). As Dr. Kudrowitz testified, because there would be little, if any, concern with breakage of skin with such low-powered airsoft guns in the first place, Respondents' contention that one of ordinary skill would be motivated to combine the teachings of Peev/Nagayoshi with another ammunition type for "skin breakage" safety reasons, or to prevent skin breakage, rings hollow.

> Q. Turning to slide 32, what is problematic with Mr. Delman's modification?
>
> A. Well, Mr. Delman says that the motivation to use SAP in the Airsoft is that there's a problem with breakage of skin, but he is referencing all of these articles that say ***breakage of skin happens at above 350-feet-per-second muzzle velocity***. ***But he is not saying that we should modify those adult ones. He is saying that we should modify the youth line, or the ones that already don't break skin.***
>
> And so there's -- yeah, I guess, ***what's the motivation if they already don't break skin***.

(Tr. (Kudrowitz) at 434:16-435:7 (emphases added).).

Respondents attempted to expand their explanation of the safety motivation to combine the cited references for the first time in their Initial Post-Hearing Brief where they state that the safety motivation is "to reduce all injuries, not just breakage of the skin." (RBr. at 77.). However, as Complainants pointed out, when Complainants tried to explore other types of

[34] Dr. Kudrowitz testified that based on Mr. Delman's opening expert report, there are two (2) types of airsoft guns: (i) low-powered airsoft guns designed for children; and (ii) high-powered, or adult focused, airsoft guns used for hunting, target practice, and tactical training. (Tr. (Kudrowitz) at 433:5-14; CDX-0005C.0029 (citing CX-1154C (Delman Op. Rpt.) at ¶ 391); Tr. (Delman) at 279:24-280:2 (referring to a low-powered airsoft rifle).).

injuries with Mr. Delman during the Hearing, Respondents objected, stating: "We narrowed his opinions. We narrowed his positions down to one." (Tr. (PTT Counsel) at 284:9-285:8.).

In any case, Respondents did not submit any evidence that launching SAP ammunition from an airsoft gun (i.e., at airsoft gun speeds) would "reduce all injuries" associated with airsoft guns.

In sum, Respondents failed to meet their burden to explain why one of ordinary skill in the art would have sought to combine the teachings of Clear Spheres/Spit Balls as a "safer" ammunition at low-power airsoft speeds because: (i) Respondents did not argue there was any skin breakage/injury at that speed; and (ii) Respondents presented no evidence that Clear Spheres/Spit Balls' teachings would be any "safer" at that speed.

To the extent Respondents are instead proposing to combine high-powered airsoft guns with SAP ammunition, there are additional problems with such a proposed combination. First, there are fundamental differences between airsoft guns (Peev and Nagayoshi) and the Clear Spheres and Spit Balls toys.

For example, Peev discloses an electric airsoft gun "that provides improved operational performance as well as bringing the way of functioning and manipulation of the electric airsoft gun ***as close as possible to the way of functioning and manipulation of the real firearm***." (RX-0008 (Peev) at 4 (emphasis added).). Peev indicates that "[e]lectric airsoft guns find application in the sporting gun industry and are used for military emulations or training or for fun when conducting airsoft games." (*Id.* at 3.). Likewise, although the airsoft gun disclosed in Nagayoshi is referred to as a "toy gun," Mr. Delman testified that Nagayoshi describes a realistic looking gun that looks similar to a real military M16 or AR-15. Mr. Delman's testimony is supported by Nagayoshi's descriptions of the claimed gun. (Tr. (Delman) at 273:15-17, 375:7-18.). Thus, as

Mr. Delman opined, the objective of both Peev and Nagayoshi is to simulate a real firearm, either explicitly or implicitly. (Tr. (Delman) 271:14-17, 272:4-8, 273:15-17, 273:24-274:1, 375:7-18.).

In contrast, as evidenced in the relevant product documents, Clear Spheres and Spit Balls are clearly educational/entertainment toys and were intended to be used accordingly. (CX-0082 (Jelly Marbles Activity Guide) at 1 ("Get ready to experiment with superabsorbent, super-fun, Jelly Marbles!"); RX-0002 (Back of Spit Balls Package) ("Exact revenge on co-workers or classmates!").).

Second, as Dr. Kudrowitz testified, modifying an airsoft gun (Peev and Nagayoshi) to shoot Clear Spheres or Spit Balls would destroy the basic purpose of an airsoft gun. *See Trivascular, Inc. v. Samuels*, 812 F.3d 1056, 1068 (Fed. Cir. 2016) (finding no motivation to modify the prior art where doing so "would destroy the basic objective" of the prior art); *Medtronic, Inc. v. Teleflex Innovations S.à.r.l*, 69 F.4th 1341, 1349-50 (Fed. Cir. 2023) ("*Medtronic I*"). In other words, the combination would render the airsoft gun useless for hunting, target practice, and airsoft games.

> Q. Turning to slide 26, what would happen if you changed the ammunition to the Airsoft gun?
>
> A. Yeah, if you put SAP in an Airsoft gun, it sort of conflicts with the intent or the purpose of these Airsoft guns. So you can't -- you could no longer use it for hunting, they become less accurate, and then you can't use them for target practice.

(Tr. (Kudrowitz) at 432:1-7; *see also id.* at 431:20-25 (using Clear Spheres or Spit Balls in an Airsoft gun "would change the use of the Airsoft gun. The intent is to be like a real gun.").).

Respondents' reliance on *Intel Corp. v. Qualcomm Inc.*, 21 F.4th 784, 800 (Fed. Cir. 2021) that the "intended purpose of [the prior art] does not control" is misplaced. (RBr. at 18, 81.). In *Medtronic I*, the Federal Circuit distinguished its holding in *Intel Corp.*, holding

evidence that a proposed modification would interfere with a reference's stated purpose ***is relevant*** when assessing obviousness. Clarifying its holding in *Intel Corp.*, the Federal Circuit explained:

> We did ***not*** hold . . . that a proposed modification's destruction of a device's primary purpose is ***always legally irrelevant to obviousness***. Such a conclusion is equally at odds with common sense and gives in to the very hindsight bias the obviousness inquiry is designed to avoid. Indeed, we have held it was ***error*** for the Board to ***ignore*** evidence that a proposed modification would interfere with a reference's stated purpose.

Medtronic I, 69 F.4th at 1349 (emphases added).

Even assuming, *arguendo*, that a person of ordinary skill in the art would had been motivated to make airsoft guns safer, it is not clear whether one of ordinary skill would have focused on ***softer ammunition*** as the solution. (RBr. at 50.). As discussed above, the materials Mr. Delman cited in his expert report indicate that safety concerns with airsoft guns were the result of ***high muzzle velocity***, not the result of hard ammunition. (Tr. (Kudrowitz) at 433:18-434:15; RX-0841.0003 (Airsoft Guns: A Double-Edged Sword) ("Airsoft guns can shoot these rounds at velocities up to 450 feet per second (the legal limit). While this may not seem dangerous, it can be enough to crack the skin and cause minor bleeding."); CX-0584.0003 (Washington Post Article – "Not Your Dad's BB Gun") ("The Youth Line guns . . . fire BBs or pellets at a velocity of less than 350 fee per second. . . . The Power Line Guns . . . often more than double the Youth Line velocities."); CX-0583.0001 (WebMD – BB, Pellet, Paintball Guns Dangerous to Kids) ("Most nonpowder guns have a projectile velocity of between 350-450 feet per second, whereas regular firearms have a velocity of 750-1,450 feet per second"); RX-0834.0005 (Pellet Guns and BB Guns: Dangerous Playthings in the Open Market) ("Pellet guns are on the market today with projectile impact power often exceeding that of conventional

firearms.”).).

None of the cited articles or reports teach or suggest that using an alternative, softer ammunition would alleviate safety concerns with airsoft guns. As Complainants pointed out, if anything, the materials Mr. Delman cited suggest that a skilled artisan would focus on safety improvements by lowering muzzle velocity to improve safety, rather than altering the composition of the ammunition. (CRBr. at 20.).

In addition, Mr. Delman acknowledged that there were other ways to enhance the safety of airsoft guns than changing the composition of the ammunition, which also undermine Respondents’ proposed combinations. (Tr. (Delman) at 277:23-278:2 (“Q. Those are all viable techniques to reduce the number of injuries that would be inflicted by an airsoft gun, fair? A. Yes[.]”).). Specifically, Mr. Delman testified that: (i) the players themselves could stand farther apart (*id.* at 276:3-19, 277:1-4); (ii) manufacturers could reduce muzzle velocity (*id.* at 277:5-9, 280:11-13); (iii) airsoft guns could use weaker springs (*id.* at 277:10-15); and (iv) the airsoft guns could use a smaller ratio between the compression chamber and the acceleration tube (*id.* at 277:19-22). Neither Respondents nor Mr. Delman explained why one of ordinary skill would seek to modify the composition of the ammunition, rather than to modify the components of the airsoft guns themselves.

For the foregoing reasons, Respondents did not present clear and convincing evidence of any motivation to combine Peev or Nagayoshi with Clear Spheres or Spit Balls. *See Alexsam, Inc. v. IDT Corp.*, 715 F.3d 1336, 1347 (Fed. Cir. 2013) (defendant bore the burden of proving motivation to combine by clear and convincing evidence).

3. Respondents Presented Evidence that One of Ordinary Skill Would Have Had a Reasonable Expectation of Success

Although Respondents failed to demonstrate that a person of ordinary skill would have been motivated to combine the prior art references, as addressed above in Section VII.E.2, in the event that one of ordinary skill would have had such a motivation, Respondents presented sufficient evidence that one of ordinary skill would have had a reasonable expectation of success in doing so.

Respondents' experts, Mr. Delman and Dr. Reitman, agreed that replacing hard plastic projectiles in an airsoft gun with soft SAP projectiles was well within the technical grasp of a skilled artisan as of 2009. Mr. Delman testified that one of ordinary skill would have known that airsoft guns could be easily adjusted and that the SAP projectiles were also easily adjustable.

> Q. Was there a reasonable expectation of success?
>
> A. Yes. We know that airsoft guns can be easily adjusted should you need to make any adjustments to make this work, and we also know, as we've discussed, both from the description on the back of Spit Balls, from Steve Spangler's testimony, and from my conversations with Dr. Reitman that SAPs are easily adjusted. You can make them bigger. You can make them smaller. You can make them harder, softer, less durable, et cetera.

(Tr. (Delman) at 218:25-219:8.).

With respect to airsoft guns, Mr. Delman explained that a person of ordinary skill in the art could change the spring pressure to avoid any premature breakage of SAP projectiles. (*Id.* at 219:16-220:9.). Alternatively, he explained that one of ordinary skill could change the size of the air compression chamber to regulate the amount of force that would be exerted on the SAP projectiles. (*Id.* at 219:9-220:21.).

On cross-examination, Complainants' expert, Dr. Kudrowitz, agreed that in 2009, it was within the technical grasp for a skilled artisan to modify airsoft guns to launch soft SAP

projectiles in place of hard plastic spheres.

> Q. Sure. In 2009 was it within the technical grasp of a person of ordinary skill in the art to ***modify Airsoft guns such as Peev to launch soft SAP projectiles*** in place of the hard plastic spheres that the Airsoft guns used?
>
> A. I see. If someone was asked to do so, ***they would have the ability to do that***.
>
> Q. It was in their technical skills to do that, correct?
>
> A. Sure.

(Tr. (Kudrowitz) at 532:15-23 (emphases added).).

Dr. Kudrowitz's direct testimony that he was unable to shoot ***unmodified*** soft SAP projectiles from ***unmodified*** airsoft guns is irrelevant (*id.* at 438:22-440:12), since Dr. Kudrowitz agreed on cross-examination that a person of ordinary skill would have the technical skills to make the necessary modifications (*id.* at 532:15-23.).

Mr. Delman relied on Dr. Reitman to opine that it would be easy to change the SAP material, instead of making these changes to the airsoft gun.

> Q. . . . What if I didn't want to make any changes to the airsoft gun, I didn't want to change the pressure, I didn't want to change the chamber, what other options would I have?
>
> A. Well, if we take a look at the next slide, again, Dr. Reitman has provided all the guidance that a POSITA would need to understand that, if you didn't want to change the gun, you could easily change the SAP material.
>
> So a POSITA would be able -- reading from Dr. Reitman's report now at paragraph 106, Exhibit RX-0580 -- a POSITA would be easily able to achieve different material properties and physical characteristics for SAP ammunition, including adjustments to desired size of the hydrated SAP and adjustments to the strength and durability of the SAP before 2010. These would all be routine adjustments that would not require extensive effort.

(Tr. (Delman) at 220:24-221:15.).

Dr. Reitman confirmed that she agreed with Mr. Delman's opinions when she testified during the Hearing. (Tr. (Reitman) at 400:10-403:3 (explaining techniques known prior to 2010

for making spherical SAPs), 403:4-404:19 (explaining techniques known prior to 2010 for adjusting the size of SAPs), 404:20-408:22 (explaining techniques known prior to 2010 for adjusting the softness and stiffness of SAPs).).

Again, on cross-examination, Dr. Kudrowitz agreed with Mr. Delman and Dr. Reitman, and acknowledged that as of 2010, a person of ordinary skill would have known how to make a SAP projectile (like Clear Spheres and Spit Balls) that is spherical and soft, and would fit inside a airsoft gun.

> Q. So as of 2010, a person of ordinary skill in the art knew how to make ***a SAP projectile that's spherical and soft that would fit inside a Airsoft gun***, correct?
>
> A. Those didn't exist at the time, but I think ***a person of ordinary skill would be able to make one, if you asked them to***.

(Tr. (Kudrowitz) at 529:21-530:12 (emphases added).).

Moreover, Dr. Kudrowitz conceded that if one of ordinary skill hydrated a Clear Spheres for 30 seconds so as to achieve a size of 6 mm and at that size, but found that the Clear Spheres was too firm, then he/she could rely on a chemist to adjust the softness while maintaining the 6 mm size.

> Q. And if we can put up slide CDX-0005C.23. Do you recall talking about this slide this morning?
>
> A. Yes.
>
> Q. And you testified that the ***Clear Spheres at 6mm is not soft***; isn't that right?
>
> A. Yes.
>
> Q. And then you cited to some testimony from Mr. Delman saying that it was fairly firm at that size. Do you ever recall that?
>
> A. Yes.
>
> Q. But you agree that ***a person with a bachelor's degree in chemistry would be able to adjust the softness of the SAP projectile***, correct?

A. ***If they were asked to do so, they would be able to do that***.

(Tr. (Kudrowitz) at 539:10-25 (emphases added).).

Thus, both Complainants' and Respondents' experts agreed that replacing hard plastic projectiles in an airsoft gun with soft SAP projectiles of the appropriate size and softness was well within the technical grasp of a person of ordinary skill in the art as of 2009, and that he/she would have had a reasonable expectation of success in doing so.

F. Secondary Considerations of Non-Obviousness

1. Legal Standard

The Federal Circuit "has repeatedly explained, [that secondary consideration evidence] is not just a cumulative or confirmatory part of the obviousness calculus but constitutes independent evidence of nonobviousness." *Ortho-McNeil*, 520 F.3d at 1365. "In fact, objective consideration of simple technology is often the most difficult because, once the problem and solution appear together in the patent disclosure, the advance seems self-evident. Instead, the proper analysis requires a form of amnesia that 'forgets' the invention and analyzes the prior art and understanding of the problem at the date of invention." *Mintz v. Dietz & Watson, Inc.*, 679 F.3d 1372, 1379 (Fed. Cir. 2012).

2. Secondary Considerations Overview

Even assuming, *arguendo*, that Respondents had made a *prima facie* showing that the Asserted Patents are obvious in view of the prior art, Complainants adduced sufficient objective evidence of non-obviousness to rebut Respondents' showing. For the following reasons, Complainants offered persuasive evidence that Hasbro's DI Products: (i) were a commercial success; (ii) garnered industry praise; (iii) were copied by competitors; and (iv) and that other had failed in producing the same products. Respondents offered some evidence that there was a

simultaneous invention that was moderately persuasive.

3. Complainants Presented Evidence of Commercial Success

The Maya Group's sales of the Xploderz and Blaster Pro products (collectively, "Xploderz") provide objective evidence it was not obvious to a person of ordinary skill in 2010 to combine elements of the prior art to arrive at the claimed inventions.[35] (*See* Tr. (Kudrowitz) at 440:13-441:2, 447:25-450:21.).

a) Background

In late 2010/early 2011, when the Maya Group owned the Asserted Patents,[36] they launched a new "blaster" product line called Xploderz that fired "Xploderz Ammo," also described as ammo with "H2GROW" technology. (Tr. (Julia Rowe)[37] at 609:16-21; Tr. (Kudrowitz) at 449:6-20; CX-0518.0001; CX-1634C (Oded Ben-Ezer Dep. Tr.)[38] at 280:2-21; CPX-0035; RX-0417.). A photograph of the Xploderz product is shown below in Figure 10.

[35] Physical samples of Xploderz product include: CPX-0032 – CPX-0069 and CPX-0072 – CPX-0074. Documents describing Xploderz include: CX-0517, CX-0518, CX-0531C, CX-0552, and CX-1179.

[36] *See* Section III.B, *supra* (discussing assignment and ownership of the Asserted Patents).

[37] When she testified during the Hearing on May 23, 2023, Ms. Julia Rowe was a Managing Director of Kroll. (RPSt. at Ex. C.). Respondents identified Ms. Rowe as an expert to testify about, *inter alia*, "the economic prong of the domestic industry requirement commercial success, remedy, and bond." (RPSt. at 6.). Ms. Rowe was admitted without objection during the Hearing as an expert for the topics upon which she was called to testify.

[38] Mr. Oded Ben-Ezer, the Founder of the Maya Group, was deposed on December 13, 2022. (CX-1634C (Ben-Ezer Dep. Tr.) at 12:21-13:1.).

Figure 10: Maya Group's Xploderz

(CPX-0035.).

The Xploderz ammunitoin were spherical beads of super-absorbent polymer, as claimed in the Asserted Patents. (Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 4; RX-0415; CX-1634C (Ben-Ezer Dep. Tr.) at 280:2-21; Tr. (Kudrowitz) at 445:1-9.). From Xploderz, multiple line extensions were produced, including an original generation, X2 series, Blaster Pro series, X3 series, and a Firestorm series. (Tr. (Kudrowitz) at 450:1-8; Tr. (Lynn Ann Rosenblum)[39] at 566:7-568:9; RX-3312.0003; RX-3313.0001; RX-3314.0002-3; RX-3315.0003-4; RX-3316.0001; CX-1634C (Ben-Ezer Tr.) at 152:12-155:12.).

b) The Xploderz Practiced the Asserted Patents

Respondents stipulated that Xploderz "meet all limitations of Claims 1, 8, 19, and 20 of the '282 Patent and all limitations of Claims 1 and 5 of the '683 Patent, as construed by the

[39] When she testified during the Hearing on May 22, 2023, Dr. Lynn Ann Rosenblum was a full-time Professor of Toy Design at Otis College of Art and Design in Los Angeles. (Tr. (Rosenblum) at 557:16-18.). Complainants retained Dr. Rosenblum as an expert to testify about the commercial success of Xploderz. (Tr. (Rosenblum) at 557:19-20; *see also* RPSt. at 7.). Dr. Rosenblum was accepted without objection as an expert for the topics upon which she was called to testify during the Hearing.

ALJ." (Doc. ID No. 796787 (Stip. Regarding Prior Art) at ¶ 4.). Dr. Kudrowitz also testified that Xploderz practiced the Asserted Patents. (Tr. (Kudrowitz) 441:14-442:8.).

The Xploderz products launched hydrated spherical SAP beads. (Tr. (Rowe) at 609:16-21; Tr. (Kudrowitz) at 449:6-20, 441:14-442:8; RX-0405; RX-0406; RX-0407; RX-0409; RX-0415; RX-0416; RX-0417, CPX-0044; CPX-0041, CPX-0042, CPX-0043; CPX-0055; CPX-0062; CPX-0064, CPX-0070 CPX-0071; CPX-0074; CX-0677; CX-1634C (Ben-Ezer Dep. Tr.) at 280:2-21; RX-0137C (Ronald Brawer Dep. Tr.)[40] at 80:12-81:4.).

The Xploderz products also included a feeding chamber that loads the ammunition into a firing position. (*See* CPX-0032-69; CPX-0070-74; Tr. (Kudrowitz) at 441:14-442:8.).

Additionally, the firing mechanism of the Xploderz had a piston, air compression chamber, and a spring to bias the piston from a cocked position to rest position. (CPX-0032; CPX-0035; CPX-0036; CPX-0037; CPX-0038; CPX-0033; CPX-0047; CPX-0040; CPX-0052; CPX-0039; CPX-0034; CPX-0063; CPX-0048; CPX-0049; CPX-0050; CPX-0051; CPX-0061; CPX-0059; CPX-0060; CPX-0064; CPX-0062; Tr. (Kudrowitz) at 441:14-442:8.). There was also a smaller diameter tube in communication with the air compression chamber. (*Id.*). These features allowed the Xploderz to use air pressure to project the ammunition in free flight. (*Id.*).

c) The Xploderz Were Commercially Successful

The Maya Group enjoyed more than $35 million in sales and sold more than 3.7 million units of Xploderz to retailers during 2011-12. (CX-0165C; Tr. (Kudrowitz) at 449:6-20; Tr. (Rosenblum) at 564:6-17; CX-1634C (Ben-Ezer Dep. Tr.) at 147:1-148:2, 266:18-268:3.).

[40] Mr. Ronald Brawer, the Founder of Hobbeezone, Inc., ("Hobbeezone") was deposed on March 31, 2023. (RX-0137C (Brawer Dep. Tr.) at 21:1-6.). Mr. Brawer joined the Maya Group when Hobbeezone and the Maya Group merged. (*Id.* at 23:12-17.). Additionally, he is a named inventor of the Asserted Patents. (*See* JX-0001 at (75); JX-0002 at (72).).

Overall sales over the life of the products were approximately $50 million. (CX-1634C (Ben-Ezer Dep. Tr.) at 275:11-14.).

The Xploderz were sold at large retailers like Amazon, Kmart, Target, Toys "R" Us, and Walmart, among others. (CX-0165C; Tr. (Rosenblum) at 564:18-21 ("Q. Where were the Xploderz sold? A. So all the major places that basically sold toys -- Target, Walmart, Toys 'R' Us, those kinds of stores. Really the big, the big ones.").). As Staff noted, and industry expert, Dr. Rosenblum, confirmed, for a new market entrant like the Maya Group to get Xploderz on the shelves of major retailers was impressive and signifies additional evidence of commercial success. (SBr. at 38.).

> So I think the way to explain this is to think about Maya Group at the time. It was a relatively new company, these parties coming together to form a company, and then beyond that they had no awareness, no product whatsoever in the blaster category. And so they didn't have that going for them. Now certainly I know some relationships happen and they may get you that phone call or even that meeting, but to have a product where you get it in the door, you have a meeting, you get an order, and then you go literally from zero to, you know, two million units in a year, that, like, just doesn't happen. So, again, that's I really think the commercial success and how impressive it was to get in with these retailers.

(Tr. (Rosenblum) at 564:25–565:16.). *See also ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 546 (Fed. Cir. 1998) ("It was undisputed that the product met an unsolved need and was quickly adopted by the automotive industry, this commercial success also weighing against obviousness.").

Reiterating Mr. Brawer's deposition testimony, Dr. Kudrowitz testified that Xploderz was the "number one selling boy toy product for Target" when it was launched. (Tr. (Kudrowitz) at 448:2-8; RX-0137C (Brawer Dep. Tr.) at 299:8-300:4.). Indeed, Respondent PTT's CEO, Mr. Chia, testified that "[w]hen the [Xploderz] product came out, and you walked the stores, you cannot not see the product." (CX-1639C (Chia Dep. Tr.) at 83:18-84:7.). In one year, the Xploderz grew to a 3.2% blaster market share in 2011. (Tr. (Rosenblum) at 570:9-21;

CX-0531C; CX-0165C; RX-0132C (John Tomulonis Dep. Tr.)[41] at 126:16-20; RX-0114C (Barros Dep. Tr.) at 67:3-70:10.).

The Xploderz products were on the market until about 2015. (CX-1634C (Ben-Ezer Dep. Tr.) at 232:19-233:9.). As Drs. Kudrowitz and Rosenblum explained, the length of the Xploderz product lifecycle, and the multiple line extensions, strongly indicate that they were a commercial success.

> Q. . . . Have you observed any other reasons that indicate commercial success?
>
> A. Sure. Yeah, there were four line extensions on The Maya Group blaster. And so if --you know, people -- you know, for several years, they made new blasters, and this says that the consumers wanted them and the stores wanted them too. If it wasn't successful, they wouldn't keep putting out new product line.

(Tr. (Kudrowitz) at 450:1-8.).

> Q. . . . [C]ould you tell the Court what a line extension is?
>
> A. So a line extension, you have to think about just how it sounds. If a toy company has a successful line, you want to extend it, you want to keep it going, you want to keep those dollars going, you want to keep your shelf space, you want to add more products. So you do what are called line extensions.
>
> * * *
>
> The point is it's an investment when you do a line extension. And you don't make that investment in the toy industry, in a small company, relatively, to a Mattel or some other large company, when you have, you know, you only do it when you have a successful line you want to keep it going and you're going to make those investments in the future.
>
> Q. Did Xploderz have any line extensions? A. Yes, it had many line extensions.
>
> * * *
>
> Either way you're making an investment in your line. You're putting more costs, more time into it. So when I see line extensions, extensive, over a four-year period,

[41] Mr. John Tomulonis was deposed on December 14, 2022. (RX-0132C (Tomulonis Dep. Tr.).). Hasbro, Inc. identified Mr. Tomulonis as a corporate designee to testify on its behalf. (*Id.* at 11:3-6.).

I know that brand has been successful for the toy industry.

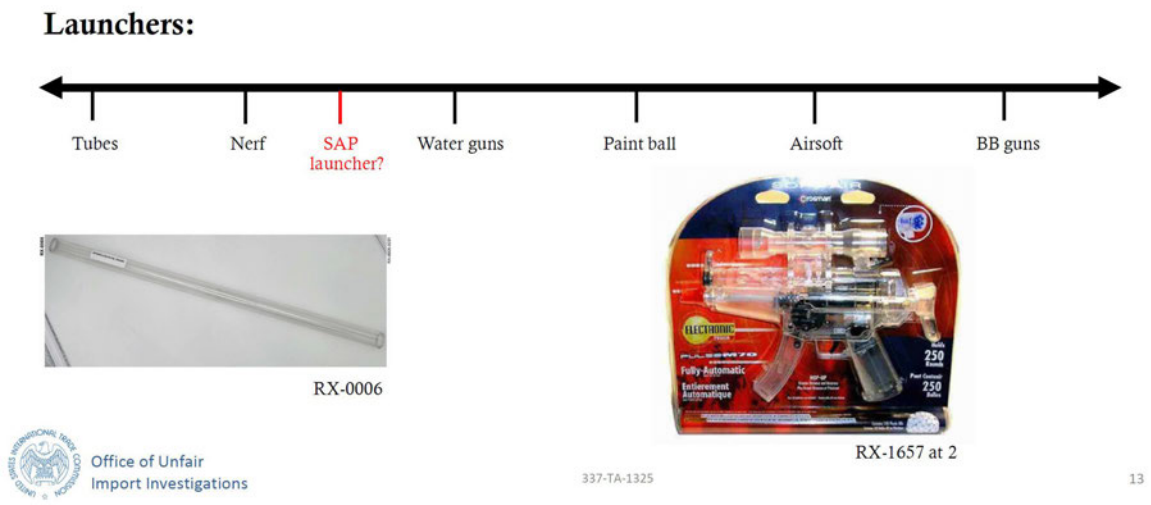
(Tr. (Rosenblum) at 566:7-567:2, 568:5-9.).

The commercial success of Xploderz is also evidenced by the creation of an entirely new product segment, i.e., blasters that shoot SAP ammunition, within the blaster category. (Tr. (Rosenblum) at 546:3-7, 568:10-569:20; CX-0173C.0003 (Splat-R-Ball Spring 2022); RX-0132C (Tomulonis Dep. Tr.) at 126:16-127:19; CX-1631C (Thomas Roeder Dep. Tr.)[42] at 87:17-88:8.). Former respondent Splat-R-Ball agreed that blasters that shoot SAP ammunition was a "new category." (CX-0173C.0003; CX-1631C (Roeder Dep. Tr.) at 87:17-88:8; *see also* CX-0173C.0004 (depicting "new category" as what "Bridges the Gap Between NERF and Shooting Sports").). Although every claim element may have been individually known in the prior art, the combination was not. (*See* Tr. (Rosenblum) at 562:13-19 (Xploderz "created a brand-new category in the toy industry. It was not something that had been seen before. It was not something retailers had seen before.").). Therefore, the Xploderz product represented a new category of toy guns.

During the Hearing, Staff presented a demonstrative that depicted the vast range of products that project or launch projectiles and that existed before the SAP launchers, i.e., from toy tubes that launch, for instance, spit balls, to airsoft guns and BB guns geared toward more mature consumers. Staff placed SAP launchers between NERF products and water guns. Staff's demonstrative is replicated below in Figure 11.

[42] Mr. Thomas Roeder was deposed on December 7, 2022. (CX-1631C (Roeder Dep. Tr.).). At the time of his deposition, Mr. Roeder was the Chief Financial Officer of BRS Air Device Holdings, the company that owns, *inter alia*, former respondents Splat-R-Ball, LLC and Daisy Manufacturing Co. (*Id.* at 13:7-14:1.).

Figure 11: Staff's Demonstrative of Launchers



(SDX-0001C at 13.).

Although Staff's demonstrative is not adopted *per se* by this decision, the type of products that existed in the "blaster category" before the Maya Group began selling the Xploderz product appears to corroborate the novelty of the product's features, that is, a launcher that projects or shoots out SAPs.

Respondents' attempt to undermine the Xploderz sales data and their commercial success is not convincing. At the start of the product's launch in early 2011, in the first 30 days, "10, 20 thousand, not more than that" number of blasters had to be exchanged due to a production issue. (RX-0137C (Brawer Dep. Tr.) at 73:11-74:17.). This was a "small recall" compared to the millions sold overall. (Tr. (Rowe) at 625:18-627:7; CX-0165C.). Mr. Brawer testified that recalled blasters were replaced. (RX-0137C (Brawer Dep. Tr.) at 122:12-14.). Even if all sales in the first 30 days of 2011 were cancelled out, the gross revenue for the Xploderz would be reduced by only $800,000. Even with that reduction, there were more than $30 million in sales of Xploderz blasters between 2011-2012. (Tr. (Kudrowitz) at 449:6-20; Tr. (Rosenblum) at

564:6-17; Tr. (Rowe) at 626:19-627:7.). Additionally, there was no problem with returns of defective blasters. According to unrebutted testimony, the evidence of the product's return rate was in line with the return rate of the toy industry as a whole. (RX-0137C (Brawer Dep. Tr.) at 209:15-209:19; CX-1634C (Ben-Ezer Dep. Tr.) at 277:1-277:4.). Even removing returns from sales, the Xploderz were commercially successful. (Tr. (Rowe) at 625:8-16 (agreeing that if "returns were the worst case of 5 percent," sales would be reduced from $32.8 million to $31.2 million).).

d) The Xploderz Commercial Success Was Because of the Patented Technology

The Xploderz' commercial success was directly due to the claimed invention. (Tr. (Kudrowitz) at 442:14-443:11, 446:3-447:6, 450:9-21, 474:9-14, 493:1-497:16, 498:11-14, 501:11-502:14, 503:22-504:12, 505:1-506:8; Tr. (Rosenblum) at 568:14-23, 574:4-576:12, 581:17-582:10.). In focus groups, boys preferred the Xploderz product with their ability to project the ammunition a greater distance and with more ammo over comparison products such as NERF. (RX-0137C (Brawer Dep. Tr.) at 57:2-7, 84:5-10, 265:3-270:18; RX-3330C.0003-4 ("The most important features are 'shoots twice as far' as comparable products (i.e. Nerf) and 'Can hold 100 rounds in the magazine.['']"); *see also* Tr. (Rosenblum) at 563:9-20.). As Drs. Kudrowitz and Rosunblum repeatedly pointed out, the benefits of the blasters' capacity to project greater distances and more ammunition, are benefits that resulted directly from practicing the asserted claims. (Tr. (Kudrowitz) at 442:14-443:11, 446:21-447:6, 450:9-21, 474:9-14, 493:1-497:16, 498:11-14, 501:11-502:14, 503:22-504:12, 505:1-506:8; Tr. (Rosenblum) at 568:14-23, 574:4-576:12, 581:17-582:10.).

First, the combination of the claimed blaster with the claimed ammunition, as embodied

in the Xploderz line, resulted in ammunition that flew faster, farther, and straighter than the foam ammunition used during the 2010-2012 timeframe. (Tr. (Kudrowitz) at 442:25-443:11 ("[A]sserted claims [19 and 20] relate to a piston that's spring-loaded that compresses air and transfers it to a small-diameter tube, which launches the SAP. And the range that you can get here is directly a result of those asserted claim components"), 446:3-447:6 (referring to the asserted claims, "the firing distance . . . is directly related to that firing mechanism that can -- with the spring, the air compression chamber, the smaller-diameter tube -- that can get that SAP to reach that distance"), 497:9-16, 498:11-14, 501:11-502:14; CX-1634C at 287:22-288:22.).

Inventor Ron Brawer testified that "the use of the SAPs as the ammunition" was "by far the most important thing" in "enabl[ing] the Xploderz products to shoot twice as far as comparable NERF products." (RX-0137C (Brawer Dep. Tr.) at 267:2-6.). In other words, it was the claimed Xploderz blaster with the claimed Xploderz ammo that enabled the Xploderz line to shoot "twice as far as comparable NERF products." (*See id.*).

Respondents inaccurately portrayed Mr. Brawer's testimony as suggesting that it was the use of SAPs in a vacuum—divorced from the claimed blaster—that enabled the Xploderz ammo to achieve astounding distance. (RPBr. at 84.). As Complainants argued compellingly, and with support, that is not the case. Mr. Brawer's compelling testimony, which was consistent with contemporaneous evidence of the time, is clear that it was the use of SAPs that "enable[d] the Xploderz products to shoot twice as far," and it is undisputed that the Xploderz loaded and fired SAP using the mechanisms recited in the asserted claims. (*See* RX-0137C (Brawer Dep. Tr.) at 267:2-6.).

Second, the claimed Xploderz ammuniton in conjunction with the feed chamber (as directly claimed in '282 claim 8 and '683 claim 5) allowed more Xploderz SAP ammunition

rounds to be stored onboard the launcher and loaded for firing with minimal actions by the user, which was an advantage over existing blasters. (Tr. (Kudrowitz) at 446:3-12 ("70 rounds per second. And this is related to being to have a feed chamber that can hold that large amount of ammo and then feed it into the blaster"), 479:16-17 ("[T]he claims discuss a feed chamber, which is what allows you to hold lots of ammo."), 497:4-16, 504:18-21 (Dr. Kudrowitz agreeing that "the use of SAP as ammunition was" part of "what enabled the Xploderz products to hold more ammo in the magazine"), 503:22-504:12 ("The use of SAPs as ammunition in a blaster" is what "enabled the Xploderz products to hold more rounds of ammunition in the magazine."); RX-0137C (Brawer Dep. Tr.) at 268:2-8; CX-1634C (Ben-Ezer Dep. Tr.) at 288:6-13; *see generally* CPX-0035 ("More ammo. More distance"); CX-0167 at 0:00:15-18 ("More ammo. Clip holds 70 rounds.").).

Even if features are "individually known" in the prior art, there is a "nexus where the [objective indicia] evidence was 'tied to the ***combination*** of features as a whole' and the ***combination*** was not previously known." *Medtronic, Inc. v. Teleflex Innovations S.à.r.l.*, 70 F.4th 1331, 1337 (Fed. Cir. 2023) ("*Medtronic II*") (emphases added) (citation omitted). The Federal Circuit noted that the PTAB properly credited testimony showing that "[w]hen the various features of the prior art were combined to form the [product embodying the claims] . . . the result was a new, market-making, commercially successful product that provided significant benefits over prior art devices, received praise in the art, and was copied by competitors." *Id.* (citation omitted). Thus, the Federal Circuit found that the PTAB properly grounded its nexus finding on a ***combination*** of features that it found were not disclosed, at least as a combination, in the prior art.

Like the facts in *Medtronic II*, here, the Xploderz patented design, i.e., the ***combination***

of the blaster mechanism as-claimed and the ammunition as-claimed, did not exist in any other prior art blaster. (RX-0137C (Brawer Dep. Tr.) at 297:7-298:10; Tr. (Kudrowitz) at 455:15-456:25, 507:16-508:12; 527:11-21; Tr. (Rosenblum) at 568:14-23.). *Medtronic*, 70 F.4th at 1337; *see also Rambus Inc. v. Rea*, 731 F.3d 1248, 1257-58 (Fed. Cir. 2013). There were many blasters available on the market that were designed differently or used different ammunition, such as by using foam darts, discs, plastic balls, or other types of projectile, as in Peev and Nagasaki. (CX-1634C (Ben-Ezer Dep. Tr.) at 287:12-289:1; RX-0137C (Brawer Dep. Tr.) at 57:2-7, 84:5-10, 265:3-270:18; RX-3330C.0003-4; Tr. (Rosenblum) at 563:9-20.). Prior to the launch of Xploderz, no other toy manufacturer had made the claimed blaster that fired the claimed SAP ammunition. (RX-0137C (Brawer Dep. Tr.) at 297:7-298:10; Tr. (Rosenblum) at 574:4-11.).

As an industry expert, Dr. Rosenblum, testified, "[a] blaster that sho[t] SAP ammunition ha[d] a unique selling proposition that differentiate[d] it from all other toys at the time." (Tr. (Rosenblum) 568:14-569:1.). The synergy of the hydrated SAP ammunition in the claimed launcher designed to hold, load, and launch such ammunition was the product differentiator between the Maya Group Blaster products and foam blasters like the NERF products, and was the reason to purchase such products. (CX-1634C (Ben-Ezer Dep. Tr.) at 287:18-289:1; 285:13-19; RX-0137C (Brawer Dep. Tr.) at 298:1-298:21; Tr. (Kudrowitz) at 455:15-456:25, 507:16-508:12; 527:11-21; Tr. (Rosenblum) at 563:9-20, 568:14-23.).

Moreover, the Maya Group touted the benefits enabled by the patented technology in its advertising and product packaging. (Tr. (Kudrowitz) at 506:15-19; Tr. (Rosenblum) at 574:16-575:6, 581:17-582:10; RX-0137C (Brawer Dep. Tr.) at 57:2-59:2 ("major benefits of our blasters"); 274:11-275:9 ("Q. Is it fair to say that all of the features of the product that you used

to create excitement in your TV advertising were directly linked to the use of SAPs as ammunition in your projectile launcher? A. Absolutely."); CPX-0035 ("More ammo. More distance."); CX-0167 at 0:00:15-24; CX-1634C (Ben-Ezer Dep. Tr.) at 100:1-19, 104:12-106:6, 287:18-289:1.). The Maya Group's commercials highlighted enhanced ballistics ("more distance: up to 85 feet"), larger ammunition capacity ("more ammo; clip holds 70 rounds"), and easy loading/firing ("Xploderz: Quickly reload and shoot"); CX-0167 at 0:00:15-24; *see also* RX-0137C (Brawer Dep. Tr.) at 62:12-64:4, 63:1-63:15, 274:11-17 ("Q. What were the features of the Xploderz product line that you promoted in the TV advertising to start to grow that brand awareness? A. . . . [D]istance was by far the number 1, the fact that we shot farther. The amount of ammo that we could carry."); Tr. (Kudrowitz) at 505:1-506:19.). The Maya Group also emphasized the firing mechanism and linked it to distance, calling it a "Power Arm" that would "pull back the spring." (RX-0137C (Brawer Dep. Tr.) at 261:12-263:4; RX-3330C.).

4. Complainants Presented Evidence of Industry Praise

The Xploderz products were praised for the features that were enabled by the asserted patent claims, including the SAP ammo and improved firing range. (Tr. (Kudrowitz) at 442:14-447:24.). The Wall Street Journal noted Xploderz' "astounding 100-foot range;"its unique ammo, "squishy blue gel balls that break apart on impact . . . made from a super-absorbent polymer [that are] safe;"and its firing mechanism, "to fire, you pull and release a spring-loaded lever." (CX-1180.0004; Tr. (Kudrowitz) at 442:14-443:11.). As Dr. Kudrowtiz opined, the Wall Street Journal praise (with other industry praise) has a nexus to the patented technology. (Tr. (Kudrowitz) at 442:14-447:24.).

First, the statements praising the "astounding 100-foot range" (CX-1180.0002) ties to the "super absorbent polymers and the mechanism pulling and releasing a spring-loaded lever . . .

that [100-foot] distance is a result of that as-claimed firing mechanism using the as-claimed ammunition." (Tr. (Kudrowitz) at 442:14-24; *see also* JX-0001 at 6:30-45.).

> Q. And just so we're clear, how did the statements with an astounding 100-foot range and you pull and release a spring-loaded lever relate to the asserted claims?
>
> A. Yes, so the asserted claims relate to a piston that's spring loaded that compresses air and transfers it to a smaller diameter tube, which launches the SAP. And the range that you can get here is directly a result of those asserted claim components.
>
> Q. And when you're referring to those asserted claim elements, you're referring to claims 19 and 20 of the '282 patent?
>
> A. Yes.

(Tr. (Kudrowitz) at 442:25-443:11.).

Second, the praise directed to the "unique ammo" reflects the invention's "plurality of soft-projectiles having the same shape, each soft projectile being formed from hydrated super absorbent polymer" that are "disposed within a feed chamber of the projectile launcher, and wherein the projectile launcher is adapted to load a soft-projectile from the feed chamber to a firing position" so that they can fired from the blaster, which is claimed in claim 8 of the '282 (and alternatively described as "the projectile launcher includes a feed chamber for loading the soft-projectiles within projectile launcher" in claim 5 of the '683 claim 5).

Specifically, the Xploderz device, with its feed chamber, allowed for repeated firing of SAP ammunition, a feature not present in alleged prior art systems. (*See* Tr. (Kudrowitz) at 446:3-447:6 ("[K]ids love Xploderz because they can shoot further and carry more ammo, and carrying more ammo relates to having a feed chamber [of '282 claim 8, '683 claim 5]. . . . And the way that you have the rapid fire or the lots of ammo is related to having a feed chamber that can hold lots of ammo.").).

In addition to the Wall Street Journal article, Popular Science listed the Xploderz X2

Retaliator among "[a] dozen good ideas in gear" and explained that "with a range of 100 feet, the Retaliator 2000 shoots farther than all other toy guns . . . the marble-size bullets . . . made of a gel-like polymer, whiz through the air like BBs," but "[g]etting shot won't hurt" because "[t]hey disintegrate upon contact." (CX-1408.0002; Tr. (Kudrowitz) at 443:12-24.). Referring to the praised benefit of a 100-foot shooting distance that was "farther than all other toy guns," Dr. Kudrowitz testified that this "is talking about . . . the ammunition as described [in the claims], being the SAP ammo, and the blaster as described by these claims being able to take the SAP and use that mechanism to launch it 100 feet," i.e., the combination of the claimed ammunition in the claimed blaster. (Tr. (Kudrowitz) at 443:16-24.).

Complainants also presented evidence that the Xploderz product received three (3) industry awards: (i) Toy Industry Association named Xploderz XBlaster 200 a finalist in the "Outdoor Toy of the Year" category (CX-1177 (Toy Industry Association News Release)); (ii) Canadian Toys "R" Us store directors selected Xploderz as their 2011 "Best Overall Toy" at ToysRUs Canada Spring Vendor Show (CX-1179 (Toys "R" Us)); and (iii) British Toy and Hobby Association named Xploderz as Best New Toy of 2011 during the London Toy Fair (CX-0518 (London Toy Fair)). With respect to nexus, a newswire publication that announced the Toys "R" Us Canada award highlighted the unique hydrated ammunition that explodes on impact: "The Xploderz line . . . features a unique and safe firing and ammo system using hydrated rounds that burst on impact." (CX-1179 (Toys "R" Us); *see also* Tr. (Kudrowitz) at 445:10-446:20 (linking the praise directly to the asserted claims).).

Lastly, statements made by the Respondents are evidence of industry praise for the patented technology introduced by Xploderz. For example, Gel Blaster described its now-licensed patent products that practice the asserted patents as "revolutionary," "superior," and

"innovations" and has highlighted them as being environmentally friendly. (CX-0019.0002; CX-0020.0001-2; CX-0022.0001.). Additionally, Splat-R-Ball recognized that its own practicing products are part of a new product category, gel blasters (CX-0173C.0003;[43] CX-1631C (Roeder Dep. Tr.) at 87:17-88:8), that has "enormous market potential" (CX-0171.0047), estimating a $10 billion market (CX-0173C.0005). Accused infringers' "recognition of the importance of this advance is relevant to a determination of nonobviousness." *Gambro Lundia AB v. Baxter Healthcare Corp.*, 110 F.3d 1573, 1579 (Fed. Cir. 1997); *see also WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1334 (Fed. Cir. 2016) ("Industry participants, especially competitors, are not likely to praise an obvious advance over the known art. Thus, if there is evidence of industry praise in the record, it weighs in favor of the nonobviousness of the claimed invention.").

5. Complainants Did Not Present Sufficient Evidence of Copying

Copying by a competitor is a relevant consideration in the objective indicia analysis and may be evidence that the patented invention is nonobvious. *See Liqwd, Inc. v. L'Oreal USA, Inc.*, 941 F.3d 1133, 1137 (Fed. Cir. 2019). However, "[n]ot every . . . product that arguably falls within the scope of a patent is evidence of copying. Otherwise[,] every infringement suit would automatically confirm the nonobviousness of [a] patent." *Iron Grip Barbell Co. v. USA Sports, Inc.*, 392 F.3d 1317, 1325 (Fed. Cir. 2004). As the Federal Circuit explained: "Our case law holds that copying requires evidence of efforts to replicate a specific product, which may be demonstrated through internal company documents, direct evidence such as disassembling a patented prototype, photographing its features, and using the photograph as a blueprint to build a

[43] "Such internal documents from the patentee's top competitor represent important admissions, acknowledging the merits of the patented advance over the then state of the art and can be used to establish industry praise." *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 839 F.3d 1034, 1054 (Fed. Cir. 2016) (en banc).

replica, or access to the patented product combined with substantial similarity to the patented product." *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1246 (Fed. Cir. 2010). For the reasons discussed below, Complainants failed to present sufficient evidence of copying by competitors. (CBr. at 41-42; RBr. at 71-73.).

Complainants' expert, Dr. Kudrowitz, testified that the PTT Respondents' Goo Shooter and Goo Spewer do not practice any asserted claims.[44] (Tr. (Kudrowitz) at 454:19-22 ("the Goo Shooters doesn't [sic] practice any of the claims of the asserted patents").). With respect to evidence that the PTT Respondents copied the Xploderz product in designing the accused Hydro Strike blasters, Dr. Kudrowitz testified that the PTT Respondents only "looked at" the Xploderz X2 and noted that PTT Respondents' "Hydro Strike blasters practice all of the asserted claims." (Tr. (Kudrowitz) at 454:10-22.). However, as Staff noted, copying must be supported by "actual evidence of copying efforts as opposed to mere allegations regarding similarities between the accused product and a patent." (SBr. at 42 (quoting *Liqwd*, 941 F.3d at 1137-38).). In other words, "copying requires the replication of a specific product." *Iron Grip Barbell*, 392 F.3d at 1325.

With regard to the "Shoot Game" blaster and "Vapor Atlas 250," Complainants did not present any evidence that the PTT Respondents had access to or duplicated the relevant features of the Xploderz product. As Respondents pointed out, Dr. Kudrowitz did not testify about either of these products. The cited testimony that Messrs. Ben-Ezer and Brawer gave about these products is, at best, speculative and conclusory. (RRBr. at 12-13.).

Mr. Brawer was not asked about, and did not testify about, the Shoot Game blaster, the

[44] Complainants did not accuse these products of infringing the Asserted Patents. (*See* Section II.C.1. *supra*.).

Vapor Atlas 250, or any specific product that is an alleged copy. Instead, he generally testified that he came across some unspecified "knockoffs," but he also admitted that at the time, he was "just a little too busy to overfocus on them." (RX-0137C (Brawer Dep. Tr.) at 300:21-302:10.).

Mr. Ben-Ezer did testify about the Razor Vapor but did not personally know whether it infringed or not. Although he stated that Mr. Brawer was "adamant that it does infringe on the patent," Mr. Ben-Ezer could not identify which patent claims (i.e., asserted or unasserted claims) were allegedly infringed. (CX-1634C (Ben-Ezer Dep. Tr.) at 239:8-241:5.). He also did not provide testimony that the manufacturer of the Razor Vapor had access to the Xploderz.

While Complainants cited to CX-1851, a video that demonstrated the Razor Vapor, the video does not support Complainants' contention because it demonstrates that the Razor Vapor was not a knock-off of the Xploderz. (CBr. at 41.). As the narrator of the video explained, the Razor Vapor had a trigger while the Xploderz products referenced in the cited video did not. (*See* CX-1851.). With respect to the Shoot Game blaster, Mr. Ben-Ezer testified that he did not look at the "internal components for this product" and could not remember if anyone else at the Maya Group looked at the internal components. (CX-1634C (Ben-Ezer Dep. Tr.) at 245:11-247:8.). Their testimonies, whether alone or in combination, do not support a finding of copying because their evidence of knowledge of the Accused Products or of copying is insufficient.

6. Complainants Did Not Present Sufficient Evidence of Failure by Others

Complainants argued that the Goo Shooter and Goo Spewer products (sold by the PTT Respondents in the 1990s) is evidence of a failure by others. (CBr. at 44.). As an initial matter, Complainants noted that "Goo Shooter and Goo Spewer used a firing mechanism similar to a water gun to shoot slime like substance." (*Id.*). Complainants also correctly pointed out that the

Goo Shooter and Goo Spewer "did not practice the Asserted Claims" because it did not "shoot spherical projectiles" or "soft-projectiles having the same shape", and it did not "make use of a piston axially aligned with an air compression chamber, a spring to bias the piston towards a rest position from a cocked position, or a tube having a smaller diameter than the air compression chamber." (*Id.* at 25, 44.). Given these differences, it is difficult to follow Complainants' argument as to how PTT Respondents' commercialization of the Goo Shooter and Goo Spewer could be considered a failure by others.

Moreover, contrary to Complainants' argument that the Goo Shooter and Goo Spewer products were a failure in the marketplace and later discontinued (*id.* at 44), Mr. Chia of Respondent PTT testified that the Goo Shooter and the Goo Spewer were commercially successful in markets in which PTT advertised.

Q. Why did PTT decide to discontinue the Goo Spewer?

(CX-1639C (Chia Dep.) at 106:21-107:9.).

Complainants did not present any evidence "that these prior attempts failed because the devices lacked the claimed features." *Ormco Corp. v. Align Tech., Inc.*, 463 F.3d 1299, 1313 (Fed. Cir. 2006). More importantly, there is no evidence that others tried and failed to develop a launcher that fired spherical SAPs.

7. There Is Some Evidence of Simultaneous Invention

Respondents alleged that two (2) references represent evidence of a simultaneous

invention of the claimed combination of a projectile launcher with spherical SAPs: (i) Korean Patent Publication No. 20-2010-0004855 to Kim (RX-0052) ("Kim"); and (ii) U.S. Patent No. 8,584,589 to Carlson (RX-0053) ("Carlson"). (RBr. at 57-60.). "Simultaneous invention may serve as evidence of obviousness when considered in light of all of the circumstances." *Regents of Univ. of Cal. v. Broad Inst., Inc.*, 903 F.3d 1286, 1295 (Fed. Cir. 2018) (citation omitted). However, a simultaneous invention cannot alone show obviousness. *Id.* at 1295-96 (citation omitted). Therefore, the weight of evidence must be carefully considered in light of all the circumstances. *Id.* at 1296 (citation omitted).

Kim was filed on November 1, 2008, and was published on May 11, 2010, one day after the critical date of the Asserted Patents. (RX-0052 (Kim) at 1; *see also* Sections V.A, VI.A (discussing priority dates of the Asserted Patents).). Kim discloses a "toy gun" and "a toy bullet formed of gel or gel material." (*Id.*). However, there is ***no*** disclosure that the gel material is a SAP. Instead, Kim describes the gel material as a "cleaning material" or "luminous material." (*Id.* at 4.). Respondents' own expert, Mr. Delman, also did ***not*** testify that the gel disclosed in Kim represents a SAP. He did not offer such an opinion.

> Q. And Kim just doesn't tell us what kind of gel we're talking about, correct?
>
> A. It does not specify.
>
> Q. And you certainly have not offered the opinion that came [sic] discloses a super absorbent polymer, correct?
>
> A. I have not.

(Tr. (Delman) at 302:4-9.).

Carlson was filed on October 6, 2010, five (5) months after the priority date of the Asserted Patents. Carlson discloses an "air-powered toy gun" and projectiles formed from "a hydro-polymer (similar to the absorbent polymer material used in a diaper)." (RX-0053

(Carlson) at 15-16; *see also* Sections V.A, VI.A (discussing priority dates of the Asserted Patents); Tr. (Delman) at 225:6-10 (Carlson "relates to toy projectiles made of hydro-polymers similar to the . . . polymer material used in a diaper can be formed of a variety of shapes, examples of which include being round.").

Complainants contended that because Mr. Delman acknowledged that the projectile in Carlson "will stick to the target," and that SAPs "don't stick to the target," Carlson does not disclose SAPs. (CBr. at 46 (citing Tr. (Delman) at 304:21-306:6) (other citation omitted).). Whether the projectiles described in Carlson "stick" or "don't stick" to the target is irrelevant. The asserted claims and specifications of the Asserted Patents do not describe SAPs along such lines.

Because Carlson was filed within a comparatively short space of time after the priority date of the Asserted Patents, Carlson represents some evidence of simultaneous invention. *See Geo. M. Martin Co. v. All. Mach. Sys. Int'l LLC*, 618 F.3d 1294, 1306 (Fed. Cir. 2010) (invention occurring only a year later than the earliest possible reduction-to-practice date of the claimed invention, qualified as a simultaneous invention). However, by itself, neither the timing of Carlson nor its content is conclusive on the issue of the obviousness of the Asserted Patents.

G. Conclusion

After considering the record associated with Complainants' claims of secondary considerations of non-obviousness, Complainants have presented sufficient objective evidence of non-obviousness to rebut Respondents' attempted showing of obviousness. *See Mitsubishi Tanabe Pharma Corp. v. Sandoz, Inc.*, 533 F. Supp. 3d 170, 204 (D.N.J. 2021) (citing *Graham*, 383 U.S. at 17-18 ("[A] court need not find that all factors are present to determine that the objective considerations support a finding of nonobviousness.")).

"Once all relevant facts are found, the ultimate legal determination involves the weighing of the fact findings to conclude whether the claimed combination would have been obvious to an ordinary artisan." *Arctic Cat Inc. v. Bombardier Recreational Prods. Inc.*, 876 F.3d 1350, 1361 (Fed. Cir. 2017). In totality, Respondents failed to prove by clear and convincing evidence that it would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of airsoft guns (i.e., Peev and Nagayoshi) with the spherical SAPs (i.e., Clear Spheres and Spit Balls). Specifically, the evidence is not clear and convincing proof that a person of ordinary skill would have been motivated to combine Peev or Nagayoshi with Clear Spheres or Spit Balls.

VIII. ECONOMIC PRONG OF DOMESTIC INDUSTRY REQUIREMENT

A. Legal Standard

The Commission may only find a violation of Section 337 "if an industry in the United States relating to the articles protected by the patent . . . exists or is in the process of being established." 19 U.S.C. § 1337(a)(2) (emphases added). Typically, a complainant must show that a domestic industry existed at the time the complaint was filed. *See Motiva LLC v. Int'l Trade Comm'n*, 716 F.3d 596, 601 n.6 (Fed. Cir. 2013).

The legislative history of 19 U.S.C. § 1337(a)(2) and Commission precedent provide that an industry is "in the process of being established" if: (i) the patent owner "can demonstrate that he is taking the necessary ***tangible steps*** to establish such an industry in the United States"; and (ii) there is "a ***significant likelihood*** that the industry requirement will be satisfied in the future." H. Rep. 100-40 at 157; S. Rep. 100-71 at 130 (emphases added); *see, e.g.*, *Certain Televisions, Remote Controls, and Components Thereof*, Inv. No. 337-TA-1263, Comm'n Op., 2022 WL 17486245, at *12 (Nov. 30, 2022) ("*Remote Controls*") (citing *Certain Stringed Musical*

Instruments and Components Thereof, Inv. No. 337-TA-586, Comm'n Op. at 13 (Apr. 24, 2008) ("*Stringed Musical Instruments*")).

The domestic industry requirement consists of a "technical prong" and an "economic prong." *See, e.g.*, *Certain Convertible Sofas and Components Thereof*, Inv. No. 337-TA-1122, Initial Determination, 2019 WL 3315628, at *8 (July 12, 2019) (unreviewed) ("*Convertible Sofas*") (citations omitted). A complainant satisfies the "technical prong" of the domestic industry requirement when it proves that its activities relate to an article "protected by the patent." *See Certain Unified Commc'ns Sys., Prods. Used with Such Sys., and Components Thereof*, Inv. No. 337-TA-598, Order No. 9 at 2 (Sept. 5, 2007) ("*Unified Communications Systems*"). A complainant satisfies the "economic prong" of the domestic industry requirement when it demonstrates that the economic activities set forth in subsections (A), (B), and/or (C) of Section 337(a)(3) ("Section 337(a)(3)(A)," "Section 337(a)(3)(B)," and "Section 337(a)(3)(C)," respectively) have taken place or are taking place with respect to the protected articles. *See id.*

Section 337(a)(3) states that:

> (3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned –
>
> (A) significant investment in plant and equipment;
> (B) significant employment of labor, or capital; or
> (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. § 1337(a)(3).

Because the criteria are listed in the disjunctive, satisfaction of any one of them will be sufficient to meet the economic prong of the domestic industry requirement. *Convertible Sofas*, 2019 WL 3315628, at *8. Establishment of the "economic prong" is not dependent on any "minimum monetary expenditure" and there is no need for a complainant "to define the industry

itself in absolute mathematical terms." *Certain Moveable Barrier Operator Sys, and Components Thereof*, Inv. No. 337-TA-1118, Comm'n Determination, 2022 WL 20585214, at *70 (Mar. 2022) ("*Moveable Barrier Operator Systems*") (citing *Stringed Instruments*, Inv. No. 337-TA-586, Comm'n Op. at 25-26). However, a complainant must substantiate the nature and the significance of its activities with respect to the articles protected by the patent at issue. *Id.* (citing *Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Comm'n Op. at 30 (Feb. 17, 2011) ("*Imaging Devices*")).

The Commission has interpreted Sections 337(a)(3)(A) and (B) to concern "investments in plant and equipment and labor and capital with respect to the ***articles*** protected by the patent." *Id.* at *71 (emphasis in original) (citing *Certain Ground Fault Circuit Interrupters and Prods. Containing Same,* Inv. No. 337-TA-739, 2012 WL 2394435, at *50, Comm'n Op. at 78 (June 8, 2012) ("*Circuit Interrupters*") (quoting 19 U.S.C. §§ 1337(a)(3)(A), (B)).

When a complainant proceeds under Section 337(a)(3)(C), it is not sufficient for the "substantial investment" under subsection (C) to merely relate to articles protected by the asserted patents. Rather, "the complainant must establish that there is a nexus between the claimed investment and asserted patent regardless of whether the domestic- industry showing is based on licensing, engineering, research and development." *Certain Integrated Circuit Chips & Prods. Containing the Same*, Inv. 337-TA-859, Comm'n Op., 2014 WL 12796437, at *22 (Aug. 22, 2014) ("*IC Chips*").

In addition, the Commission has definitively stated that investments in plant and equipment or labor and capital that relate to engineering and research and development ("R&D") (that are expressly identified under subsection (C)), are properly considered under subsections (A) and (B):

> The statutory text of section 337 does not limit sections 337(a)(3)(A) and (B) to investments related to manufacturing or any other type of industry. It only requires that the domestic investments in plant and equipment, and employment of labor or capital be "with respect to the articles protected by the patent." 19 U.S.C. § 1337(a)(3). Moreover, even though subsection (C) expressly identifies "engineering" and "research and development" as exemplary investments in the "exploitation" of the patent, that language does not unambiguously narrow subsections (A) and (B) to exclude those same types of investments.

Certain Solid State Storage Drives, Stacked Elecs. Components, and Prods. Containing Same, Inv. No. 337-TA-1097, Comm'n Op., 2018 WL 4300500, at *5 (June 29, 2018) ("*Storage Drives*"); *see also, e.g.*, *Certain Marine Sonar Imaging Devices, Including Downscan and Sidescan Devices, Prods. Containing the Same, and Components Thereof*, Inv. No. 337-TA-921, Comm'n Op., 2016 WL 10987364, at *39 (Jan. 6, 2016) ("*Sonar Imaging Devices*").

There is no mathematical threshold test or a "rigid formula" for determining whether a domestic industry exists. *Certain Artificial Eyelash Extension Sys., Prods., and Components Thereof*, Comm'n Op., 2022 WL 15498309, at *18 (Oct. 24, 2022) ("*Artificial Eyelash Extension Systems*") (citing *Stringed Musical Instruments*, Comm'n Op. at 25-26; *Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Comm'n Op. at 39, USITC Pub. 4005 (May 2008) ("*Male Prophylactic Devices*")). However, to determine whether investments are "significant" or "substantial," the actual amounts of a complainant's investments or a quantitative analysis must be performed. *Lelo Inc. v. Int'l Trade Comm'n*, 786 F.3d 879, 883-84 (Fed. Cir. 2015). Even after *Lelo*, which requires some quantification of a complainant's investments, there is still no bright line as to a threshold amount that might satisfy an economic industry requirement.

It is the complainant's burden to show by a preponderance of evidence that each prong of the domestic industry requirement is satisfied. *Certain Prods. Containing Interactive Program Guide and Parental Control Tech.*, Inv. No. 337-TA-845, Final Initial Determination, 2013 WL 3463385, at *14 (June 7, 2013). Moreover, the Commission makes its determination by an examination of "the facts in each investigation, the article of commerce, and the realities of the

marketplace." *Artificial Eyelash Extension Systems*, 2022 WL 15498309, at *18 (citation omitted). "Commission precedent permits complainants to present evidence of their U.S. investments using methods and approaches that are appropriate to the facts of a particular investigation; such methods and approaches may include a comparison between complainant's domestic investments to the complainant's foreign investments to inform the contextual analysis for determining whether the claimed domestic investments are significant or substantial." *Certain Movable Barrier Operator Sys. and Components Thereof*, Inv. No. 337-TA-1118, Comm'n Op. at 23 (Jan. 12, 2021) (citation omitted).

In addition, as the Commission explained, it has looked to several different "contextual indicators" to determine if a complainant's investments and expenditures are sufficient to constitute a domestic industry. *See Certain Bone Cements, Components Thereof and Prods. Containing the Same*, Inv. No. 337-TA-1153, Comm'n Op. at 26 (Jan. 25, 2021). The Commission stated:

> For instance, one methodological approach the Commission has used in both pre- and post-1988 investigations is "comparing complainant's domestic expenditures to its foreign expenditures." Another approach, among others, is to consider "the value added to the article in the United States by the domestic activities." Indeed, Commission decisions have accepted a "value-added" analysis to assess whether an industry in the United States exists. Moreover, the Federal Circuit in *Schaper* compared the investments in the United States with "the total production process of [the domestic industry products]," and found that there was not "significant value added" to the products in the United States. In sum, as discussed above, the Commission's determination as to the existence of a domestic industry must be assessed according to a highly fact-specific assessment of the "nature and significance" of the complainant's domestic activities.

Id. at 26-27 (internal citations omitted).

B. Economic Prong Overview

Complainants alleged that there is a domestic industry under Sections (a)(3)(B) and (C)

based on Hasbro's claimed domestic activities and investments. (CBr. at 52-87.). Complainants also alleged that an industry is in the process of being established based on Hasbro's plan to make investments in its DI Products post-Complaint. (*Id.* at 87-94.). Complainants did not rely on any activities and investments in the DI Products by Spin Master.

For the following reasons, Complainants have not satisfied the domestic industry requirement under Section 337(a)(3)(B) or (C). However, Complainants have proven that a domestic industry is in the process of being established under Section 337(a)(2).

C. Sections (a)(3)(B) and (C): Complainants Have Failed to Demonstrate that a Domestic Industry Exists

1. Section 337(a)(3)(B)

a) Labor Investments

, Complainants estimated that on a full-time equivalent ("FTE") basis, there have been who have been or are fully dedicated to work on the DI Products. (CBr. at 67 n.31 (citing CX-1588 (Mulhern Ex. 19); *see also* CX-1569C (Mulhern Revised Rpt.) at ¶ 95.). Complainants alleged that the employees performed the following activities: [45] (CPBr. at 114-15; CBr. at 56-58.).

Complainants claimed that Hasbro's

[45]

Complainants contended in particular that, (CPBr. at 120; CBr. at 59.). Complainants described the roles of Hasbro's U.S. personnel as follows.

With respect to , Complainants stated that:

(CBr. at 56.).

With regard to , Complainants stated that:

(*Id.*).

With respect to the , Complainants stated that:

[46] For the reasons discussed below on pages 95-96, only expenses related to qualify as proper DI investments under Section (a)(3)(B).

(*Id.*).

With respect to , Complainants stated that:

(*Id.*).

Based on the allocation of each employee's share of time devoted to the DI Products for the , Complainants estimated Hasbro's U.S. labor investments related to the DI Products to be [47] (CX-1569C (Mulhern Revised Rpt.) at ¶¶ 92-93; CX-1585C (Mulhern Ex. 16); CX-1586C (Mulhern Ex. 17); CBr. at 59.).

Respondents argued that Hasbro's claimed investments of , are "overstated" because, *inter alia*, domestic employees who carry out such activities should not be included in Hasbro's claimed investments. (RRBr. at 23.). Complainants attempted to dismiss Respondents' argument, by arguing that it is an issue

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[47] Complainants estimated the share of Hasbro labor expenses associated with Hasbro's U.S. employees' work on the DI Products using an allocation methodology based on each employee's share of time devoted to the DI Products . (CPBr. at 116.). . (*See* RX-0114C (Barros Dep. Tr.) at 156:11-20; RX-0117C (Kleinman Dep. Tr.) at 270:16-20.). However, Hasbro conducted detailed interviews with each employee (or, if the employee was no longer with Hasbro, with that former employee's supervisor) to ascertain the share of time each employee spent on the DI Products for . (RX-0114C (Barros Dep. Tr.) at 75-84, 149:4-151:8, 152:18-156:20; RX-0192C (Barros Ex. 8).). The resulting time estimates are summarized in CX-1584C (Mulhern Ex. 15).

At the time of his deposition on December 6, 2022, Mr. John Barros was a Hasbro employee, who served as the Senior Engineering Manager of the NERF business. (RX-0114C (Barros Dep. Tr.) at 22:2-8.). Mr. Barros explained that he was deposed "because of [his] role and involvement in Gelfire development." (*Id.* at 16:21-17:2.). Respondents identified Mr. Barros as a possible adverse fact witness. (RPSt. at 6.). Mr. Barros did not appear or give testimony during the Hearing.

"based solely on the label that Hasbro ascribes to the activities," and that their . (CBr. at 60).

Specifically, with respect to , Complainants described that Hasbro's (CPBr. at 57 (citing Tr. (Tino) at 127:1-10).). However, as Respondents noted, Complainants' claim that should accurately describe the DI Products does not persuasively support Complainants' argument that . (RRBr. at 24.).

Similarly, with regard to , Complainants described the role of the Hasbro (CBr. at 57 (citing Tr. (Tino) at 127:11-15).). Complainants also argued that Hasbro's employees are separate from (CBr. at 57-58 (citing Tr. (Tino) at 128:2-6; CX-1569C (Mulhern Revised Rpt.) at ¶ 89).). However, the fact that Hasbro's does not necessarily mean that the rest of their activities are .

Moreover, Complainants provided no support for their theory that engaging in certain to the exclusion of others should allow such employees' salaries to count as domestic industry investments. Although it is true that this is not a case where Complainants are seeking to rely in Complainants' claimed labor investments,

which is more than [redacted] (CBr. at 59 (citing Tr. at (Mulhern) at 661:10-21; CDX-003C.4; CX-1569C (Mulhern Revised Rpt.) at ¶ 93; CX-1586C (Mulhern Rpt. Ex. 17).). *See, e.g.*, *Certain Solid State Storage Drives, Stacked Elecs. Components, & Prods. Containing the Same*, Inv. No. 337-TA-1097, Initial Determination Finding Satisfaction of Economic Prong, 2018 WL 3031748, at *11 (May 11, 2018) ("*Solid Stage Storage Drives*").[48]

Additionally, Respondents argued that "Complainants artificially inflate[d]" the Hasbro claimed labor investments because they include Hasbro's investments [redacted]. (CX-0699C (Spin Master/Hasbro Patent License Agreement) at ¶ 2(a); RPBr. at 130-31; RRBr. at 25.). Respondents also argued that [redacted] (CX-0699C.0021 (Spin Master/Hasbro Patent License Agreement) at Amendment 1; RPBr. at 130-31; RRBr. at 26.).

However, it is undisputed that ***as of the filing date of the Complaint***, Hasbro was the exclusive licensee to the Asserted Patents and the [redacted]. (CX-0699C.0021 (Spin Master/Hasbro Patent License Agreement) at Amendment 1; RX-0574C (Rowe Reb. Rpt.) at ¶ 26 [redacted]). Thus, the license covers all of Hasbro's activity to develop the DI Products [redacted], which is what Hasbro relies on for its domestic industry. Because the timeframe for evaluating DI investments is the filing date of a complaint, there is no dispute that

[48] *See also* Doc. ID No. 664922 (official received date May 17, 2018).

all of the relevant DI activity was licensed as of the timeframe relevant for assessing Hasbro's DI in this case. *See Motiva, LLC. v. Int'l Trade Comm'n*, 716 F.3d 596, 601 n.6 (Fed. Cir. 2013) (affirming the "Commission's use of the date of the filing of the complaint as the relevant date at which to determine if the domestic industry requirement . . . was satisfied").

Respondents also criticized Complainants for citing to *Solid State Storage Drives* for the premise that Hasbro's pre-license expenditures count as DI investments. (RRBr. at 26 (citing CBr. at 62-63); *Solid State Storage Drives*, 2018 WL 3031748, at *18 n.4.). Respondents argued that *Solid State Storage Drives* is inapplicable because "it stands for the proposition that the Complainant need not own the Asserted Patents for the entire domestic industry period to assert a domestic industry through a licensee who had rights in the Asserted Patents ***at all relevant times***." (RRBr. at 26 (emphasis in original).).

Specifically, Respondents argued that: (i) the domestic industry licensee in *Solid State Storage Drives* "was the previous owner of the Asserted Patents" and the complainant obtained the asserted patents from the domestic industry licensee "through a patent purchase agreement" that included a license-back to the domestic industry licensee; (ii) the domestic industry licensee was a co-owner of the complainant; and (iii) thus, "all the domestic industry licensee's claimed investments and activities were protected by the Asserted Patents ***at the time they were made***, either as the owner or licensee of the Asserted Patents." (*Id.* at 27 (internal citations omitted) (emphasis added).).

Here, [redacted], as discussed above, Respondents did not contest that at the time Complainants filed the Complaint, Hasbro was the exclusive licensee to the Asserted Patents and the [redacted].

(CX-0699C.0021 (Spin Master/Hasbro Patent License Agreement) at Amendment 1; RX-0574C (Rowe Reb. Rpt.) at ¶ 26.). *Motiva*, 716 F.3d at 601 n.6.

Therefore, the evidence shows that [redacted] of Hasbro's U.S. labor investments qualify as domestic investments under Section 337(a)(3)(B).

b) Capital Investments

Complainants relied on investments related to the Pawtucket facility used by the Hasbro's U.S. domestic-industry employees. (CBr. at 65; CX-1569C (Mulhern Revised Rpt.) at ¶ 95.). According to Complainants' expert's allocation, [redacted] (CBr. at 66-67; CX-1569C (Mulhern Revised Rpt.) at ¶ 95; Tr. (Mulhern) at 662:24-664:5; CX-1588C (Mulhern Ex. 18).). Because expenses, such as utilities, real estate, repair and maintenance, waste removal, facilities services, depreciation, taxes and insurance, incurred at Hasbro's Pawtucket, Rhode Island facility represent typical capital investments, Hasbro's facility-related investments qualify as capital investments under Section 337(a)(3)(B). (*Id.* at 66 (citing CX-1569C (Mulhern Revised Rpt.) at ¶ 95).). However, for the reasons discussed in Section VIII.C.1(a) above, Complainants failed to provide sufficient evidence that activities [redacted] qualify as capital under Section 337(a)(3)(B).

Complainants also relied on a [redacted]

[redacted]"[49] (CX-0699C (Spin Master/Hasbro Patent License Agreement) at ¶ 4(a) [redacted] "capital" and "enabled it to develop the DI Products and bring them to market." (CBr. at 66; *see also* CPBr. at 118 (payment "provided Hasbro with the necessary patent rights and was critical to enabling Hasbro to develop the DI Products").).

Complainants did not cite to relevant precedent to support their allegation that such a [redacted] is "capital" under Section 337(a)(3)(B), and as Staff noted, it appears that there is no such precedent. (SBr. at 53-55.). Complainants cited to *Lelo*, 786 F.3d at 883, and the resulting use of Webster's Dictionary by the Federal Circuit, to define the term "capital" in the context of Section 337 and assert that the patent rights obtained by Hasbro are "accumulated assets, resources, sources of strength or advantages." (CBr. at 66.). However, Complainants did not present or cite to any evidence in the record to support their assertion that Hasbro viewed and treated its license with Spin Master according to Complainants' promoted dictionary definition. Complainants did not cite to any evidence in the record that suggests Hasbro would not have developed the DI Products and brought them to market without obtaining the license. As Staff pointed out, although "royalties received by a complainant can be circumstantial evidence that an investment was made" (but not that they constitute the investment itself), here, Hasbro is ***making*** (not receiving) the royalty payment. (SBr. at 53-54 (citing *Certain Multimedia Display and Navigation Devices and Sys., Components Thereof, and Prods. Containing Same*, Inv. No. 337-TA-694, Comm'n Op. at 24 (public version Aug. 8, 2011) ("*Certain Multimedia Display*

[49] Complainants also claimed this same royalty amount as exploitation under Section (a)(3)(C). (*See* Section VIII.C.2, *infra*.).

Devices”)).).

Moreover, Complainants have not relied on any investments by Spin Master in domestic products, including the receipt of royalty payments, to establish that a domestic industry exists. (*Id.*). Thus, this situation differs from that in *Certain Multimedia Display and Navigation Devices*, in which the Commission evaluated the significance of investments the complainant made ***in an attempt to license*** its navigation portfolio. *Id.* Here, the relationship between licensee and licensor is the ***inverse*** of that in *Certain Multimedia Display Devices*.

Even assuming, *arguendo*, that claiming a [redacted] payment as a capital investment were appropriate, Complainants cannot [redacted] (CX-0699C (Spin Master/Hasbro Patent License Agreement) at ¶ 4(a); RRBr. at 29; SBr. at 54.). As Respondents and Staff indicated, the evidence does not clearly establish what portion of the payment should be allocated to articles protected by the Asserted Patents. (RRBr. at 29; SBr. at 54.).

Furthermore, Complainants argued that [redacted]. (Tr. (Tino) at 153:11-14, 160:23-161:5; Tr. at (Mulhern) at 659:18-660:13, 688:18-21, 699:9-15; CX-0699C.). Thus, any claim that Complainants made that Hasbro could not bring the DI Products to market without the [redacted] payment to Spin Master is unpersuasive, since it is clear that the [redacted].

In view of this analysis and the fact that no party has cited Commission precedent in which the Commission has defined “capital” to include such an investment in this context, the

there is insufficient evidence to find that the [redacted] represents a qualifying domestic investment under 19 U.S.C. § 1337(a)(3)(B). Moreover, even if some portion of the payment can be considered a capital investment as of the filing date of the Complaint, there is no evidence in the record to determine how much of the payment should be credited as such.

Therefore, the evidence demonstrates that only [redacted] of Hasbro's facility-related investments qualify as capital under Section 337(a)(3)(B).

c) Quantitatively and/or Qualitatively Significant or Substantial

The evidence indicates that Hasbro had a total qualifying economic domestic industry investment of [redacted] under Section 337(a)(3)(B). 19 U.S.C. § 1337(a)(3)(B). As Respondents argued, Hasbro's investments are not quantitatively significant or substantial.[50] (RPBr. at 132-35; RRBr. at 30, 34; *see also* SBr. at 55-56; SRBr. at 6.).

With respect to Hasbro's alleged labor investments in its economic domestic industry, an employment of [redacted], is neither significant or nor substantial. (RDX-0006C.0020-21; RX-0574C (Rowe Reb. Rpt.) at ¶¶ 98-99; RX-1762 (Rowe Rpt. Ex. 4.0); RX-1763C (Rowe Rpt. Ex. 5.0); Compl., Ex. 6 (Adam Kleinman Decl.)[51] at ¶ 13; RX-1595 (Hasbro Form 10-K 2021).). As Ms. Rowe confirmed, this

[50] *Certain Carburetors and Prods. Containing Such Carburetors*, Inv. No. 337-TA-1123, Comm. Op. at 24 (Oct. 28, 2019) (qualitative evidence could not alter conclusion that investments were quantitatively insignificant, and thus need not be considered).

[51] When he signed his declaration on July 20, 2022, Mr. Adam Kleinman was the Senior Vice President &

is . (RX-0574C (Rowe Reb. Rpt.) at ¶ 99; *see also* RDX-0006C.0022.). As Ms. Rowe testified, Hasbro's employment of U.S. labor in the DI Products is not significant or substantial in the context of the industry in question or Hasbro's relative size. (Tr. (Rowe) at 733:16-734:21.). That is the finding here.

With respect to Hasbro's alleged capital investments, Hasbro incurred approximately in "operating expenses, utilities, maintenance & repair, property taxes, insurance, and other facilities-related costs" at its Pawtucket facility in 2021, which dwarfs the in facilities expenditures Hasbro has attributed to the DI Products . As Ms. Rowe calculated, percent of Hasbro's domestic capital expenses were dedicated to the DI Products. (RX-0574C (Rowe Reb. Rpt.) at ¶ 120.).

On an FTE basis, Complainants alleged that Hasbro's U.S. domestic industry FTE employees of worldwide employees involved in the DI Products. (CBr. at 73.). However, Complainants only considered employees to arrive at this percentage. (CX-1569C (Mulhern Revised Rpt.) at ¶110; CX-1595C (Mulhern Rpt. Ex. 26).).

Additionally, Hasbro's foreign labor directed to the DI Products has exceeded its domestic labor. While the

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General Manager, NERF & Sports Action at Hasbro, Inc. (Compl., Ex. 6 (Kleinman Decl.) at ¶ 1.). Mr. Kleinman stated that he had been with Hasbro since 2009 and that in his current role, he has "overall responsibility over the global NERF and Sports Action business, including product design and development, marketing, franchise development, and brand creative." (*Id.*). Mr. Kleinman was deposed on December 7, 2022 on behalf of Hasbro and Spin Master. (RX-0117C (Kleinman Dep. Tr.) at 9:3-8.).

, the number of Hasbro's foreign-based FTEs has .[52] (*See* Tr. (Rowe) at 725:13-726:6; RDX-0006C.0017; RX-1762C (Rowe Rpt. Ex. 4.0); Tr. (Mulhern) at 701:8-702:3.). Excluding , the number of claimed Hasbro domestic industry employees leading up to the filing of the Complaint. (Tr. (Mulhern) at 700:9-25; CX-1584C (Mulhern Rpt. Ex. 15).).

In contrast, the number of Hasbro employees employed outside of the United States, . (Tr. (Mulhern) at 701:8-17; CX-1592C (Mulhern Rpt. Ex. 23).). Hasbro also engaged (RX-0112C (Owen Ip Dep. Tr.)[53] at 24:1-25:14, 27:11-28:11.).

Moreover, Hasbro (RX-0112C (Ip Dep. Tr.) at 31:9-11, 34:9-35:10.). Complainants did not present any evidence that Hasbro was involved in

[52] Complainants attempted to downplay the FTE disparity between Hasbro's employees who work outside of the United States and Hasbro's U.S. employees by instead comparing Hasbro's foreign-based and U.S. labor expenses. (CBr. at 72-73.). However, as Respondents noted correctly, especially given the size of Hasbro's U.S. based, small workforce, such a comparison is less probative than FTEs due to the higher labor costs in the United States compared to labor costs in China. (RRBr. at 32 n.7.).

[53] At the time of his deposition on November 30, 2022, Mr. Owen Ip was a Hasbro employee who worked out of Hasbro's Hong Kong office. (RX-0112C (Ip Dep. Tr.) at 11:1-3, 14:16-15:3, 15:6-18, 16:2-4.). Mr. Ip confirmed that he had been working at Hasbro since 2015, he worked "primarily . . . on Nerf product," and that "recently," he had been "working on Nerf GelFire products[.]" (*Id.* at 11:4-15.). Respondents identified Mr. Ip as a potential adverse witness. (RPSt. at 6.). He did not appear or give testimony during trial.

(Tr. (Mulhern) at 692:17-22, 694:2-10, 709:5-10.). Similarly, Ms. Mulhern did not consider the employment investments in (Tr. (Mulhern) at 691:19-692:16; RX-0112C (Ip Dep. Tr.) at 36:1-11.). Thus, Hasbro failed to provide an apples-to-apples comparison of foreign and domestic expenses in the DI Products.

For the foregoing reasons, Complainants have not proven that Hasbro's domestic economic investments in the DI Products are quantitatively and/or qualitatively significant or substantial.

2. Section 337(a)(3)(C)

Hasbro also alleged that it has made considerable U.S. investments in engineering and research and development ("R&D") under Section 337(a)(3)(C) in support of its DI Products. (CBr. at 84-87.). , these investments correspond to Hasbro's investments under Section 337(a)(3)(B). (*See* CBr. at 54 (Table 2) (showing that investments for engineering and R&D under Sections 337(a)(3)(B) and (C) are).). Thus, the analysis and conclusion with respect to Complainants' investments under Section 337(a)(3)(B) also apply to the Section 337(a)(3)(C) analysis.

The subset of Complainants' economic DI investments that Hasbro has claimed under Section 337(a)(3)(C) are not significant or substantial for the same reasons they are not qualitatively significant or substantial under Section 337(a)(3)(B). (*See* Section VIII.C.1(c), *supra*.). Although the Commission has not established a minimum monetary expenditure that would meet the domestic industry requirement, it has emphasized the importance of considering

Complainants' relative size. *Printing & Imaging Devices*, 2011 WL 1303160, at *15 (full cite?). Hasbro's sub-prong (a)(3)(C) economic investments in its DI Products— —are neither significant nor substantial to Hasbro, which . (CX-1569C (Mulhern Revised Report) at ¶ 50.).

Complainants also have failed to demonstrate a nexus between the claimed Hasbro expenditures under sub-prong (a)(3)(C) and the Asserted Patents. Rather than offer any proof, Complainants claimed that the nexus may be inferred because the DI Products are projectile launchers with ammunition. Complainants argued that the asserted claims relate to the combination of the projectile launcher and ammunition, essentially conflating nexus with the technical prong. (CBr. at 84-85.). Complainants did not provide or cite to evidence that any of the elements of the claims were developed or otherwise worked on by Hasbro's domestic employees. The . (RX-0112C (Owen Ip Dep. Tr.) at 31:9-11, 34:9-35:10.). The that Hasbro allegedly developed in the United States are not claimed by the Asserted Patents. Given Complainants' inability to tie Hasbro's domestic activities to the Asserted Patents, or to show that they are substantial, Complainants have not met their burden under Section 337(a)(3)(C).

D. Section 337(a)(2): Complainants Have Demonstrated that a Domestic Industry Is "In the Process of Being Established"

1. Tangible Steps

Complainants presented documentary and testimonial evidence that Hasbro has taken tangible steps towards establishing a domestic industry. This includes the development of three

(3) blasters that are currently available (Mythic, Legion, and Mythic Beast), as well as the continued development of other DI Products that Hasbro plans to release [redacted] (Tr. (Mulhern) at 682:6-15; Tr. (Tino) at 110:1-117:22 (discussing DI Products); CDX-0007C.0005-8.). Based on the evidence of the cited products' designs produced during discovery, Respondents stipulated that all of Hasbro's product designs practice the Asserted Patents. (Doc. ID No. 796608 (Stip. Regarding DI Products) at ¶¶ 1-3.).

During the Hearing, Mr. Tino, Hasbro's Engineering Manager, described a number of milestones that the DI Products pass through, which applies to the Hasbro products under development. The product milestones Mr. Tino described include [redacted] (*See* Tr. (Tino) at 119:4-122:11; CDX-0007C.0009-11.).

Figure 12: Selected Milestones of GelFire Development

(CDX-0007C.0009.).

The product creation milestones are and were produced at CX-1082C for the DI Products. (*See* Tr. (Tino) at 122:14-123:3.). Some examples of these milestones (and others) for the DI products that are part of the DI products that have been established or are under development according to Hasbro's "in the process" arguments are discussed below.

a) Mythic, Legion, and Mythic Beast

With respect to the Mythic, Hasbro

[54] . (CBr. at 88 n. 50).

of F7267 (Mythic)).). Pre-orders began in July 2022, and the Mythic was available in retail stores by November 2022. (RX-0117C (Kleinman Dep. Tr.) at 257:8-258:13.).

With respect to the Legion,

of F7979 (Legion)).). The Legion was available in stores and online by December 2022. (RX-0117C (Kleinman Dep. Tr.) at 260:7-14, 261:7-11; CX-0446 (Hasbro Pulse website).).

With respect to the Mythic Beast, Hasbro

Pre-orders for the Mythic Beast had begun by December 2022. (*See* RX-0117C (Kleinman Dep. Tr.) at 260:7-14, 261:7-11; CX-0446 (Hasbro Pulse website).). The Mythic Beast was available for purchase by the time of the Hearing. (*See* Tr. (Tino) at 113:21-23.).

Pictures of the GelFire Mythic, Legion, and Mythic Beast are replicated below in Figure 13.

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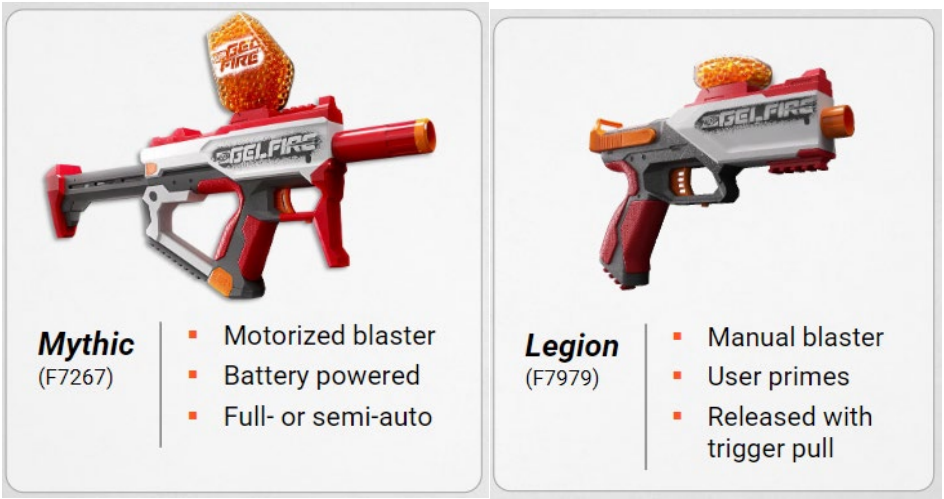
[55] (CBr. at 88 n.50).

Figure 13: GelFire Mythic, Legion, and Mythic Beast



(CDX-0007C.0005-6.).

The [redacted]

b) Additional DI Products

Complainants provided evidence indicating that Hasbro is on track to complete

development of additional DI Products [redacted] (Tr. (Tino) at 114:22-115:13, 116:12-18; CDX-0007C.0007.). Based on Hasbro's engineering records, Hasbro completed final CAD/3D drawings for the [redacted]

(CDX-0007C.0007.).

(CDX-0007C.0007.).

Based on the design documents that Hasbro produced during discovery, Respondents stipulated that the described additional DI Products practice the Asserted Patents as well. (Doc. ID No. 796608 (Stip. Regarding DI Products) at ¶¶ 1-3.).[56] Mr. Tino testified that Hasbro is

(Tr. (Tino) at 118:7-119:3.).

[56] Based on this stipulation, Respondents have abandoned and waived the argument (RPBr. at 19, 112) that "Complainants failed to establish" that certain of the DI products "will practice any Asserted Claim." (RPBr. at 19.).

(*Id.* at 142:1-11, 145:22-146:11, 168:5-19.).

2. Significant Likelihood

Evidence that Complainants presented demonstrates that there is a significant likelihood that Hasbro will satisfy the DI requirement in the future. (*See* Tr. (Mulhern) at 682:16-683:20.) Hasbro U.S. personnel have been engaged in ongoing development activities with respect to DI Products , through the July 2022 Complaint filing, and beyond. (*See, e.g.*, RX-0117C (Kleinman Dep. Tr.) at 259:15-261:21.). Even assuming U.S. employee time devoted to the DI Products remained constant, with no new personnel added,[57] (*See* Tr. (Mulhern) at 682:16-

[57] Mr. Tino testified that (Tr. (Tino) at 142:1-11, 145:22-146:11.).

683:20; CX-1585C (Mulhern Ex. 16).).

Moreover, Hasbro's ongoing investments in [redacted] (*Id.*).

In sum, the evidence that Complainants adduced in this Investigation is proof that supports Hasbro's argument that Hasbro is on track to continue its development of DI Products, to continue to launch them commercially, and to continue to invest in qualifying U.S. activities towards establishing a DI, to the extent one did not already exist as of Hasbro's filing of the Complaint.

IX. REMEDY AND BOND

This decision recommends: (1) a Limited Exclusion Order ("LEO") with a standard certification provision and service and repair exception; (2) a Cease and Desist Order ("CDO"); and (3) that a bond of 5% is warranted and should be entered during the Presidential Review Period.

A. Legal Standard

Pursuant to Commission Rule 210.42, an administrative law judge ("ALJ") must issue a recommended determination on: (i) an appropriate remedy if the Commission finds a violation of Section 337, and (ii) an amount, if any, of the bond to be posted. 19 C.F.R. § 210.42(a)(1)(ii). When a Section 337 violation has been found, as has been found in this Investigation, "the Commission has the authority to enter an exclusion order, a cease and desist order, or both." *Certain Flash Memory Circuits and Prods. Containing the Same*, Inv. No. 337-TA-382, Comm'n Op. on the Issues Under Review and on Remedy, the Public Interest and Bonding, at 26 (June 9, 1997).

B. A Limited Exclusion Order Is Warranted

Upon a finding of infringement, the Commission's enabling statute, 19 U.S.C. § 1337(d) provides for a Limited Exclusion Order ("LEO"), that can be directed to any articles that infringe one or more claims of the asserted patent(s) of any of the named respondents. 19 U.S.C. § 1337(d). A limited exclusion order instructs the U.S. Customs and Border Protection ("CBP") to exclude from entry all articles that are covered by the patent at issue that originate from a named respondent in the investigation. *Fuji Photo Film Co. Ltd. v. Int'l Trade Comm'n*, 474 F.3d 1281, 1286 (Fed. Cir. 2007).

Complainants have requested that the Commission issue "a standard LEO excluding all of Respondents' infringing products and components thereof." (CPBr. at 145; CBr. at 96; *see also* SBr. at 60 (agreeing that an LEO is "appropriate").). Complainants argued that the LEO should apply to "Respondents' affiliated companies, parents, subsidiaries, agents, or other related business entities, or their successors or assigns." (CPBr. at 145 (citing *Certain Semiconductor Chips with Minimized Chip Package Size and Prods. Containing Same*, Inv. No. 337-TA-605,

Initial Determination, 2008 WL 5626937, at *71 (U.S.I.T.C. Dec. 1, 2008); CBr. at 96 (citing same).).

Respondents requested that a LEO include a reporting requirement that requires Hasbro to provide quarterly updates as to the status of its domestic industry activities and investments. (RPBr. at 146-47; RRBr. at 42.). In support of their request, Respondents stated that "[t]he DI Products have not been successful on the market as evidenced by their dramatic reduction in price over the past quarters" (RRBr. at 43 (citing RX-0098C (Mulhern Dep. Tr.) at 88:8-89:13), "Hasbro's investments are quantitatively insignificant and will likely continue to decline, providing for an easy exit from the market" (*id.*), and "[t]o the extent the Commission finds that Complainants established a violation based on a domestic industry in the process of being established, it would be uncertain whether that industry would actually be established" (*id.*). For the following reasons, the record does not support such a requirement.

First, the evidence does not support Respondents' proposition that because the price of the DI Products was reduced shortly after launch, the DI Products have been unsuccessful. Respondents only cite to Ms. Mulhern's deposition testimony where she simply confirmed that discounting could "var[y] across distribution channels."

> Q. . . . Are you aware of what the retail price of the Mythic was at launch?
>
> A. My understanding is it was a suggested retail price of 79.99.
>
> Q. And are you aware of what the Mythic's suggested retail price was about a month later?
>
> A. I don't -- I don't recall.3
>
> Q. Are you aware that it went down to 59.99? You weren't aware of that, right?
>
> A. I'm not aware of that. I am aware that ***there can be discounting that varies across distribution channels***. I think -- I think according to information I reviewed in preparing my report, on December 8th according to the Hasbro Website the

> Gelfire Mythic price was 79.99, but it was offered for 59 on Amazon. ***So I think it could depend on the particular retail channel***.

(RX-0098C (Mulhern Dep. Tr.) at 88:19-89:13 (emphases added).

Second, that Hasbro's investments under Sections (a)(3)(B) and (C) were found to be quantitively insignificant and insubstantial (*see* Section VIII.C.1, *supra*) bears no weight on whether Complainants should be required to provide quarterly reports as part of a remedy. As discussed in Section VIII.D above, Complainants have shown that an industry is in the process of being established based on Hasbro's plan to make investments post-Complaint.

Moreover, unlike the ***single*** domestic industry product at issue in *Certain Biometric Scanning Devices, Components Thereof, Associated Software, & Prods. Containing the Same*, the only case to which Respondents cite, Complainants have presented compelling evidence of [redacted] that Complainants have alleged practice the Asserted Patents in this Investigation. *Certain Biometric Scanning Devices, Components Thereof, Associated Software, & Prods. Containing the Same*, Inv. No. 337-TA-720, Comm'n Op. at 27-28 (Nov. 10, 2011) ("*Biometric Scanning Devices*"). (*See* Section VIII.D, *supra*.). In *Biometrics Scanning Devices*, there was also evidence that the production of the domestic industry product suffered from "multiple recent stoppages and restarts," with limited production of only 25 units on and off in 2010 through February 2011, and "no plans for any units beyond February 2011." *Id.* at 27-28. Under such circumstances, the Commission agreed with the initial determination that a reporting requirement was warranted "to ensure that [the complainant] continues to exploit the [asserted] patent while the remedy is in place." *Id.* at 28. That is not the case here.

Respondents also requested that a LEO include a warranty/service provision to "permit

Respondents to continue providing warranty service, repair, and replacement of products that consumers have already purchased in the United States." (RPBr. at 148.). Such a provision for the warranty and repair of existing products Respondents have already sold to customers for which Respondents are obligated to provide warranty, repair or replacement services, is appropriate, provided that Respondents can provide evidence of such warranties. *See Certain Network Devices, Related Software and Components Thereof (I)*, Inv. No. 337-TA-944, Comm'n Op. at 53 (Apr. 19, 2017).

For the reasons explained, a LEO against each of the Respondents is warranted. *See, e.g.*, *Fuji Photo Film*, 474 F.3d at 1286. This decision also recommends including a certification provision. The Commission now generally includes a certification provision in every exclusion order because it is something that "CBP typically requests." *Certain Road Construction Machines & Components Thereof*, Inv. No. 337-TA-1088, Comm'n Op., 2019 WL 6003332, at *27 (July 15, 2019); *Certain Composite Aerogel Insulation Materials and Methods for Manufacturing the Same*, Inv. No. 337-1003, Comm'n Op., at 62 (Feb. 22, 2018)

C. A Cease and Desist Order Is Warranted

Section 337 provides that in addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue a Cease and Desist Order ("CDO") as a remedy for violation of Section 337. *See* 19 U.S.C. § 1337(f)(1). The Commission generally issues a cease and desist order directed to a domestic respondent when there is a "commercially significant" amount of infringing, imported product in the United States that could be sold so as to undercut the remedy provided by an exclusion order. *See Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293, Comm'n Op. on the Issue Under Review, and on Remedy, the Public Interest and Bonding at 37-42, Pub. No. 2391 (U.S.I.T.C., June 1991). Cease and desist orders have been

declined when there is no evidence in the record with respect to infringing inventories in the United States. *Certain Condensers, Parts Thereof and Prods. Containing Same, Including Air Conditioners for Automobiles*, Inv. No. 337-TA-334, Comm'n Op. at 28 (U.S.I.T.C. Aug. 27, 1997).

Complainants have requested that the Commission issue cease and desist orders in this Investigation because Respondents maintain commercially significant inventory and have significant domestic operations that could undercut an exclusion order's effectiveness. (CBr. at 96-97 (citing CX-1569C (Mulhern Revised Rpt.) at ¶¶ 124-34; *see also* SBr. at 61 (agreeing that CDOs are "necessary").). *Certain Table Saws Incorporating Active Injury Mitigation Tech. and Components Thereof*, Inv. No. 337-TA-965, Comm'n Op. at 4-5 (Feb. 1, 2017).). Respondents' fact witness, Ms. Wong, testified that Respondents intended to carry U.S. inventory of the HydroStrike products to supply its customers [redacted] (CX-1638C (Wong Dep. Tr.) at 100:6-21, 101:4-7.). Complainants presented evidence that as of December 9, 2022, [redacted] units of Respondents' HydroStrike Nebula Pro were in transit to the United States, to be held in inventory by Prime Time Toys LLC at Regal Logistics in Fife, WA. (*Id.*; CX-0098C (PTT Respondents Resp. to Rog. 14) at 5; CX-1519C.). Based on the average selling price ("ASP") of the HydroStrike Nebula Pro of [redacted], these [redacted] units are valued at [redacted]. (CX-1614C (Mulhern Ex. 45).). Based on Respondents' average sales of the HydroStrike Nebula Pro during 2022, the [redacted] units represent approximately [redacted] of inventory. (*Id.*; CX-1613C (Mulhern Ex. 44).).

In addition, Respondents have on-going commercial activities in the United States. As Respondents acknowledged, Prime Time Toys LLC "imports and/or will sell Accused Products within the United States after importation;" that it is "the recipient of shipments of the Nebula

Pro and Pulsar Pro Products into the United States;" and that it "distributes and/or will sell the Nebula Pro and Pulsar Pro Products to other third parties for sale to retail customers within the United States." (CX-1514C (PTT Respondents Resp. to Rog. 6) at 14-15.). Prime Time Toys LLC also has employees in the United States, including at its office in Pompton Lakes, NJ and other locations "all around America." (CX-1638C (Wong Dep. Tr.) at 36:8-18.).

For these reasons, a CDO against each of the Respondents is necessary to address their violation of Section 337. *See Certain Three-Dimensional Cinema Sys. and Components Thereof*, 337-TA-939, Comm'n Op. at 62 (Aug. 23, 2016).

D. A Bond During the Presidential Review Period Is Warranted

During the Presidential Review Period, imported articles otherwise subject to a remedial order are entitled to conditional entry under bond. *See Certain Beverage Dispensing Sys. & Components Thereof*, Comm'n Op., Inv. No. 337-TA-1130 at 26 (Mar. 26, 2020) (citing 19 U.S.C. § 1337(j)(3)). The amount of bond is determined by the Commission and must be enough to protect the complainant from injury. *See id.* "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).

Complainant bears the burden of establishing the need for a bond, including the amount of bond. *See, e.g.*, *Certain Rubber Antidegradants, Components Thereof & Prods. Containing Same*, USITC Pub. No. 3975, Inv. No. 337-TA-533, Comm'n Op. at 40 (April 2008); *Certain Coenzyme Q10 Prods. and Methods of Making Same*, Inv. No. 337-TA-790, Initial and

Recommended Determination (Sept. 27, 2012) (recommending Commission not impose a bond because complainant failed in its burden to demonstrate the appropriate bond amount); *Certain Mobile Telephones and Wireless Commc'n Devices Featuring Digital Cameras, and Components Thereof*, Inv. No. 337-TA-703, Recommended Determination (Jan. 24, 2011) (recommending no bond because complainant did not meet its burden in providing evidence on the necessity of a bond); *Certain Liquid Crystal Display Devices and Prods. Containing the Same*, Inv. No. 337-TA-631, Comm'n Op. at 27-28 (July 14, 2009) (setting zero bond because complainant "simply claimed that it was impossible to conduct a price differential analysis" and "should not benefit from a lack of any effort to identify" relevant pricing information, particularly that which is in its possession).

The Commission frequently sets the bond based on the difference in sales prices between the patented domestic product and the infringing product. *See, e.g.*, *Microsphere Adhesives*, Inv. No. 337-TA-366, Comm'n Op. at 24. In other instances, when a direct comparison between a patentee's product and the accused product is not possible, the Commission has set the bond at a reasonable royalty rate. *See, e.g., Certain Integrated Circuit Telecomm. Chips and Prods. Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm'n Op. at 41-43 (Aug. 3, 1993). Commission precedent allows for a 100 percent bond when it is not practical or possible to set the bond based on price differential. *Certain Voltage Regulators, Components Thereof and Prods. Containing Same*, Inv. No. 337-TA-564, Comm'n Op. at 79 (Public Version Oct. 19, 2007). The purpose of the bond is to protect the complainant from any injury. 19 U.S.C. § 1337(j)(3); 19 C.F.R. §§ 210.42(a)(1)(ii), 210.50(a)(3).

Here, Complainants have requested a bond during the Presidential review period and argued that it should be set no lower than 5% of the entered value of the covered products based

on the [redacted]. (CPBr. at 149; CBr. at 97-98; CX-0699C [redacted]. As Staff noted, Respondents did not argue that the evidence supports a bond greater than 5%. (RPBr. at 150; RRBr. at 44-45.). Thus, Respondents did not dispute that a 5% bond rate is appropriate. Accordingly, a bond of 5% of entered value is appropriate.

X. AFFIRMATIVE DEFENSES

In their Response to the Complaint, Respondents asserted the following affirmative defenses ("Affirmative Defenses"): (i) Invalidity (First Affirmative Defense); (ii) Inequitable Conduct (Second Affirmative Defense); (iii) Non-Infringement (Third Affirmative Defense); (iv) Ensnarement (Fourth Affirmative Defense); and (v) Lack of Domestic Industry (Fifth Affirmative Defense). (Resp. at 26-34.).

Respondents did not raise in their Pre-Hearing Brief or offer any evidence during the Hearing to support their Second Affirmative Defense of Inequitable Conduct and Fourth Affirmative Defense of Ensnarement.

Accordingly, it is a finding of this decision that Respondents have withdrawn, waived and/or abandoned their Second and Fourth Affirmative Defenses consistent with Ground Rules 7.2 and 10.1. *Kinik Co. v. Int'l Trade Comm'n*, 362 F.3d 1359, 1367 (Fed. Cir. 2004).

XI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Jurisdiction and standing requirements are satisfied.

2. Claims 8, 19, and 20 of U.S. Patent No. 8,371,282 and claims 5 and 14 of U.S. Patent No. 8,640,683 have been found to be directly and indirectly infringed.

3. Complainants' DI Products have been found to practice one or more claims of the Asserted Patents.

4. The Asserted Patents are valid and specifically have not been found to be invalid.

5. Complainants' domestic activities with respect to their DI Products have been found to satisfy the economic prong of the domestic industry requirement under 19 U.S.C. § 337(a)(2).

6. A Limited Exclusion Order and Cease and Desist Order are recommended based upon the evidence and findings of infringement.

7. A Bond is recommended.

The lack of discussion of any matter raised by the Parties, or any portion of the record, does not indicate that it has not been considered. Rather, any such matter(s) or portion(s) of the record has/have been determined to be irrelevant, immaterial or meritless. Arguments made on briefs, which were otherwise unsupported by record evidence or legal precedent, have been accorded no weight.

XII. INITIAL DETERMINATION

This Initial Determination on Violation of Section 337 of the Tariff Act of 1930 is certified to the Commission. All orders and documents, filed with the Secretary, including the exhibit lists enumerating the exhibits received into evidence in this Investigation, that are part of the record, as defined in 19 C.F.R. § 210.38(a), are not certified, since they are already in the Commission's possession in accordance with Commission Rules. *See* 19 C.F.R. § 210.38(a). In accordance with 19 C.F.R. § 210.39(c), all material found to be confidential under 19 C.F.R. § 210.5 is to be given *in camera* treatment.

Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review pursuant to 19 C.F.R. § 210.43(a) or the Commission, pursuant to 19 C.F.R. § 210.44, orders on its own motion a

review of the Initial Determination or certain issues therein.

Within fourteen (14) days of the date of this document, the Parties shall submit to the Office of Administrative Law Judges through McNamara337@usitc.gov a joint statement whether or not they seek to have any portion of this document deleted from the public version. The Parties' submission must include a copy of this ID with yellow highlighting, with or without red brackets, indicating any portion asserted to contain CBI to be deleted from the public version. The Parties' submission shall also include an index identifying the pages of this document where proposed redactions are located. The Parties' submission concerning the public version of this document need not be filed with the Commission Secretary.

After the Parties have provided proposed redactions of confidential business information ("CBI") to McNamara337@usitc.gov that Chambers has evaluated and accepted, the Secretary shall serve a public version of this ID upon all parties of record. The Secretary shall serve a confidential version upon counsel who are signatories to the Protective Order (Order No. 1).

SO ORDERED.

MaryJoan McNamara
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the parties listed have entered an appearance in the above captioned investigation, and a copy of the PUBLIC CERTIFICATE OF SERVICE was served upon the following parties via first class mail and air mail where necessary.

Document	Security	Document Type	Official Rec'd Date	Title
808477	Public	ID/RD - Final on Violation	11/14/2023 10:55 AM	Initial Determination on Violation of Section 337 and Recommended Determination on Remedy and Bond

Service Date: November 14, 2023

/s/

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