

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

In the Matter of

**CERTAIN PERSONAL
TRANSPORTERS, COMPONENTS
THEREOF, AND PACKAGING AND
MANUALS THEREFOR**

And

**CERTAIN PERSONAL
TRANSPORTERS AND COMPONENTS
THEREOF**

**Investigation No. 337-TA-1007
Investigation No. 337-TA-1021
(Consolidated)**

**NOTICE OF A COMMISSION FINAL DETERMINATION OF VIOLATION OF
SECTION 337; ISSUANCE OF REMEDIAL ORDERS; TERMINATION OF
INVESTIGATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

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

FOR FURTHER INFORMATION CONTACT: Michael Liberman, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3115. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

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

On September 21, 2016, the Commission instituted Inv. No. 337-TA-1021, *Certain Personal Transporters and Components Thereof*, based on a complaint filed by the same Complainants. 81 FR 64936-37 (Sept. 21, 2016). The complaint alleges a violation of section 337 by reason of infringement of certain claims of the ‘230 and ‘607 patents. The named respondents for Investigation No. 337-TA-1021 are Powerboard LLC of Scottsdale, Arizona; Metem Teknoloji Sistemleri San of Istanbul, Turkey; Changzhou Airwheel Technology Co., Ltd. of Jiangsu, China; Airwheel of Amsterdam, Netherlands; Nanjing Fastwheel Intelligent Technology Co., Ltd. of Nanjing, China; Shenzhen Chenduoxing Electronic, Technology Ltd., China, a.k.a. C-Star of Shenzhen, China; Hangzhou Chic Intelligent Technology Co., Ltd. of Hangzhou, China; Hovershop of Placentia, California; Shenzhen Jomo Technology Co., Ltd., a.k.a. Koowheel of Shenzhen City, China; Guangzhou Kebye Electronic Technology Co., Ltd., a.k.a. Gotway of Shenzhen, China; and Inventist. OUII was also named as a party to this investigation. 81 FR 64936 (Sept. 21, 2016). The Commission directed the presiding ALJ to consolidate Inv. Nos. 337-TA-1007 and 337-TA-1021. *See id.* at 64937.

Subsequently, the Commission determined not to review an initial determination (“ID”) finding respondents PhunkeeDuck, Inc. and Segaway in default. Order No. 9 (Sept. 1, 2016) (*not reviewed* Oct. 3, 2016). The Commission further determined not to review an ID granting complainants’ corrected motion to amend the complaint and notice of investigation to assert the ‘763, ‘330, and ‘872 patents against respondent Jetson Electric Bikes LLC, and to terminate the investigation with respect to all asserted claims of the ‘984 patent as to all respondents. Order No. 17 (Nov. 14, 2016) (*not reviewed* Dec. 7, 2016). The Commission also determined not to review an ID terminating the investigation as to respondent Nanjing Fastwheel Intelligent Technology Co., Ltd. based on a Consent Order Stipulation. Order No. 18 (Nov. 15, 2016) (*not reviewed* Dec. 7, 2016). The Commission likewise determined not to review an ID granting a motion to terminate the investigation as to the ‘763 patent. Order No. 19 (Dec. 16, 2016) (*not reviewed* Jan. 10, 2017). The Commission further determined not to review an ID finding respondents Shenzhen Chenduoxing Electronic, Technology Ltd., China, a.k.a. C-Star; Shenzhen Jomo Technology Co., Ltd., a.k.a. Koowheel; Guangzhou Kebye Electronic Technology Co.,

Ltd., a.k.a. Gotway; Metem Teknoloji Sistemleri San; and Airwheel Netherlands in default. Order No. 22 (Jan. 9, 2017) (*not reviewed* Feb. 7, 2017). The Commission also determined not to review an ID terminating this investigation with respect to all asserted claims of the '330 patent and the '872 patent as to all respondents. *See* Order No. 24 (Jan. 10, 2017) (*not reviewed* Feb. 7, 2017).

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

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

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

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

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

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

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

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

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

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

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

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

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

manufactured by or on behalf of, or imported by or on behalf of, Respondent Segaway; and (2) a CDO directed against Respondent Swagway.

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

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

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

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: December 11, 2017

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC

In the Matter of
CERTAIN PERSONAL TRANSPORTERS,
COMPONENTS THEREOF, AND
PACKAGING AND MANUALS THEREFOR

and

CERTAIN PERSONAL TRANSPORTERS
AND COMPONENTS THEREOF

Inv. No. 337-TA-1007
Inv. No. 337-TA-1021
(Consolidated)

CORRECTED LIMITED EXCLUSION ORDER

The United States International Trade Commission (“Commission”) has determined that there is a violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), in the unlawful importation, sale for importation, or sale within the United States after importation by respondent Swagway LLC of South Bend, Indiana (“Swagway”) of certain personal transporters, components thereof, and packaging and manuals therefor that infringe U.S. Trademark Registration Nos. 2,727,948 and 2,769,942, which cover the “SEGWAY” marks. The Commission has also found respondent Segaway of Studio City, California (“Segaway”) in default pursuant to subsection (g)(1) of section 337, 19 U.S.C. § 1337(g)(1), and section 210.16 of the Commission’s Rules of Practice and Procedure, 19 C.F.R. § 210.16, for failing to respond to a Complaint and Notice of Investigation that alleged a violation of section 337 with respect to the unlawful importation, sale for importation, and sale after importation of certain personal

transporters, components thereof, and packaging and manuals therefor that infringe U.S.

Trademark Registration Nos. 2,727,948 and 2,769,942, which cover the "SEGWAY" marks.

Having reviewed the record of this investigation, including the written submissions of the parties, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined that the appropriate form of relief is a limited exclusion order prohibiting the unlicensed entry of covered personal transporters, components thereof, and packaging and manuals therefor manufactured by or on behalf of, or imported by or on behalf of, respondents Swagway and Segaway or any of their affiliated companies, parents, subsidiaries, or other related business entities, or its successors or assigns.

The Commission has also determined that the public interest factors enumerated in 19 U.S.C. § 1337(d)(1), (f)(1) and (g)(1) do not preclude the issuance of the limited exclusion order. The Commission has further determined that the bond during the period of Presidential review shall be in the amount of zero percent (*i.e.*, no bond) of the entered value of the imported subject articles of respondent Swagway and 100 percent of the entered value of the imported subject articles of respondents Segaway.

Accordingly, the Commission hereby **ORDERS** that:

1. SWAGWAY-branded and SEGAWAY-branded personal transporters, components thereof, and packaging and manuals thereof manufactured outside the United States that infringe one or more of the following U.S. Trademark Registration Nos. 2,727,948 and 2,769,942 and that are manufactured abroad by or on behalf of, or imported by or on behalf of, respondents Swagway or Segaway, or any of their affiliated companies, parents, subsidiaries, or other related business entities, or its successors or assigns, are excluded from entry for consumption into the United States, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, except if imported by,

under license from, or with the permission of the trademark owner, or as provided by law, until such date as the trademarks are abandoned, canceled, or rendered invalid or unenforceable.

2. Notwithstanding paragraph 1 of this Order, respondent Swagway's personal transporters, components thereof, and packaging and manuals thereof are entitled to entry into the United States for consumption, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption, under bond in the amount of zero percent of the entered value (*i.e.*, no bond), and respondent Segaway's personal transporters, components thereof, and packaging and manuals thereof are entitled to entry into the United States for consumption, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption, under bond in the amount of 100 percent of the entered value, pursuant to subsection (j) of Section 337 (19 U.S.C. § 1337(j)) and the Presidential Memorandum for the United States Trade Representative of July 21, 2005 (*70 Fed. Reg.* 43,251), from the day after this Order is received by the United States Trade Representative until such time as the United States Trade Representative notifies the Commission that this Order is approved or disapproved but, in any event, not later than sixty days after the date of receipt of this Order.
3. At the discretion of U.S. Customs and Border Protection ("CBP") and pursuant to procedures that it establishes, persons seeking to import personal transporters, components thereof, and packaging and manuals thereof that are potentially subject to this Order may be required to certify that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state

that, to the best of their knowledge and belief, the products being imported are not excluded from entry under paragraph 1 of this Order. At its discretion, CBP may require persons who have provided the certification described in this paragraph to furnish such records or analyses as are necessary to substantiate the certification.

4. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to personal transporters, components thereof, and packaging and manuals thereof imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.
5. Complainants Segway Inc., DEKA Products Limited Partnership, and Ninebot (Tianjin) Technology Co., Ltd. (collectively, "Complainants") shall file a written statement with the Commission, made under oath, each year on the anniversary of the issuance of this Order stating whether Segway continues to use each of the aforesaid trademarks in commerce in the United States in connection with personal transporters, components thereof, and packaging and manuals thereof, whether any of the aforesaid trademarks has been abandoned, canceled, or rendered invalid or unenforceable, and whether Segway continues to satisfy the economic requirements of Section 337(a)(2).
6. The Commission may modify this Order in accordance with the procedures described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).
7. The Secretary shall serve copies of this Order upon each party of record in this investigation and upon CBP.

8. Notice of this Order shall be published in the *Federal Register*.

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: February 7, 2018

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC**

In the Matter of

**CERTAIN PERSONAL TRANSPORTERS,
COMPONENTS THEREOF, AND
PACKAGING AND MANUALS THEREFOR**

and

**CERTAIN PERSONAL TRANSPORTERS
AND COMPONENTS THEREOF**

**Inv. No. 337-TA-1007
Inv. No. 337-TA-1021
(Consolidated)**

CEASE AND DESIST ORDER

IT IS HEREBY ORDERED THAT Swagway LLC, 3431 William Richardson Drive, Suite F, South Bend, IN 46628, cease and desist from conducting any of the following activities in the United States: importing, selling, offering for sale, marketing, advertising, distributing, transferring (except for exportation) and soliciting United States agents or distributors for personal transporters, components thereof, and packaging and manuals therefor that infringe U.S. Trademark Registration Nos. 2,727,948 or 2,769,942, in violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337.

I. Definitions

As used in this order:

- (A) “Commission” shall mean the United States International Trade Commission.
- (B) “Complainants” shall mean Segway Inc. of Bedford, New Hampshire; DEKA Products Limited Partnership of Manchester, New Hampshire; and Ninebot (Tianjin) Technology Co., Ltd. of Tianjin, China.

- (C) "Respondent" shall mean Swagway LLC, 3431 William Richardson Drive, Suite F, South Bend, IN 46628.
- (D) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity or its majority-owned or controlled subsidiaries, successors, or assigns.
- (E) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.
- (F) The terms "import" and "importation" refer to importation for entry for consumption under the Customs laws of the United States.
- (G) The term "covered products" shall mean SWAGWAY-branded personal transporters, components thereof, and packaging and manuals therefor that infringe one or more of U.S. Trademark Registration Nos. 2,727,948 and 2,769,942.

II. Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by section III, *infra*, for, with, or otherwise on behalf of, Respondent.

III. Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by this Order.

While U.S. Trademark Registration Nos. 2,727,948 and 2,769,942 remain valid and enforceable, Respondent shall not:

- (A) import, sell for importation, or sell after importation into the United States

covered products;

- (B) market, distribute, offer for sale, or otherwise transfer (except for exportation) in the United States imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

IV. Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of U.S. Trademark Registration Nos. 2,727,948 and 2,769,942 licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States, as applicable.

V. Reporting

For purposes of this requirement, the reporting periods shall commence on July 1 of each year and shall end on the subsequent June 30. The first report required under this section shall cover the period from the date of issuance of this order through June 30, 2018. This reporting requirement shall continue in force until such time as Respondent has truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of covered products that it has (i) imported and/or (ii) sold in the United States after importation during the reporting period, and (b) the quantity in units and value in U.S. dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

When filing written submissions, Respondent must file the original document electronically on or before the deadlines stated above and submit eight (8) true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-947") in a prominent place on the cover pages and/or the first page. *See Handbook for Electronic Filing Procedures*, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf. Persons with questions regarding filing should contact the Secretary (202-205-2000). If Respondent desires to submit a document to the Commission in confidence, it must file the original and a public version of the original with the Office of the Secretary and must serve a copy of the confidential version on Complainants' counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

VI. Record-Keeping and Inspection

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

¹ Complainants must file a letter with the Secretary identifying the attorney to receive reports and bond information associated with this Order. The designated attorney must be on the protective order entered in the investigation.

(B) For the purposes of determining or securing compliance with this Order and for no other purpose, subject to any privilege recognized by the federal courts of the United States, and upon reasonable written notice by the Commission or its staff, duly authorized representatives of the Commission shall be permitted access and the right to inspect and copy, in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, in detail and in summary form, that must be retained under subparagraph VI(A) of this Order.

VII. Service of Cease and Desist Order

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

VIII. Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to section V of this Order should be made in accordance with section 201.6 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 201.6). For all reports for which

confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX. Enforcement

Violation of this order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.75), including an action for civil penalties under section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(f)), as well as any other action that the Commission deems appropriate. In determining whether Respondent is in violation of this order, the Commission may infer facts adverse to Respondent if it fails to provide adequate or timely information.

X. Modification

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

XI. Bonding

The conduct prohibited by section III of this order may be continued during the sixty-day period in which this Order is under review by the United States Trade Representative, as delegated by the President (70 *Fed. Reg.* 43,251 (Jul. 21, 2005)), under bond in the amount of zero percent of the entered value (*i.e.*, no bond). This bond provision does not apply to conduct that is otherwise permitted by section IV of this Order. Covered products imported on or after the date of issuance of this Order are subject to the entry bond as set forth in the exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of

temporary exclusion orders. *See* 19 C.F.R. § 210.68. The bond and any accompanying documentation are to be provided to and approved by the Commission prior to the commencement of conduct that is otherwise prohibited by section III of this Order. Upon the Secretary's acceptance of the bond, (a) the Secretary will serve an acceptance letter on all parties, and (b) Respondent must serve a copy of the bond and accompanying documentation on Complainant's counsel.²

The bond is to be forfeited in the event that the United States Trade Representative approves this Order (or does not disapprove it within the review period), unless (i) the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or (ii) Respondent exports or destroys the products subject to this bond and provides certification to that effect that is satisfactory to the Commission.

This bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved (or not disapproved) by the United States Trade Representative, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: December 11, 2017

² *See* Footnote 1.

PUBLIC VERSION

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

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**Investigation No. 337-TA-1007
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COMMISSION OPINION

I. BACKGROUND AND PROCEDURAL HISTORY

The Commission instituted Inv. No. 337-TA-1007, *Certain Personal Transporters, Components Thereof, and Packaging and Manuals Therefor* under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (“section 337”), on June 24, 2016, based on a complaint filed by Segway, Inc. of Bedford, New Hampshire; DEKA Products Limited Partnership of Manchester, New Hampshire; and Ninebot (Tianjin) Technology Co., Ltd. of Tianjin, China (collectively, “Complainants”). 81 *Fed. Reg.* 41342-43 (Jun. 24, 2016). The complaint alleges a violation of section 337 by reason of infringement of certain claims of U.S. Patent Nos. 6,302,230 (“the ‘230 patent”); 6,651,763 (“the ‘763 patent”); 7,023,330 (“the ‘330 patent”); 7,275,607 (“the ‘607 patent”); 7,479,872 (“the ‘872 patent”); and 9,188,984 (“the ‘984 patent”); and U.S. Trademark Registration Nos. 2,727,948 (“the ‘948 TM”) and 2,769,942 (“the ‘942 TM”). The named respondents for Investigation No. 337-TA-1007 are Inventist, Inc. of Camas, Washington; PhunkeeDuck, Inc. of Floral Park, New York (“PhunkeeDuck”); Razor USA LLC

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of Cerritos, California; Swagway LLC of South Bend, Indiana (“Swagway”); Segaway of Studio City, California (“Segaway”); and Jetson Electric Bikes LLC of New York, New York (“Jetson”). The Commission’s Office of Unfair Import Investigations (“OUII”) was also named as a party to this investigation. 81 Fed. Reg. 41342 (Jun. 24, 2016).

On September 21, 2016, the Commission instituted Inv. No. 337-TA-1021, *Certain Personal Transporters and Components Thereof*, based on a complaint filed by the same Complainants. 81 Fed. Reg. 64936-37 (Sept. 21, 2016). The complaint alleges a violation of section 337 by reason of infringement of certain claims of the ‘230 and ‘607 patents. The named respondents for Investigation No. 337-TA-1021 are Powerboard LLC of Scottsdale, Arizona (“Powerboard”); Metem Teknoloji Sistemleri San of Istanbul, Turkey (“Metem”); Changzhou Airwheel Technology Co., Ltd. of Jiangsu, China (“Airwheel”); Airwheel of Amsterdam, Netherlands (“Airwheel NL”); Nanjing Fastwheel Intelligent Technology Co., Ltd. of Nanjing, China; Shenzhen Chenduoxing Electronic, Technology Ltd., China, a.k.a. C-Star of Shenzhen, China (“C-Star”); Hangzhou Chic Intelligent Technology Co., Ltd. of Hangzhou, China (“Chic”); Hovershop of Placentia, California; Shenzhen Jomo Technology Co., Ltd., a.k.a. Koowheel of Shenzhen City, China (“Koowheel”); Guangzhou Kebye Electronic Technology Co., Ltd., a.k.a. Gotway of Shenzhen, China (“Gotway”); and Inventist. OUII was also named as a party to this investigation. 81 Fed. Reg. 64936 (Sept. 21, 2016). The Commission directed the presiding ALJ to consolidate Inv. Nos. 337-TA-1007 and 337-TA-1021. *See id.* at 64937.

Subsequently, the Commission determined not to review an initial determination (“ID”) finding respondents PhunkeeDuck and Segaway in default. Order No. 9 (Sept. 1, 2016) (*not reviewed*, Notice, Oct. 3, 2016). The Commission further determined not to review an ID

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granting complainants' corrected motion to amend the complaint and notice of investigation to assert the '763, '330, and '872 patents against respondent Jetson, and to terminate the investigation with respect to all asserted claims of the '984 patent as to all respondents. Order No. 17 (Nov. 14, 2016) (*not reviewed*, Notice, Dec. 7, 2016).

Only the following respondents remain active in the consolidated investigation: Airwheel; Chic; Jetson; Powerboard; and Swagway. ID at 9-10. The remaining respondents were found in default or entered into the consent orders. At the time PhunkeeDuck and Segaway were found in default, claims 1-3 and 5-20 of the '984 patent remained pending against them.

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

The technology at issue relates to "vehicles and methods for transporting individuals, and more particularly to balancing vehicles and methods for transporting individuals over ground having a surface that may be irregular." '230 patent, 1:5-8. ID at 17. It also pertains to "control of personal transporters, and more particularly to devices and methods for providing user input with respect to either directional or velocity control of such transporters (having any number of ground-contacting elements) based on the position or orientation of a user." '607 patent, 1:21-26. ID at 17-18.

The '230 patent, entitled "Personal mobility vehicles and methods," issued on October 16, 2001. The invention of the '230 patent pertains to vehicles and methods for transporting individuals, and more particularly to balancing vehicles and methods for transporting individuals over ground having a surface that may be irregular. While a wide range of vehicles and methods

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used for transportation typically rely on static stability, being designed so as to be stable under all foreseen conditions of placement of their ground-contacting members, '230 patent, 1:5-16, an alternative to a static stability is dynamic stability that may be maintained by action of the user, as in the case of a bicycle or motorcycle or scooter, or in accordance with embodiments disclosed in the '230 patent. '230 patent, 6:66-7:2. The '230 patent discloses a dynamically balanced vehicle that determines the real-time maximum operating velocity under the current conditions of the vehicle and monitors "the difference between the maximum velocity of the vehicle and the present velocity of the vehicle." '230 patent, Abstract. The vehicle generates a warning when such a difference falls below a specified limit. *Id.*

The '607 patent, entitled "Control of a personal transporter based on user position," issued on October 2, 2007. The invention disclosed in the '607 patent is directed to dynamically stabilized transporters, *i.e.*, to personal transporters having a control system that actively maintains the stability of the transporter while the transporter is operating. The control system maintains the stability of the transporter by continuously sensing the orientation of the transporter, determining the corrective action to maintain stability, and commanding the wheel motors to make the corrective action. '607 patent, 1:30-37. The disclosed invention pertains to control of personal transporters, and more particularly to devices and methods for providing user input with respect to either directional or velocity control of such transporters (having any number of ground-contacting elements) based on the position or orientation of a user. '607 patent, 1:21-26. The '607 patent discloses an automatically balanced vehicle with a "controller for providing user input of a desired direction of motion or orientation." '607 patent, Abstract. "The controller has an input for receiving specification by a user of a value based on a detected

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body orientation of the user.” *Id.*

The ‘948 TM for the mark SEGWAY covers “motorized, self-propelled, wheeled personal mobility devices, namely, [wheelchairs], scooters, utility carts, and chariots.” ID at 165 (citing JX-0005 (brackets in original)). The ‘942 TM for the stylized SEGWAY mark covers “motorized, self-propelled, wheeled personal mobility devices, namely, wheelchairs, scooters, utility carts, and chariots.” ID at 165 (citing JX-0007).

The evidentiary hearing in this investigation was held from April 18 through April 21, 2017. On August 10, 2017, the ALJ issued his final ID finding a violation of section 337 based on trademark infringement. The ID found that the accused products do not infringe the asserted claims of the ‘230 and ‘607 patents, which were not found to be invalid. The ID also found that the technical prong of the domestic industry requirement was not satisfied for the ‘230 or ‘607 patents, and therefore the domestic industry requirement was not satisfied for those patents. The ID further found that the Swagway accused products infringe the ‘948 TM and ‘942 TM, for which the domestic industry requirement was satisfied. ID at 192-93; 82; 147. The ALJ issued his Recommended Determination (“RD”) on remedy and bonding on August 22, 2017.

All active parties to this investigation (with the exception of respondents Powerboard and Airwheel)¹ filed timely petitions for review of various portions of the final ID, as well as timely responses to the petitions.

The Commission determined to review the final ID in part, and issued a notice dated

¹ Respondent Airwheel timely filed a joinder to Chic’s Petition. It also filed a response to Complainants’ petition. Respondent Powerboard requested leave to file a contingent petition for review of the ID one day out of time on August 24, 2017. The Chairman denied the request because good cause had not been shown.

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October 13, 2017 (“the Commission Notice”) in which the Commission specified the issues under review and the questions pertaining to such issues. *See* 82 *Fed. Reg.* 48724-26 (Oct. 19, 2017). In particular, the Commission determined to review the following:

- (1) the ID’s determination that the claim term “maximum operating velocity” should be construed to mean “a variable maximum velocity where adequate acceleration potential is available to enable balance and control of the vehicle,” *see* ID at 44;
- (2) the ID’s determination that “nothing in the plain language of the disputed limitation [‘the motorized drive arrangement causing, when powered, automatically balanced operation of the system’] from claim 1 of the ‘230 patent requires the operation by a rider. The claim only requires the ‘motorized drive arrangement causing, when powered, automatically balanced operation of the system,’” *see* ID at 82;
- (3) the ID’s infringement, validity, and domestic industry (technical prong) determinations pertaining to the ‘230 patent;
- (4) the instances in the ID that refer to a disclaimer of “manual input” with respect to the ‘607 patent and on review, determined that this disclaimer is actually a disclaimer of “manual input via joystick.” The Commission’s analysis on this issue is provided in this opinion below; and
- (5) the ID’s finding with respect to actual confusion regarding the SWAGWAY mark, *see* ID at 171-72.²

Id. at 48725. The Commission determined not to review the remainder of the ID. *Id.*

The Commission requested the parties to brief their positions on only the following issues, with reference to the applicable law and the evidentiary record:

1. The ID determined with respect to the ‘230 patent that “the claim term ‘maximum operating velocity’ should be construed to mean ‘a variable maximum velocity where adequate acceleration potential is available to enable balance and control of the vehicle.’” ID at 44.

² In addition, the Commission determined to correct two typographical errors in the ID: In the first line of the last paragraph on page 170 “the Swagway ‘trademark’” was replaced with “the Segway ‘trademark’”; and in the first line on page 171 “‘Swagway’” was replaced with “‘Segway’”. 82 *Fed. Reg.* 48725.

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a. Does intrinsic evidence support the ID's above determination?

b. Does extrinsic evidence support the ID's above determination?

2. The ID determined with respect to the '230 patent that "nothing in the plain language of the disputed limitation ['the motorized drive arrangement causing, when powered, automatically balanced operation of the system'] from claim 1 of the '230 patent requires the operation by a rider. The claim only requires the 'motorized drive arrangement causing, when powered, automatically balanced operation of the system.'" ID at 82.

a. Does intrinsic evidence support the ID's above determination?

b. Does extrinsic evidence support the ID's above determination?

82 *Fed. Reg.* 48726.

In accordance with the Commission Notice, parties to this investigation filed timely opening written submissions, and timely reply submissions.³ On August 23, 2017, the Commission issued a Notice of Request for Statements on the Public Interest. No written submissions from the public were filed with the Commission. Complainants timely filed a public interest submission on September 21, 2017. 19 C.F.R. § 210.50(a)(4). Respondents did not file any public interest submissions.

³ One of the active respondents, Powerboard, did not file any pleadings in response to the Review Notice. Respondent Jetson filed only an opening pleading in response to the Review Notice.

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II. SUMMARY OF DETERMINATIONS

The Commission has determined as follows with respect to the issues under review and the issues of remedy, the public interest, and bonding. The Commission affirms any findings under review that are not specifically discussed below.

The Commission affirms the ID's determination that the claim term "maximum operating velocity" should be construed to mean "a variable maximum velocity where adequate acceleration potential is available to enable balance and control of the vehicle," ID at 44. The Commission likewise affirms the ID's determination that "nothing in the plain language of the disputed limitation [the motorized drive arrangement causing, when powered, automatically balanced operation of the system] from claim 1 of the '230 patent requires the operation by a rider. The claim only requires the 'motorized drive arrangement causing, when powered, automatically balanced operation of the system,'" ID at 82. The Commission affirms the ID's infringement, validity, and domestic industry (technical prong) determinations pertaining to the '230 patent, with the exception of the ID's findings and analysis in its discussion of the non-infringement of the '230 patent that are based on Complainants' preferred construction of the term "maximum operating velocity," *see* ID at 51-77, on which the Commission takes no position.

Finally, the Commission modifies, as detailed *infra*, the ID's discussion and conclusion with respect to the "actual confusion" factor regarding the SEGWAY mark on pages 171-172 of the ID, to find that the "actual confusion" factor does not weigh in favor of a finding of a likelihood of confusion.

The Commission determines to issue: (1) an LEO prohibiting the importation into the

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United States of (a) SWAGWAY-branded personal transporters, components thereof, and packaging and manuals thereof manufactured outside the United States that infringe one or more of the '948 TM and '942 TM and that are manufactured abroad by or on behalf of, or imported by or on behalf of, Respondent Swagway, or any of its affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns; and (b) personal transporters, components thereof, and packaging and manuals therefor manufactured outside the United States that infringe one or more of the '948 TM and '942 TM, which cover the "SEGWAY" marks, and that are manufactured by or on behalf of, or imported by or on behalf of, Respondent Segaway, or any of its affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns; and (2) a CDO directed against SWAGWAY-branded personal transporters, components thereof, and packaging and manuals therefor that infringe one or more of the '948 TM and '942 TM. The Commission further determines that the public interest will not be adversely affected by entry of these remedial orders. Finally, the Commission determines to set the bond amount at zero (0) percent of the entered value of Respondent Swagway's accused products and at 100 percent of the entered value of defaulted Respondent Segaway's accused products during the Presidential review period (19 U.S.C. § 1337(j)).

III. COMMISSION REVIEW

Commission review of an initial determination is limited to the issues set forth in the notice of review and all subsidiary issues therein. *Certain Bar Clamps, Bar Clamp Pads, and Related Packaging Display and Other Materials*, Inv. No. 337-TA-429, Comm'n Op. at 3 (Jan. 4, 2001). Once the Commission determines to review an initial determination, its review is conducted under a *de novo* standard. *Certain Polyethylene Terephthalate Yarn and*

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Products Containing Same, Inv. No. 337-TA-457, Comm'n Op. at 9 (Jun. 18, 2002). Upon review the "Commission has 'all the powers which it would have in making the initial determination,' except where the issues are limited on notice or by rule." *Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, Comm'n Op. on the Issues Under Review and on Remedy, the Public Interest, and Bonding at 9-10 (Jun. 2, 1997), USITC Pub. 3046 (July 1997) (quoting *Certain Acid-Washed Denim Garments and Accessories*, Inv. No. 337-TA-324, Comm'n Op. at 5 (Nov. 1992)).

On review, "the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge. . . . The Commission also may make any findings or conclusions that in its judgment are proper based on the record in the proceeding." 19 C.F.R. § 210.45(c).

IV. DISCUSSION

A. ISSUES UNDER REVIEW

1. **The ID's determination that the claim term "maximum operating velocity" should be construed to mean "a variable maximum velocity where adequate acceleration potential is available to enable balance and control of the vehicle"**

We affirm the ID's claim construction, *see* ID at 44.

2. **The ID's determination that "nothing in the plain language of the disputed limitation ['the motorized drive arrangement causing, when powered, automatically balanced operation of the system'] from claim 1 of the '230 patent requires the operation by a rider. The claim only requires the 'motorized drive arrangement causing, when powered, automatically balanced operation of the system'"**

We likewise affirm the ID's claim construction, *see* ID at 82.

3. **The ID's infringement, validity, and domestic industry (technical prong) determinations pertaining to the '230 patent**

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We affirm the ID's infringement, validity, and domestic industry (technical prong) determinations with respect to the '230 patent, with one modification. After the ALJ made non-infringement findings based on the correct claim construction of "maximum operating velocity," *see* ID at 50-52, he additionally analyzed the accused products under the incorrect claim construction proposed by Complainants, which he had properly rejected. Based on this additional analysis, the ID made additional non-infringement findings. *See* ID at 52-57. The Commission takes no position on these findings. *See Beloit Corporation v. Valmet Oy*, 742 F.2d 1421, 1423 (Fed. Cir.1984).

4. A disclaimer of "manual input" with respect to the '607 patent.

The Commission previously determined that the ID's disclaimer of "manual input" with respect to the '607 patent is actually a disclaimer of "manual input via joystick." *See 82 Fed. Reg.* 48724-26 (Oct. 19, 2017). The ID found that the evidence shows that Complainants disavowed manual inputs, in addition to tilting, from inclusion in the "body orientation of a user" limitation during prosecution of the '607 patent. ID at 112 (citing Resps. Br. at 25-26). The ID found that in the same March 6, 2007 Response to the Office Action in which the applicants disavowed tilting angle to overcome a rejection in view of Furukawa, the applicants also made statements to overcome a rejection in view of U.S. Patent No. 5,791,425 to Kamen ("Kamen '425") (RX-0020). The ID noted that the applicants stated that the Kamen '425 reference to a joystick cannot be "taken to subsume 'body orientation of a user'" and that manual input via joystick is provided "in absolute indifference to the orientation of the user." ID at 113 (citing JX-0004 ('607 Patent File History) at 55). The ID stated that thus the applicants made clear that manual input is not the same as "a detected body orientation." ID at 113 (citing RX-0050C

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(Nourbakhsh WS) at Q/A 155).

Complainants contend that, contrary to the ID's finding, applicants did not disclaim manual inputs beyond manual input via joystick. Complainants argue that during prosecution of the '607 patent, applicants disclaimed the manual operation of a joystick as not being within the scope of their claimed invention, because operation of a joystick does not correspond to the body orientation of a user. ComplPet at 39 (citing CX-1968C (Ganssle WS) at Q/A 179).⁴

Complainants assert that applicants were clear that the disclaimed subject matter only related to a joystick. *See* ComplPet at 39-40 (citing JX-0004 ('607 patent file history) at SEGWAY_1007ITC0087708).

Complainants argue that the ID erred by finding a disclaimer that would exclude any yaw control based on any "manual input." ComplPet at 40. Complainants point out that the term "manual input" does not appear in the applicants' March 6, 2007, Response to the Office Action

⁴ The following abbreviations of the parties' pleadings are used in this Opinion: ComplPet – "Complainants' Petition For Review On the Issues Of Infringement And Technical Prong Of Domestic Industry And Contingent Petition For Review On Certain Issues Relating To Patent Validity;" SwagwayPet – "Petition For Review Of Initial Determination by Respondent Swagway, LLC;" ComplResp – "Complainants' Response To Respondents Jetson's, Powerboard's And Chic's Contingent Petitions And Respondent Swagway's Petition For Review;" SwagwayResp – "Response To Complainants' Petition For Review Of Initial Determination By Respondent Swagway, LLC;" IAResp – "Response Of The Office Of Unfair Import Investigations To The Private Parties' Petitions For Review Of The Initial Determination On Violation Of Section 337;" IAOpenNotice – "Response Of The Office Of Unfair Import Investigations To The Commission Determination To Review In Part A Final Initial Determination;" RespOpenNotice – "Brief Of Chic, Swagway, And Airwheel On The Issues Under Review And Brief Of Chic, Swagway, And Airwheel On Remedy, Bond, And The Public Interest;" ComplReplyNotice – "Complainants' Reply Submission On Claim Construction And Remedy, The Public Interest And Bonding;" ComplOpenRemedy – "Complainants' Written Submission On Remedy, The Public Interest, And Bonding, And Response To Commission Notice Seeking Additional Information;" Compls. PI Statement – "Complainants' Submission On The Public Interest;" RespReplyRemedy – "Respondents' Reply To Complainants' And OUII's Written Submission On Remedy, The Public Interest, And Bonding."

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at all. They argue that since any disclaimer must be “clear” and “unmistakable,” the only disclaimer that could have been clear and unmistakable is the use of a joystick to effect an input of desired yaw and yaw rate. Complainants assert that other inputs based on a detected body orientation of the user, and any manual input other than a joystick, was not within the scope of the disclaimer because the statements made did not refer to anything other than a joystick and were made to circumvent a specific prior art reference that only disclosed the use of a joystick. ComplPet at 40.

It appears that the ID uses the term “manual input” interchangeably with the term “manual input via joystick.” In its claim construction analysis, the ID stated that the evidence shows that Complainants have disavowed manual inputs, ID at 112, and that manual input is not the same as “a detected body orientation,” *id.* at 113 (citations omitted). The ID determined that the claim term “based on a detected body orientation of the user” should be construed to mean “based on a detected lean position of the user’s body, as opposed to being based upon manual input or tilting of the vehicle.” *Id.* at 115. However, during its domestic industry (technical prong) analysis with respect to the ‘607 patent, the ID interpreted the subject waiver as applying to “manual input via joystick” rather than “manual input,” while interpreting the claim term “based on a detected body orientation of the user” with relation to the asserted Segway DI products. Thus, the ID stated that:

Complainants argue that the LeanSteer handlebar is not a joystick because it “is a much larger input that couples to the base of the Segway Personal Transporters. As previously explained, the LeanSteer Stick was specifically designed so that the user would grip it and couple their entire body to the device, making input of all desired direction and turning intuitive.” *See* CX-1968C (Ganssle) at Q/A 1408. However, complainants appear to have taken a different position in their prehearing brief, when discussing

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why the Heinzmann (RX-0018) prior art reference does not anticipate the '607 patent:

Respondents' logic applies equally to a joystick - *i.e.*, pushing the joystick to the right can also be said to "encourage" a rider to lean to the right. *See* CX-1969C (Nayfeh Statement) at A296. However, turning is based solely on the joystick input, just as in Heinzmann where turning is based solely on the grip input. *Id.* Thus, encouraging a certain body orientation does not amount to detecting a certain body orientation. Because the prosecution history makes clear that steering inputs based on the displacement of a joystick are not inputs "based on a detected body orientation of the user," neither are steering inputs based on the rotation of a hand grip.

Compls. P.H. Br. at 545.

According to complainants, if a prior art device can be "commanded to the left if the [handlebar] is moved to the left, in absolute indifference to the orientation of the user," or its handlebar "encourages" a rider to lean in the direction that the user pushes the handlebar, that handlebar is called a joystick. However, if the Segway DI products can be "commanded to the left if the [handlebar] is moved to the left, in absolute indifference to the orientation of the user," or its handlebar "encourages" a rider to lean in the direction that the user pushes the handlebar, that handlebar is no longer a joystick, but the embodiment of LeanSteer technology.

Complainants cannot be permitted to alter their interpretation of the claim to suit their validity and infringement positions. "It is axiomatic that claims are construed the same way for both invalidity and infringement." *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1330 (Fed. Cir. 2003).

Thus, the evidence shows that the Segway DI products do not practice the limitation "at least the desired yaw and yaw rate being based on a detected body orientation of the user."

Id. at 145-147 (citations omitted) (emphasis added). This portion of the ID's technical prong analysis shows that it used "manual input" and "manual input via joystick" in the context of the subject waiver interchangeably. *Compare* ID at 112 *with* ID at 146.

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In arriving at its claim construction determination, the ID relied, *inter alia*, on the opinion of Dr. Nourbakhsh. See ID at 113 (“Thus, as Chic argues, the applicants made clear that manual input is not the same as ‘a detected body orientation.’”) (citing RX-0050C (Nourbakhsh WS) at Q/A 155.). Thus, the ID’s interchangeable use of these terms is consistent with the use of these terms by Respondents’ expert, Dr. Nourbakhsh. Notably, Complainants cite the same testimony of Dr. Nourbakhsh. See ComplPet at 40 (citing RX-0050C (Nourbakhsh WS) at Q/A 155). Dr. Nourbakhsh stated as follows:

Q: And what about manual input?

A: The arguments we discussed with respect to lean position also indicate that manual input is not “based on a detected body orientation.” Indeed, in discussing the same reference with a joystick, the applicant stated that the joystick cannot be “taken to subsume ‘body orientation of a user’” and that manual input via joystick is provided “in absolute indifference to the orientation of the user.” JX-0004.55. Thus, the applicant made clear that manual input is not the same as “a detected body orientation.”

RX-0050C (Nourbakhsh WS) at Q/A 155 (emphasis added). In other words, Dr. Nourbakhsh uses the “manual input” and the “manual input with joystick” in the context of this investigation interchangeably, providing the basis for doing the same by the ID. And by expressly citing and relying on Dr. Nourbakhsh’s testimony, Complainants appear to accept the interchangeability of the terms in question.

The intrinsic evidence supports a finding that the applicants did not broadly disclaim “manual input,” but instead disclaimed “manual input via joystick.” In particular, during the prosecution of the ‘607 patent, applicants stated as follows in response to the rejection based on U.S. Patent No. 5,791,425 (RX-0020) (“Kamen ‘425”):

Kamen [‘425] teaches yaw control at col. 6, lines 12-14, in the

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following terms: “A left turn similarly is accomplished by leftward motion of the joystick. For a right turn, the joystick is moved to the right.” Surely, the position of the joystick cannot be taken to subsume “body orientation of a user.” The device will be commanded to the left if the joystick is moved to the left, in absolute indifference to the orientation of the user. (The user might lean to the right, but if the joystick is hard over left, that’s where the Kamen [‘425] device will turn.).

JX-0004 (‘607 patent file history) at SEGWAY_1007ITC0087708. This portion of the prosecution history indicates that applicants disclaimed subject matter pertaining to a joystick, or “manual input via joystick,” and this is the only basis the ID cites for disclaimer. ID at 145. *See Omega Eng’g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1325–26 (Fed. Cir. 2003) (“[F]or prosecution disclaimer to attach, our precedent requires that the alleged disavowing actions or statements made during prosecution be both clear and unmistakable.”). The extrinsic evidence is consistent with the intrinsic record and supports the same conclusion. *See e.g. CX-1968C* (Ganssle WS) at Q/A 179. Accordingly, we modify the ID’s finding of disclaimer to cover only manual input via joystick.

The record shows that the ID did not err in its application of the subject disclaimer even though it omitted the term “via joystick.” Thus, in its technical prong analysis the ID applied a disclaimer consistent with our finding. *See* ID at 145-146. *See also* ID at 149 (holding as part of its anticipation analysis that “Thus, complainants have represented that a joystick is not an input based on a detected body orientation of the user that falls within the scope of the ‘607 patent.”). Accordingly, our modification of the ID’s disclaimer does not change the ID’s application of the disclaimer.

- 5. The ID’s finding with respect to actual confusion regarding the SWAGWAY mark, ID at 172-73.**

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The ID stated that although actual confusion is not required to prevail on a claim of trademark infringement, “actual confusion is routinely considered by the Commission as proof of trademark infringement as it is ‘undoubtedly the best evidence of likelihood of confusion.’” ID at 171 (citing *Certain Handbags, Luggage, Accessories, and Packaging Thereof*, Inv. No. 337-TA-754 , Order No. 16 (ID Granting Complainants’ Motion for Summary Determination of Violation) at 14 (Mar. 5, 2012) (unreviewed, Apr. 12, 2012) (citing *Daddy’s Junky Music Stores, Inc. v. Big Daddy’s Family Music Center*, 109 F.3d 275, 284 (6th Cir. 1997); *Certain Strip Lights*, Inv. No. 337-TA-287, 1989 WL 608725 (Jun. 27, 1989)). The ID considered Complainants’ evidence of numerous instances of actual consumer confusion with respect to SWAGWAY-branded products. See ID at 171. The ID noted that the documentary evidence describing actual confusion by consumers who purchased a Swagway product with the Segway brand was detailed by Mr. Leary.⁵ ID at 171-72 (citing CX-1972C (Leary WS) at Q/A 15-29). The ID concluded that “[a]ccordingly, the overwhelming evidence shows that the SWAGWAY mark infringes the ‘948 and ‘942 TMs.” ID at 172.

Swagway argues that, first, the proffered evidence on which the ID’s conclusion of actual confusion is based is legally insufficient to support a finding that a likelihood of confusion exists. In particular, it submits that when properly considered in the context of the significant volume of sales of SWAGWAY-branded products, the evidence of actual confusion is insufficient to support a finding of a likelihood of confusion. SwagwayPet at 21.

Swagway contends that, second, the proffered evidence consisting of emails and

⁵Mr. Joseph Leary is the Service Manager at Segway. See CX-1972C (Leary WS) at Q/A 2.

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telephone calls allegedly received by Complainant Segway is unreliable and should be given little weight, if any, at least because (i) it was not Segway's policy to confirm whether senders of the alleged emails actually purchased a Swagway product; (ii) despite the purported volume of the alleged calls, Segway generated "no documentation whatsoever" regarding these alleged calls, including no contemporary internal memoranda, emails, or any other documentation either corroborating the purported number of calls received or whether Swagway products were at issue, or reflecting any concern by Segway or its employees about the alleged "overwhelm[ing]" volume of calls; (iii) the Segway witnesses who testified as to the alleged calls, *i.e.*, Mr. Buccella⁶ and Mr. Leary, have no personal knowledge of what was actually said by the alleged callers, including whether they specifically identified Swagway products; and (iv) although the two Segway employees, who purportedly spoke with the alleged callers are still employed by Segway, neither employee provided any sworn testimony in this Investigation. SwagwayResp at 21-22; *see also id.* at 23-28. Complainants and Commission investigative attorney ("the IA") oppose Swagway's position and support the ID on this issue. *See* ComplResp at 74-77; IAResp at 57-58.

We find it appropriate to consider not only the absolute number of incidents indicating actual consumer confusion offered by Complainants, but also those incidents in the context of the total number of Swagway products sold in the United States. *See, e.g., Nutri/System, Inc. v. Con-Stan Industries, Inc.*, 809 F.2d 601, 606-607 (9th Cir. 1987); *see also* 5 McCarthy § 23:14 (2017) ("Evidence of the number of instances of actual confusion must be placed against the

⁶ Mr. Brian Buccella is Vice President of Business Development and Marketing at Segway. *See* CX-1971C (Buccella WS) at Q/A 3.

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background of the number of opportunities for confusion before one can make an informed decision as to the weight to be given the evidence.”). The evidence shows that 60 emails and 600-900 telephone calls amount to less than 0.36% of the approximately 267,000 units of SWAGWAY-branded products sold in the U.S. between June 2015 and May 2016. SwagwayPet at 21 (citing CX-1971C (Buccella WS), Q/A 136: CX-1637; RX-0054C (Zhu WS), Q/A 56-61). Complainants and the IA fail to rebut this calculation. See ComplResp at 74-77; IAResp at 57. The IA even admitted that “it is undisputed that the evidence presented in this Investigation points to a small number (relative to the number of SWAGWAY-branded products sold in the U.S.) of instances of actual confusion.” IAResp at 57. Swagway argues that when properly considered in the context of the significant volume of sales of SWAGWAY-branded products, Complainants’ alleged evidence of only “isolated instances of actual confusion or misdirected mail,” which is “insufficient to sustain a finding of likelihood of confusion.” See SwagwayPet at 21 (citing RIB at 240-243; RRB at 57-63; *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 383 (7th Cir. 1976); 5 McCarthy § 23:14 (2017) (“Evidence of only a small number of instances of actual confusion can be dismissed as inconsequential or *de minimis*.”)).

The IA points out, however, that, as Swagway itself has noted, “a showing of actual confusion is not necessary to establish a likelihood of confusion.” IAResp at 57 (citing SwagwayPet. at 17, citing *In re i.am.symbolic, LLC*, No. 2016-1507, -1508, -1509, 2017 WL 3393456 at *3 (Fed. Cir. Aug. 8, 2017)). The IA argues that the ID does not rely solely on actual confusion in order to conclude that a likelihood of confusion is caused by use of the SWAGWAY mark. The IA argues that actual confusion is but one factor cited by the ID in conjunction with other factors that Swagway itself also notes must be balanced together. IAResp

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at 57 (citing SwagwayPet. at 16-17 (listing 6 factors to be considered in determining whether a reasonable consumer is likely to be confused as to the source of sponsorship)).

While the ID considers, and relies on, the evidence of absolute numbers of incidents of actual confusion, the Commission must also look to the relative significance of these absolute numbers in the context of the volume of sales of SWAGWAY-branded products, *see* discussion *supra*. *See* ID at 171-72. The ID likewise does not address Swagway's argument noted *supra* that the proffered evidence consisting of emails and telephone calls allegedly received by Complainant Segway is unreliable and should be given little weight, if any.⁷ Moreover, Complainants and the IA do not adequately rebut Swagway's argument and supporting evidence. *See* ComplResp at 76-77; IAResp at 57-58.

Based on the foregoing, we find that Complainants have not introduced sufficient evidence of actual confusion with respect to the SWAGWAY mark. *See Nutri/System, Inc.*, 809 F.2d at 606-607; *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252, 263 (5th Cir. 1980); *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 589 F.2d 1225, 1231 (3d Cir. 1978); *see also* 5 McCarthy § 23:14 (2017) ("If there is a very large volume of contacts or transactions which could give rise to confusion and there is only a handful of instances of actual confusion, the evidence of actual confusion may receive relatively little weight.") Therefore, we find that this factor does not weigh in favor of a finding of a likelihood of confusion.

⁷ *See* SwagwayPet at 21-22; *id.* at 23-28. *See also* RIB at 242 (citing JX-0027 Leary Dep. Tr. at 40:3-15; Leary Tr. 139:11-18; Leary Tr. 136:16-19); *id.* at 243 (citing JX-0027 Leary Dep. Tr. at 27:6-17; 28:7-31:3; JX-0018 (Buccella Dep. Tr.) at 32:23-33:2; 54:6-10; Buccella Tr. 126:13-19 (no company memos generated); Leary Tr. 141:9-12 (no call logs maintained); Buccella Tr. 127:13-15; Leary Tr. 135:6-10; Buccella Tr. 131:13-16; Buccella Tr. 125:4-24; Leary Tr. 142:18-23).

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Accordingly, we modify the ID by finding that evidence of actual confusion does not weigh in favor of likelihood of confusion. Although we modify the ID with respect to this single factor, we note that the ID's ultimate finding of likelihood of confusion and trademark infringement of the Segway marks by Swagway is correct. Evidence supporting the other factors considered by the ID, including the degree of similarity between the two marks in appearance, the pronunciation of the words, and the strength of the SEGWAY marks strongly support the ID's finding of infringement.⁸

B. Remedy, the Public Interest, and Bonding

1. Remedy

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

a. LEO

Section 337(d) authorizes the Commission to issue an LEO directed to a respondent's infringing products. 19 U.S.C. § 1337(d). An LEO instructs U.S. Customs and Border Protection ("CBP") to exclude from entry all articles that are covered by the intellectual property at issue that originate from a named respondent in the investigation. *Fuji Photo Film Co. Ltd. v.*

⁸ We also note that the ID's statement that "[a]ccordingly, the overwhelming evidence shows that the SWAGWAY mark infringes the '948 and '942 TMs," ID at 172, was premature irrespective of whether the record shows actual confusion because at the point of making this statement, the ID had not completed its trademark infringement analysis. *See* ID at 172-184. In fact, the ID does not make its infringement finding regarding the asserted trademarks until page 183. *See* ID at 183 ("Accordingly, complainants have shown that SWAGWAY products infringe the SEGWAY marks, but it has not been shown that SWAGTRON products infringe the SEGWAY marks.").

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Int'l Trade Comm'n, 474 F.3d 1281, 1286 (Fed. Cir. 2007).

Consistent with our determination on the issues of violation, *i.e.*, that there was no violation of section 337 in this investigation with respect to any of the asserted patents, and that there was a violation of section 337 only with respect to accused products bearing the SWAGWAY mark by reason of infringement of the '948 TM and the '942 TM, we find that the issuance of an LEO against Swagway's products is appropriate in this investigation.

We note that seven Respondents were found in default, namely, PhunkeeDuck, Segaway, Metem, Airwheel NL, C-Star, Koowheel, and Gotway. *See* Order No. 9 (Sep. 1, 2016) (unreviewed, Oct. 3, 2016); Order No. 22 (Jan. 9, 2017) (unreviewed, Feb. 7, 2017); IAOpenNotice at 12-13. We do not issue an LEO against the products of Metem, Airwheel NL, C-Star, Koowheel, and Gotway because these defaulted respondents were accused of infringement of the '230 and/or '607 patents only, and the Commission found that the domestic industry requirement was not met for these patents, *see* discussion *supra*. *See Certain Motorized Self-Balancing Vehicles*, Inv. 337-TA-1000, Notice of Comm'n Det. to Review-in-Part an ID Finding No Violation of Section 337, at 3-4 (July 28, 2017) (finding the matter of a default remedy moot in view of a finding that the domestic industry requirement was not met). We likewise do not issue an LEO against defaulted respondents PhunkeeDuck and Segaway with respect to the '984 patent because Complainants stated that they "withdrew the '984 patent from this Consolidated Investigation and are not requesting an exclusion order be issued with respect to any participating Respondent or defaulting Respondent for infringement of the '984 patent." ComplReplyNotice at 28-29. However, we do issue an LEO against defaulted respondent Segaway with respect to the asserted trademarks. Specifically, the LEO excludes Segaway's

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personal transporters, components thereof, and packaging and manuals therefor that infringe one or more of the '948 TM and '942 TM, as asserted against Segaway in the 1007 Complaint. *See* 1007 Complaint at ¶¶ 136-142. *See also* IAOpenNotice at 14; *id.* (Exhibit C); IAREplyNotice at 13.

We grant Respondents' request for a certification provision in the LEO. RespOpenNotice at 18. The Commission frequently incorporates such provisions in its LEOs. *See e.g. Certain Multiple Mode Outdoor Grills and Parts Thereof*, Inv. No. 337-TA-895, Comm'n Op., 56 (Feb. 20, 2015) ("It has been Commission practice for the past several years to include certification provisions in all exclusion orders to aid [CBP] in enforcing the Commission's remedial orders.")

With respect to Respondents' request that any exclusion order include an exception to allow for Respondents' continued service and repair of any products already sold to consumers before the effective date of any remedial order, *see* RespOpenNotice at 17 (citing RD at 14), we note that the ALJ's recommendation provides that "Such a public interest exemption may be included here to the extent that respondents show that such importations occur and that the exemption is warranted." *See* RD at 14. The record shows, however, that Respondents failed to make such a showing. Specifically, their argument in the opening brief is limited to a single sentence. *See* RespOpenNotice at 17 ("[T]o the extent an exclusion order issues, it should include an exception to allow for Respondents' continued service and repair of any products already sold to consumers before the effective date of any remedial order issued, as the ALJ has recommended") (citations omitted). In light of this record, we find that respondents have not shown that an exemption is warranted and, therefore, the LEO does not contain an exemption

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that would allow for Respondents' continued service and repair of any products already sold to consumers before the effective date of any remedial order issued.

b. CDO

Under section 337(f)(1), the Commission may issue a CDO in addition to, or in lieu of, an exclusion order. 19 U.S.C. § 1337(f)(1). Cease and desist orders are generally issued when, with respect to the imported infringing products, respondents maintain commercially significant inventories in the United States or have significant domestic operations that could undercut the remedy provided by an exclusion order.⁹ *See, e.g., Certain Table Saws Incorporating Active Injury Mitigation Technology and Components Thereof*, Inv. No. 337-TA-965, Comm'n Op. at 4-6 (Feb. 1, 2017) (public version); *Certain Protective Cases and Components Thereof*, Inv. No. 337-TA-780, USITC Pub. No. 4405 (July 2013), Comm'n Op. at 28 (Nov. 19, 2012) (citing *Certain Laser Bar Code Scanners and Scan Engines, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-551, Comm'n Op. at 22 (June 14, 2007)). A complainant seeking a CDO must demonstrate, based on the record, that this remedy is necessary to address the violation found in the investigation so as to not undercut the relief provided by the exclusion order. *Certain Integrated Repeaters, Switches, Transceivers, and Products Containing Same*, Inv. No. 337-TA-435, USITC Pub. No. 3547 (Oct. 2002), Comm'n Op. at 27 (Aug. 16, 2002)

⁹ When the presence of infringing domestic inventory is asserted as the basis for a cease and desist order under section 337(f)(1), Chairman Schmidlein does not subscribe to the view that the inventory needs to be "commercially significant" in order to issue a cease and desist order. *See, e.g., Certain Table Saws Incorporating Active Injury Mitigation Technology and Components Thereof*, Inv. No. 337-TA-965, Comm'n Op. at 6-7, n.2 (Feb. 1, 2017) (public version). In Chairman Schmidlein's view, the presence of some infringing domestic inventory, regardless of the commercial significance, provides a basis to issue a cease and desist order. *See id.*

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("[C]omplainants bear the burden of proving that respondent has such an inventory."); *see also* H.R. Rep. No. 100-40, at 160 (1987) ("When the Commission determines that both remedies [*i.e.*, an exclusion order and cease and desist order] are necessary, it should be without legal question that the Commission has authority to order such relief.").

Complainants request the issuance of a CDO against each respondent found in violation, citing the existence of commercially significant domestic inventories of accused products. RD at 15 (citing Compls. Br. at 296-98). The ALJ found that the evidence shows that respondents maintain commercially significant inventories of accused products. RD at 15-16.

We have found only Swagway in violation of section 337, and only with respect to the asserted trademarks. The record shows that Swagway maintains commercially significant amounts of domestic inventory of the SWAGWAY- branded accused products. RD at 15 (citing Staff Br. at 175-76; CX-1967C (Milani WS) at Q/A 266, 270-74 (citing inventory levels for the various respondents' accused products)). Accordingly, we determine to issue a CDO directed against Swagway only.¹⁰

2. Public Interest

Before issuing a remedy for a violation of Section 337, the Commission must consider the effect of the remedy on certain public interest considerations: (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) the U.S. production of articles that are like or directly competitive with those which are the subject of the investigation, and (4) U.S. consumers. 19 U.S.C. §§ 1337(d), (f), (g); *Certain Ink Jet Print Cartridges and Components*

¹⁰ Complainants did not request CDOs against defaulted respondents PhunkeeDuck and Segaway.

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Thereof, Inv. No. 337-TA-446, Comm'n Op. at 14 (Oct. 2002).

Complainants argue that the entry of a GEO, LEOs, and CDOs in this investigation is consistent with the public interest. ComplOpenRemedy at 13-24. Respondents do not contend that this investigation raises public interest concerns. RespOpenNotice at 16. The IA submits that the public interest factors do not weigh against the entry of remedial orders against Respondents. On August 23, 2017, the Commission issued a Notice of Request for Statements on the Public Interest, and no written submissions were received from the public in response. Complainants timely filed their submission on the public interest on September 21, 2017 ("Compls. PI Statement"), 19 C.F.R. § 210.50(a)(4). No public interest submissions were filed by any of the Respondents.

a. Public health and welfare

The record shows that the issuance of an LEO directed to the Respondents will not adversely impact the public health, safety, or welfare in the United States. Compls. PI Statement at 2. Complainants point out that the Accused Products are one and two wheel personal transporters for individual riders, and that access to Respondents' infringing personal transporters does not implicate any reasonably conceivable public health, safety or welfare concern. *Id.* at 2-3. The IA submits that he is not aware of any effect on the public health and welfare that would be caused by excluding any of the accused products in this Investigation. IAOpenNotice at 18. Respondents do not express any disagreement with Complainants' and the IA's positions on this issue. *See* RespReplyRemedy at 12 ("Respondents do not contend that this investigation raises public interest concerns.")

b. Competitive conditions in the U.S. economy

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The record indicates that motorized vehicles will continue to be available from non-infringing sources such as sellers of motor scooters, motorcycles, powered bicycles and the like. *See ComplReplyNotice* at 20-23. As complainants point out, there are no public interest concerns where, as in the present case, domestic demand for Respondents' products can be met by competitors whose products do not infringe the Complainants' intellectual property rights. *Compls. PI Statement* at 3-4 (citing *Inkjet Ink Supplies & Components Thereof*, Inv. No. 337-TA-691, *Comm'n Op. on Remedy, the Public Interest, & Bonding* at 15 (Jan. 28, 2011)). Complainants submit that, therefore, competitive conditions in the United States will not be adversely affected by the issuance of remedial orders. *Compls. PI Statement* at 3. The IA states that he is not aware of any evidence to the contrary. *IAOpenNotice* at 19. Respondents do not respond to Complainants' assertion. *See RespReplyRemedy* at 12.

c. U.S. production of relevant articles

No party proffered evidence that the accused products or products resembling the infringing products have been or are currently manufactured in the United States. It appears that the market can be adequately supplied with articles that are like or directly competitive with Respondents' accused products.

d. U.S. consumers

Complainants argue that U.S. consumers would have access to products from Complainants and third-parties in amounts sufficient to meet demand, should infringing personal transporters be excluded from the United States. *See ComplReplyNoticey* at 20. Complainants submit that U.S. consumers will therefore not be adversely affected by the issuance of the requested relief. *Id.* The IA submits that it appears U.S. consumers will have like or directly

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competitive options to choose from. IAOpenNotice at 19. Respondents do not disagree. *See* RespReplyRemedy at 12. In conclusion, we find that the record does not support a finding of any adverse effect on the public health and welfare, competitive conditions in the U.S. economy, the U.S. production of articles that are like or directly competitive with those which are the subject of the investigation, or U.S. consumers sufficient to preclude issuance of the proposed remedial orders. Based on the foregoing, we find that entry of the remedial orders in accordance with our determinations on the issues of violation would not be contrary to the public interest in this investigation.

3. Bond During Presidential Review Period

Pursuant to section 337(j)(3), the Commission must determine the amount of bond to be required of a respondent during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to issue a remedy. 19 U.S.C. § 1337(j)(3). The purpose of the bond is to protect the complainant from any injury. 19 C.F.R. § 210.42(a)(1)(ii), § 210.50(a)(3). The amount of bond must “be sufficient to protect the complainant from any injury.” 19 U.S.C. § 1337(j)(3); *see also* 19 C.F.R. § 210.50(a)(3). When reliable price information is available, the Commission has often set bond by eliminating the differential between the domestic product and the imported, infringing product. *Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm’n Op. at 24 (1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *Certain Integrated Circuit Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm’n Op. at

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41 (1995), and a 100 percent bond has been required when no effective alternative existed, *Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 26-27 (July 1997) (a 100 percent bond imposed when price comparison was not practical because the parties sold products at different levels of commerce, and the proposed royalty rate appeared to be *de minimis* and without adequate support in the record). Complainant bears the burden of establishing the need for a bond. *Certain Rubber Antidegradants, Components Thereof, and Prods. Containing Same*, Inv. No. 337-TA-533, Comm'n Op. at 39, 40 (July 21, 2006); *see also Certain Laser Imageable Printing Plates*, Inv. No. 337-TA-636, Comm'n Op. at 9 (November 30, 2009).

In his recommended determination, the ALJ considered Complainants' argument that a bond rate of 100 percent is appropriate "both because reliable price information for the Accused Products is not available; and because the prices for the Accused Products differ across retailers." RD at 17 (citing Compls. Br. at 298). The ALJ noted that Complainants submit that the prices for respondents' accused products range from \$135 to \$553, whereas the average price of the Segway Domestic Industry Products ("DI Products") is [[]]. *Id.* (citing Compls. Br. at 299).

The ALJ further noted that, as argued by the IA and Respondents, Complainants' Ninebot by Segway miniPRO (hands-free, two-wheel self-balancing scooter) and the One S1 (a single-wheel device) are products that more closely resemble and, thus, are more competitive with respondents' accused products than the Segway DI Products. RD at 17-18 (citing Staff Br. at 177-78; Resps. Br. at 292). The ALJ found that complainants failed to present any evidence regarding price differentials between respondents' accused products and the Ninebot by Segway miniPRO or One S1 products. RD at 18. The ALJ stated that while a realistic bond rate could

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have been determined based on price differentials if complainants presented evidence with respect to the more relevant miniPRO and One S1 products, Complainants failed to do so. The ID held that Complainants should not benefit from a higher bond rate when it was within their means to propose an alternative. The ALJ, accordingly, recommended that no bond should be imposed during the Presidential review period.

Complainants request that, if a violation of Section 337 is found and an exclusion order is issued, the Commission require a bond equal in value to that of the Accused Products (*i.e.* one hundred percent) in order to mitigate harm during the Presidential review period.

ComplOpenRemedy at 24. Complainants argue that available pricing data supports a bond equal in value to that of the Accused Products. ComplOpenRemedy at 25-28. Complainants contend that the bond rate cannot be calculated on the basis of a reasonable royalty because data is not available to calculate such a rate. *Id.* at 28-29. Complainants submit that without reliable pricing data or data for a reasonable royalty, a bond equal in value to that of the Accused Products is most appropriate. Complainants argue that when reliable price information is not available, or if the prices for the Accused Products differ, the Commission typically sets the bond at 100 percent of the price of the infringing imported products. ComplOpenRemedy at 29 (citing *Certain Cigarettes and Packaging Thereof*, 337-TA-643, Comm'n Op. at 30-31 (Oct. 1, 2009)).

Respondents argue that the record supports the ALJ's recommendation that no bond should be imposed during the Presidential review period. RespOpenNotice at 24-25 (citing RD at 18). Respondents contend that Complainants failed to present any evidence that they will suffer injury from the continued sale or importation of the accused products during the 60-day Presidential Review period, and that Complainants' own economic expert admitted that the

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domestic industry products will not be at a competitive disadvantage if consumers can purchase the accused products. RespOpenNotice at 25 (citing Milani Tr. 426:15-22).

Respondents point out that the domestic industry products and the Accused Products are sold at extremely different price points: the average price for the domestic industry products is [[]], while the accused products average between \$135 and \$553. RespOpenNotice at 25 (citing Milani Tr. 425:22-426:5). Respondents contend that the Accused Products are not sold into any of the same markets that the domestic industry products are sold into, *i.e.*, tour group operators, public law enforcement, and private security agencies. *Id.* (citing Milani Tr. 430:11-21). Respondents assert that Complainants acknowledge that no distribution channels sell both the accused products and the domestic industry products. RespOpenNotice at 25-26 (citing Milani Tr. 426:11-14). Respondents also submit that Complainants' own economic expert admitted that he was not aware of any prospective purchaser of a domestic industry product that purchased an Accused Product instead. RespOpenNotice at 26 (citing Milani Tr. 426:6-10).

Respondents contend that Complainants' One S1 and MiniPro products – which are manufactured in China by Segway's Chinese owner Ninebot – are the products that more closely resemble the accused products, in that they are sold into a similar consumer segment of the market. *Id.* (citing Milani Tr. 428:12-16).¹¹ Respondents submit that because Complainants are not competitors in the U.S. hoverboard market, where the Accused Products compete, Complainants would not be harmed during the Presidential Review Period, and that, therefore, no bond should be imposed. *See id.* at 26-27.

¹¹ We note that Complainants' lower priced One S1 and MiniPro products bear the Segway marks, *i.e.*, the Ninebot by Segway miniPro and the Ninebot One S1 by Segway. *See ID* at 16; *see also* 1007 Complaint at ¶ 159.

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The IA observes that the ALJ found that Complainants failed to present any evidence regarding price differentials between Respondents' Accused Products and the more comparable products marketed and sold by Complainants. IAOpenNotice at 17 (citing RD at 17-18). The IA notes that, rather, Complainants only compared the average price of their Segway DI products – *i.e.*, [[]] – to the average prices of Respondents' accused products – *i.e.*, \$135 to \$553 – to argue that a 100 percent bond is appropriate. IAOpenNotice at 17 (citations omitted). The IA notes that the ALJ found that a realistic bond rate based on price differentials could have been determined if Complainants presented evidence with respect to the more relevant Ninebot by Segway miniPRO (a hands-free, two-wheel self-balancing scooter) and One S1 (a single-wheel device) products, which more closely resemble and, thus, are more competitive with Respondents' accused products. *Id.* at 17-18 (citations omitted). The IA concludes that no bond should be imposed during the Presidential review period.

We find that, for the reasons provided in the ALJ's RD, the record supports the ALJ's recommendation that no bond is appropriate in this investigation with respect to respondent Swagway. *See* RD at 16-18. *See also* RespOpenNotice at 24-27; IAOpenNotice at 17-18. Accordingly, consistent with the ALJ's recommendation on this issue, we determine to set the bond amount at zero (0) percent of the entered value of Respondent Swagway's accused products during the Presidential review period.

The Commission generally sets the bond at 100 percent of entered value when a party defaults. *See Certain Carbon Spine Board, Cervical Collar, CPR Masks And Various Medical Training Manikin Devices, And Trademarks, Copyrights Of Product Catalogues, Product Inserts And Components Thereof*, Inv. No. 337-TA-1008, Comm'n Op. at 13 (Jun. 14, 2017).

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Accordingly, we determine to set the bond at 100 percent of the entered value of defaulted Respondent Segaway's accused products during the period of Presidential review. *See Certain Foam Footwear*, Inv. No. 337-TA-567 (Remand), Comm'n Op. at 9 (setting different bond amounts for covered products of different respondents during the period of Presidential review) (Aug. 2, 2011).

V. CONCLUSION

Having considered the ALJ's Initial Determination and Recommended Determination, the parties' submissions filed in response to the Commission's Notice, and the evidentiary record, the Commission has determined to issue (1) an LEO prohibiting the importation into the United States of (a) SWAGWAY-branded personal transporters, components thereof, and packaging and manuals thereof manufactured outside the United States that infringe one or more of the '948 TM and '942 TM and that are manufactured abroad by or on behalf of, or imported by or on behalf of, Respondent Swagway, or any of its affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns; and (b) personal transporters, components thereof, and packaging and manuals therefor manufactured outside the United States that infringe one or more of the '948 TM and '942 TM, which cover the "SEGWAY" marks, and that are manufactured by or on behalf of, or imported by or on behalf of, Respondent Segaway, or any of its affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns; and (2) a CDO directed against SWAGWAY concerning SWAGWAY-branded personal transporters, components thereof, and packaging and manuals therefor that infringe one or more of the '948 TM and '942 TM.

The Commission has further determined that the public interest factors enumerated in

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

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: January 12, 2018