

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN BEVERAGE BREWING CAPSULES,
COMPONENTS THEREOF, AND PRODUCTS
CONTAINING THE SAME**

**Inv. 337-TA-929
(Enforcement and Rescission
Proceeding)**

**INITIAL DETERMINATION ON ENFORCEMENT OF LIMITED EXCLUSION AND
CEASE AND DESIST ORDERS, AND RECOMMENDED DETERMINATION ON
RESCISSION**

Administrative Law Judge Theodore R. Essex

(March 27, 2017)

Appearances:

For the Complainants Adrian Rivera and Adrian Rivera Maynez Enterprises, Inc.:

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For the Respondents Eko Brands, LLC and Espresso Supply, Inc.:

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For the Commission Investigative Staff:

Margaret D. Macdonald, Esq., Director; Jeffrey T. Hsu, Esq., Supervisory Attorney; Monisha Deka, Esq., Investigative Attorney of the Office of Unfair Import Investigations, U.S. International Trade Commission, of Washington, DC

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Pursuant to the Notice of Institution of Formal Enforcement Proceeding, 81 Fed. Reg. 43242 (July 1, 2016), and to the Notice of Institution of Rescission Proceeding, 81 Fed. Reg. 85264 (Nov. 25, 2016), this is the Enforcement Initial Determination (“EID”) and Recommended Determination (“RD”) on Rescission in the matter of *Certain Beverage Brewing Capsules, Components Thereof, and Products Containing the Same*. See 19 C.F.R. §§ 210.75(b)(3), 210.76(b).

It is the initial determination of the Administrative Law Judge (“ALJ”) that the Commission’s limited exclusion and cease and desist orders in this matter should not be enforced. Further, it is the recommended determination of the ALJ that the Commission’s limited exclusion and cease and desist orders in this matter should be provisionally rescinded pending final resolution of the United States District Court for the Western District of Washington’s determination of no infringement by Eko Brands, LLC and Espresso Supply, Inc., including the exhaustion of all appeals.

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The following abbreviations may be used in this Initial Determination:

CDX	Complainant's demonstrative exhibit
CPX	Complainant's physical exhibit
CX	Complainant's exhibit
Dep.	Deposition
[Party] IPHB	[Party's] initial post-hearing brief
JX	Joint Exhibit
[Party] PrHB	[Party's] pre-hearing brief
RDX	Respondent's demonstrative exhibit
[Party] RPHB	[Party's] reply post-hearing brief
RPX	Respondent's physical exhibit
RX	Respondent's exhibit
Tr.	Transcript

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I. INTRODUCTION

A. Procedural History

1. USITC Violation Phase

On September 9, 2014, the Commission instituted the violation phase of this investigation with respect to U.S. Patent No. 8,720,320 (“the ’320 patent”) to determine:

whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain beverage brewing capsules, components thereof, and products containing the same by reason of infringement of one or more of claims 5–8 and 18–20 of the ’320 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337

79 Fed. Reg. 53445 (September 9, 2014). The Notice of Investigation named as respondents Solofill LLC of Houston, TX; DongGuan Hai Rui Precision Mould Co., Ltd. of Guangdong Province, China; Eko Brands, LLC of Woodinville, WA; Evermuch Technology Co., Ltd. of New Territories, Hong Kong; Ever Much Company Ltd. of Shenzhen, China; Melitta USA, Inc. of North Clearwater, FL; LBP Mfg. Inc. of Cicero, IL; LBP Packaging (Shenzhen) Co. Ltd. of Guangdong China; Spark Innovators, Corp. of Fairfield, NJ; B. Marlboros International Ltd. (HK) of Hong Kong; and Amazon.com, Inc. of Seattle, WA. (*Id.*)

On October 28, 2014, the ALJ ordered Respondents Eko Brands, LLC, Evermuch Technology Co., and Ever Much Company Ltd., to show cause why they should not be found in default. *Certain Beverage Brewing Capsules, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-929, Order No. 9 (Oct. 28, 2014). On April 22, 2015, the ALJ issued an ID finding those parties in default. *Certain Beverage Brewing Capsules, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-929, Order No. 19 (Apr. 22, 2015). The Commission determined not to review that ID. *Certain Beverage Brewing Capsules, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-929, Notice of

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Commission Decision Not to Review an Initial Determination Finding Three Respondents in Default (May 18, 2015). Thereafter, with the exception of Solofill, LLC and DongGuan Hai Rui Precision Mould Co., all other respondents named in the investigation were terminated, either by consent order or settlement agreement.

On March 24, 2015, the ALJ granted ARM's motion for partial termination of the investigation of dependent claims 8 and 19 of the '320 patent against Solofill, LLC and DongGuan Hai Rui Precision Mould Co. *Certain Beverage Brewing Capsules, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-929, Order 18 (Mar. 24, 2015). On June 15–16, 2015, an evidentiary hearing was held with ARM, respondents Solofill LLC and DongGuan Hai Rui Precision Mould Co., and Staff participating.

Notwithstanding its failure to respond to the ALJ's show cause order, Respondent Eko Brands filed a "Notice to Commission Regarding Status of Patents" on September 3, 2015. (*Certain Beverage Brewing Capsules, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-929, Notice to Commission Regarding Status of Patents (Sep. 3, 2016).) Through that notice, Eko Brands acknowledged that "counsel for Eko Brands withdrew from representation of Eko Brands and stated that Eko Brands no longer intended to participate in the investigation." (*Id.* at 1.) Notwithstanding that acknowledgment, the notice went on to state that "[r]ather than set aside the default, Eko Brands filed suit in United States District Court in the Western District of Washington (Cause No. 2:15-cv-00522-RSL) on April 2, 2015." (*Id.*) The notice further stated that "[r]ather than make the same arguments twice and engage in unnecessary and expensive litigation, Eko Brands opted to obtain legal determinations straight from United States District Court." (*Id.*) The notice goes on to describe the routine introductory conduct of civil litigation in a district court, including the filing and service of a complaint, the

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exchange of documents, and the issuance of a scheduling order. (*Id.* at 2.) The notice concludes by asserting that “there are open issues as to the validity of the ’320 Patent currently pending before the U.S. District Court in this matter.” (*Id.*) The notice neither requests nor suggests any action from the ALJ or the Commission. (*See id.*)

A day later, on September 4, 2015, the ALJ issued his final initial determination. *Certain Beverage Brewing Capsules, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-929, Initial Determination on Violation of Section 337 and Recommended Determination on Remedy and Bond (Sept. 4, 2015). That ID concluded that no violation of section 337 had occurred. *Id.* at ii. The ALJ also found that respondents Solofill and DongGuan were not liable for induced or contributory infringement. *Id.* at 62–68. Additionally, the ALJ found that, when combined with a Keurig single-serve brewing machine, the respondents’ products directly infringe claims 5–7, 18, and 20 of the ’320 patent. *Id.* at 40–61. And, the ALJ found that the respondents had not shown that the asserted claims were invalid by clear and convincing evidence. *Id.* at 68–94.

On November 16, 2015, the Commission issued notice that it would review portions of the ALJ’s final initial determination. Specifically, the Commission determined to review:

- (1) the ID’s findings on the construction, infringement, and technical prong of the domestic industry requirement for the limitation “a needle-like structure, disposed below the base”;
- (2) the ID’s findings on induced and contributory infringement;
- (3) the ID’s findings that the asserted claims are not invalid for a lack of written description, as anticipated by Beaulieu and the APA, or as obvious; and
- (4) the ID’s findings on the economic prong of the domestic industry requirement.

80 Fed. Reg. 70834–35 (Nov. 16, 2015). In its review, the Commission reversed the ALJ’s finding of no invalidity, and determined that the asserted claims were invalid for lack of written description. *Certain Beverage Brewing Capsules, Components Thereof, and Products Containing the Same*, Commission Opinion (“Violation Comm’n Op.”) at 24–34 (Mar. 17,

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2016). Based on that determination, the Commission “terminate[d] the investigation with a finding of no violation of section 337 by Solofill and DongGuan because all of the asserted claims are invalid.” *Id.* at 83. However, the Commission did “issue a limited exclusion order and cease and desist orders against defaulted parties Eko Brands, LLC; Evermuch Technology Company Co., Ltd.; and Ever Much Company, Ltd., based on their infringement of claim 8 and 19.”¹ *Id.* The Commission went on to explain: “We do not find that claims 8 and 19 are invalid, and presume that ARM’s allegations in its complaint against these parties are true.” *Id.* (citing 19 U.S.C. § 1337(g)(1); 19 C.F.R. § 210.16(c)(1)).

2. USITC Enforcement and Rescission Phase

On June 1, 2016, ARM filed an enforcement Complaint, which gave rise to the instant proceedings. *See* 81 Fed. Reg. 43242–43. On July 18, 2016, Respondents Eko Brands LLC and Espresso Supply, Inc. each filed answers to the enforcement Complaint. (*Certain Beverage Brewing Capsules, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-

¹ The ALJ received no requests in this investigation for the issuance of remedial orders against Eko. Though the ALJ issued his initial determination finding Eko in default on April 22, 2015, *see* Order 19, ARM did not seek a remedy with respect to any defaulting parties until well after the ALJ issued his final initial determination on violation. Upon examination of the record, it appears that ARM did not seek a remedy against Eko through a motion for summary determination, or in its pre- and post-hearing briefing. ARM also did not seek remedial orders against Eko in its petition for review of the ALJ’s final initial determination, (EDIS Doc. ID 565869 (Sep. 21, 2015)), in its response to the participating respondents petition for review, (EDIS Doc. ID 566352 (Sep. 29, 2015)), or in its first public interest statement, (EDIS Doc. ID 566617 (Oct. 5, 2015)). It appears that ARM made its first request for remedial orders directed to Eko in its November 20, 2015 “Written Submission in Response to the Commission’s November 9, 2015 Notice” to review in part the ALJ’s final initial determination. (EDIS Doc. ID 569525 at 8–9 (Nov. 20, 2015).) The ALJ notes that it is unclear whether ARM’s belated request complies with Commission Rule 210.16(c) which provides that, “[a]fter a respondent has been found in default by the Commission, the complainant may file with the Commission a declaration that it is seeking immediate entry of relief against the respondent in default.” 19 C.F.R. § 210.16(c).

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929, Respondent Eko Brands LLC's Response to Complaint (July 18, 2016); *Certain Beverage Brewing Capsules, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-929, Respondent Espresso Supply, Inc.'s Response to Complaint (July 18, 2016).)

On September 12, 2016, and in light of decisions rendered in the related litigation in the United States District Court for the Western District of Washington (the "district court litigation"), described *infra*, Respondents petitioned the Commission to rescind the limited exclusion and cease and desist orders in this investigation, and to terminate the instant enforcement proceeding. (*Certain Beverage Brewing Capsules, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-929, Respondent Eko Brands LLC's Petition to Rescind the Commission's March 17, 2016 Limited Exclusion and Cease and Desist Orders and to Terminate the Enforcement Proceeding ("Rescission Petition") (Sep. 12, 2016).) On November 25, 2016, the Commission initiated rescission proceedings, delegated authority to conduct those proceedings to this ALJ, and directed that the proceedings be consolidated with the instant enforcement proceedings. 81 Fed. Reg. 85264–65 (Nov. 25, 2016).

On January 10–11, 2017, the ALJ held a consolidated evidentiary hearing addressing enforcement and rescission with Eko, ARM, and Staff participating.

3. Related District Court Proceeding

Concurrently with this proceeding, Respondents are seeking declaratory judgment of non-infringement and invalidity with respect to the '320 patent in the United States District Court for the Western District of Washington. *See Eko Brands, Inc. v. Adrian Rivera Maynez Enterprises, Inc.*, Case No. C15-522-RSL (W.D. Wash. 2015). On August 17, 2016, the district court granted partial summary judgment in Respondents' favor. *Eko Brands, Inc.*, 2016 WL 4399597 (Aug. 17, 2016). Specifically, the district court ruled that "Plaintiff is entitled to a

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declaration that its accused products do not infringe the '320 patent because they do not contain a 'passageway.'" *Id.* at *2 (Aug. 17, 2016). The district court's ruling relied in part on its conclusion that the claim term "passageway" should be construed to mean "a narrow space of some depth or length connecting one place to another." *Id.*

The district court's construction of "passageway" differs from that adopted by the ALJ in the violation phase of this investigation: "a path, channel or course by which something passes." *Certain Beverage Brewing Capsules, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-929, Initial Determination on Violation of Section 337 and Recommended Determination on Remedy and Bond at 25.² In reaching that construction, the ALJ declined to incorporate the additional limitations "long and narrow," as then proposed by Respondents. The ALJ reasoned that the long and narrow limitations were not supported by the intrinsic evidence, and, in some cases, would exclude embodiments explicitly disclosed in the '320 patent specification. *Id.* at 26–27.

On December 13, 2017, the district court stayed its proceedings pending the outcome of the Federal Circuit's and the U.S. Patent and Trademark Office's reviews of the validity of the patent claims at issue in the district court proceeding. *See Eko Brands, Inc. v. Adrian Rivera Maynez Enterprises, Inc.*, Case No. C15-522-RSL, ECF No. 145 at 1 (W.D. Wash. Dec. 13, 2016). The district court proceeding remains stayed as of the date of this order.

² The Commission did not review the ALJ's construction of "passageway."

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B. Parties

1. Complainants

Complainant Adrian Rivera Maynez Enterprises, Inc. (“ARM Enterprises” or “ARM”) is a U.S. corporation currently located at 16141 Heron Avenue, La Mirada, California 90638. (CX-1C at Q/A 3, 5, 8.) ARM makes and sells reusable beverage capsules that work with single-serve brewing machines. (*Id.* at Q/A18-19.)

Adrian Rivera is an individual residing in Whittier, California. (CX-1C at Q/A 2.) Mr. Rivera is the inventor and owner of the ’320 patent and the founder of ARM. (CX-1C at Q/A 3, 5, 8–9, 12–17.)

2. Respondents

Respondents are Eko Brands LLC and Espresso Supply, Inc. Eko is a Washington corporation based in Woodinville, Washington. (RX-52C at Q/A 5–7.) Eko manufactures the Ekobrew, Brew & Save and Ekobrew Elite products that are at issue in this proceeding. (RX-52C at Q/A 9.) Espresso Supply, Inc. is also based in Washington, and is the parent company of Eko, which it acquired in October 2015. (RX-52C at Q/A 4, 6.) Accordingly, while Eko was a respondent during the violation phase of this investigation, Espresso Supply was not involved in that phase of this investigation.

C. Patent at Issue

U.S. Patent No. 8,720,320 (“the ’320 patent”) entitled “Pod Adapter System For Single Service Beverage Brewers,” issued on May 13, 2014, from U.S. Application No. 11/777,831, filed on July 13, 2007. (*See generally* JX-1 (’320 patent).) Adrian Rivera is the named inventor. (*Id.*) The ’320 patent is directed to a “pod adaptor assembly for use in combination with a single serve beverage brewer.” (*Id.* at Abstract.)

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During the violation phase of this investigation, ARM asserted claims 5, 6, 8, 18, 19, and 20 of the '320 patent against Eko. Violation Compl. at ¶ 52. The Commission's remedial orders, however, are limited to claims 8 and 19 of the '320 patent. *See* LEO at 1; CDO at 1. Claims 8 and 19, along with claims 5 and 18 upon which they depend, provide as follows:

Claim 5. A beverage brewer, comprising:

a brewing chamber;

a container, disposed within the brewing chamber and adapted to hold brewing material while brewed by a beverage brewer, the container comprising:

a receptacle configured to receive the brewing material; and

a cover;

wherein the receptacle includes

a base, having an interior surface and an exterior surface, wherein at least a portion of the base is disposed a predetermined distance above a bottom surface of the brewing chamber, and

at least one sidewall extending upwardly from the interior surface of the base,

wherein the receptacle has at least one passageway that provides fluid flow from an interior of the receptacle to an exterior of the receptacle;

wherein the cover is adapted to sealingly engage with a top edge of the at least one sidewall, the cover including an opening, and

wherein the container is adapted to accept input fluid through the opening and to provide a corresponding outflow of fluid through the passageway;

an inlet port, adapted to provide the input fluid to the container; and

a needle-like structure, disposed below the base;

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wherein the predetermined distance is selected such that a tip of the needle-like structure does not penetrate the exterior surface of the base.

Claim 8. The beverage brewer of claim 5, wherein the container is reusable.

Claim 18. A beverage brewer including a brewing chamber configured to receive a brewing cartridge, an inlet port adapted to provide an input fluid, and a needle-like structure fixed in a bottom of the brewing chamber and adapted to puncture a shell of the brewing cartridge to carry an outflow of brewed beverage from the brewing cartridge and arranged to avoid puncturing filtering material containing brewing material disposed inside the shell, the improvement comprising:

a container configured to replace the brewing cartridge, the container positionable within the brewing chamber and adapted to hold brewing material while brewed by the beverage brewer, the container including:

a receptacle configured to receive and support the brewing material, and

a cover;

wherein the receptacle includes:

a passageway providing fluid communication between an interior of the receptacle and the brewing chamber,

a base, having an interior surface and an exterior surface and configured to avoid contact with the needle-like structure, and

at least one sidewall extending upwardly from the interior surface of the base and configured to avoid contact with the needle-like structure;

wherein the cover is adapted to sealingly engage with a top edge of the at least one sidewall, the cover including an opening, and

wherein the container is adapted to accept the input fluid from the inlet port through the opening and to provide a corresponding outflow of fluid through the passageway.

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Claim 19. The beverage brewer of claim 18, wherein the container is reusable.

(’320 Patent at Claims 5, 8, 18, 19 (emphasis added to asserted claims).) To summarize, claims 8 and 19 are identical to the claims upon which they depend with the exception of the additional limitation that the container described in each independent claim must be reusable. (*See id.*)

D. Products at Issue

ARM relies on the Ekobrew 2.0, the Brew & Save 2.0, and the Ekobrew Elite as the basis for its enforcement complaint. While ARM addresses other Eko products at times in its briefing, ARM has clearly indicated that only these three products form the basis of its enforcement complaint. (ARM IPHB at 10 (“the products relied on to establish violations of the remedial orders are the Ekobrew 2.0, Brew & Save 2.0, and Ekobrew Elite.”).) While Eko takes issue with the discussion of its Fill ‘N Save product in ARM’s briefing, (*see* Eko RPHB at 2), the ALJ finds that ARM has clearly indicated that its enforcement complaint is based only on the three products listed above.

The Ekobrew 2.0, the Brew & Save 2.0, and the Ekobrew Elite are all beverage brewing capsules. (RX-52C at Q/A 9.) The Ekobrew 2.0 and the Brew & Save 2.0 are plastic capsules, while the Ekobrew Elite is a stainless steel capsule. (*Id.*) ARM asserts that the Ekobrew 2.0 and Brew & Save 2.0 are structurally identical to the Ekobrew³, which was the subject of the violation phase of this investigation. (ARM IPHB at 9.) As Staff notes, there appears to be no dispute among the parties that the Ekobrew 2.0 and the Brew & Save 2.0 are structurally

³ Hereinafter referred to as Ekobrew 1.0 for clarity in distinguishing the Ekobrew products.

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identical to the Ekobrew 1.0 product at issue during the violation phase of this investigation. (Staff IPHB at 14; CX-3C at Q/A 22; RX-52C at Q/A 9.) Accordingly, the ALJ finds that the Ekobrew 2.0 and the Brew & Save 2.0 are structurally identical to the Ekobrew 1.0.

ARM also asserts that the Ekobrew Elite is identical to the Ekobrew Elite from the violation phase of this investigation. (ARM IPHB at 9.) Here again, there appears to be no dispute among the parties. Accordingly, the ALJ finds that the Ekobrew Elite at issue in this enforcement investigation is identical to the Ekobrew Elite that was at issue in the underlying violation phase of this investigation. (See CX-3C at Q/A 22.) The ALJ further notes that, while Eko produces an Ekobrew Elite 2.0 product, ARM has not included that product in its enforcement allegations. (See ARM IPHB at 10.)

II. JURISDICTION

The parties contest the Commission's jurisdiction over this proceeding. ARM asserts that the Commission has subject matter jurisdiction over this proceeding by virtue of its allegations that Eko has violated the Commission's remedial orders. (ARM IPHB at 10.) ARM also asserts that the Commission has personal jurisdiction over Eko because Eko has responded to the Complaint and Notice of Investigation, participated in discovery, and made an appearance through counsel. (*Id.*)

Eko does not treat subject matter and personal jurisdiction separately. Instead, Eko "denies that the ITC has jurisdiction to issue or enforce a remedy" based on its belief that the alleged unfair acts do not infringe any valid claim of a U.S. patent. (Eko IPHB at 16.) Eko concedes that it has participated in this enforcement proceeding. (*Id.* at 15.)

Staff asserts that the Commission has jurisdiction over the enforcement proceeding and for the imposition of civil penalties for violations of the cease and desist order pursuant to 19

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U.S.C. § 1337(f)(2). (Staff IPHB at 23.) Staff further asserts that the Commission has jurisdiction over the rescission proceeding pursuant to 19 U.S.C. § 1337(k)(2). (*Id.* at 24.) Finally, Staff asserts that the Commission has personal jurisdiction over all the parties based on the appearance of the parties, and the apparent absence of any dispute as to personal jurisdiction. (*Id.*)

The ALJ finds that the Commission has personal jurisdiction over the parties based on their appearance and participation in both the enforcement and rescission proceedings. The ALJ finds that the Commission has jurisdiction to enforce its cease and desist order pursuant to 19 U.S.C. § 1337(f)(2) and jurisdiction to rescind or modify its remedial orders pursuant to 19 U.S.C. § 1337(k). To the extent Eko challenges the Commission's jurisdiction, the substance of those challenges goes to the merits of the violation determination, and not to the Commission's jurisdiction. The Federal Circuit has been clear that the Commission should treat the complaints that come before it on the merits where the underlying facts are closely intertwined with the jurisdictional requirements of section 337. *See Amgen Inc. v. U.S. Int'l Trade Comm'n*, 902 F.2d 1532, 1536 (Fed. Cir. 1990). Accordingly, the ALJ finds that the Commission has jurisdiction over the instant rescission and enforcement proceedings, jurisdiction to enforce its cease and desist order via the imposition of a civil penalty, and jurisdiction to modify or rescind its remedial orders.

III. ENFORCEMENT

A. Enforceability of the Remedial Orders

As an initial matter, the ALJ finds it necessary to address the enforceability of the Commission's remedial orders under 19 U.S.C. § 1337. While not directly raised by the parties, a domestic industry is a necessary prerequisite to obtaining relief in section 337 investigations.

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19 U.S.C. § 1337(a). In the absence of a domestic industry, the Commission lacks the statutory authority to issue remedial orders, which must be based on a violation of section 337. 19 U.S.C. § 1337(d)(1). In the instant investigation, the ALJ's initial determination found that ARM had satisfied the technical prong of the domestic industry requirement as to claim 5, and had also satisfied the economic prong of the domestic industry requirement. *See Violation Comm'n Op.* at 3. On review the Commission found claim 5 to be invalid, and explained that "[b]ecause we find that claim 5 is invalid, ARM cannot satisfy the technical prong through claim 5." *Id.* at 81. The Commission employed the same reasoning with respect to claim 18, and concluded that "because we find that claim 18 is invalid, ARM cannot satisfy the technical prong through claim 18." *Id.* As the Commission noted, ARM also alleged that its domestic industry articles practiced claims 1 and 10 of the '320 patent, but the initial determination made no findings on whether the domestic industry products practiced claims 1 and 10. The Commission declined to "determine whether ARM's products practice [claims 1 and 10.]" *Id.* at 82.

At no point in this investigation has there been a finding that ARM satisfies the technical prong of the domestic industry requirement through any claim other than claim 5 of the '320 patent. Rather, the record shows that the Commission explicitly determined that ARM could not satisfy the technical prong of the domestic industry requirement through claims 5 and 18 of the '320 patent, while declining to determine whether ARM could satisfy the technical prong of the domestic industry requirement through claims 1 and 10 of the '320 patent. *Id.* at 81–82. ARM only asserted the technical prong of domestic industry through claims 1, 5, 10, and 18 of the '320 patent.⁴ The Commission's opinion, in invalidating claims 5, leaves ARM without an

⁴ At no point has ARM asserted that its domestic industry products practice claims 8 or 19, which depend from claims 5 and 18, respectively. *See Violation Compl.* at ¶ 96.

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affirmative domestic industry determination. Domestic industry is a statutory requirement for finding a violation of Section 337, and a violation of Section 337 is a statutory prerequisite to the issuance of an exclusion or a cease and desist order. The absence of a domestic industry determination in this investigation renders the remedial orders effectively unenforceable. On this basis, the ALJ finds that Eko has not violated the Commission's limited exclusion order or cease and desist order. Pursuant to that finding, the ALJ recommends that this enforcement proceeding be terminated in its entirety.

B. Violation

Because the ALJ finds that the limited exclusion order and cease and desist order are unenforceable against Eko, the ALJ also finds that Eko cannot be found in violation of the remedial orders.

C. Penalty

Because the ALJ finds that Eko has not violated the remedial orders, the ALJ also recommends that no penalty is appropriate in this instance. Additionally, even if the Commission finds that the remedial orders are enforceable, the ALJ nonetheless recommends that no penalty be assessed because, consistent with the reasoning *infra*, the remedial orders should be provisionally rescinded in light the United States District Court for the Western District of Washington's order granting summary judgment of noninfringement to Eko.

IV. RESCISSION

A. Eko's Position

Eko seeks rescission of the Commission's remedial orders in this investigation. (Eko IPHB at 21.) Eko offers three separate grounds for rescission, each of which it asserts is

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sufficient to justify rescission. (*Id.* at 21, 28, 40.) First, Eko asserts that the remedial orders should be rescinded in light of the district court’s February 24, 2016 claim construction order, and its August 17, 2016 decision granting summary judgment of noninfringement to Eko. (*Id.* at 21–28.) Second, Eko asserts that the remedial orders should be rescinded because dependent claims 8 and 19 are invalid as a matter of law in light of the Commission’s opinion invalidating the independent claims from claims 8 and 19 depend. (*Id.* at 28–40.) Third, Eko asserts that the remedial orders should be rescinded because Eko no longer imports any accused products or components thereof. (*Id.* at 40–43.)

B. ARM’s Position

ARM opposes Rescission of the remedial orders in this investigation. (ARM IPHB at 35.) First, ARM argues that Eko seeks rescission pursuant to the portion of the rescission statute that allows relief under circumstances where relief would be available under Federal Rule of Civil Procedure 60(b). (*Id.* at 25.) ARM submits that, because Eko did not appeal the Commission’s violation determination, Rule 60(b) would not provide relief to Eko. (*Id.* at 27–28.) Second, ARM argues that the district court’s decisions on claim construction and rescission do not justify rescission because the decisions are erroneous, particularly with respect to claim construction. (*Id.* at 28–31.) ARM further notes that the Commission determined that Eko abandoned the argument that the remedial orders should be rescinded by virtue of collateral estoppel on the non-infringement issue. (ARM RPHB at 1.) Third, ARM argues that rescission cannot be based on the invalidity of claims 8 and 19 because the Commission determined that “neither the enforcement proceeding nor the rescission proceeding encompass the issue of whether claims 8 and 19 are invalid.” (*Id.* at 20.) Fourth, and finally, ARM rejects the assertion that Eko’s domestic manufacturing activity can be a basis for rescission by arguing that

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“compliance is not a basis for rescission,” and that any change in Eko’s manufacturing practices occurred prior to the issuance of the remedial orders. (*Id.* at 22.)

C. Staff’s Position

Staff supports rescission of the remedial orders based on the district court’s noninfringement decision. (Staff IPHB at 54.) Staff further submits that, in accordance with prior Commission precedent, the rescission should initially be considered temporary pending the Federal Circuit’s review of the district court’s decision. (*Id.* at 54 n.11.) Staff notes that the ALJ’s decision in Order No. 34 precludes Eko’s second ground for rescission, *i.e.*, the Commission’s own determination regarding the invalidity of the independent claims from which claims 8 and 19 depend. (*Id.* at 55.) Finally, Staff supports rescission of the remedial orders on the basis of Eko’s third ground, *i.e.*, Eko’s change in manufacturing practices. (*Id.* at 55–56.)

D. Resolution

Subsection (k) of Section 337 lays out the conditions under which the Commission’s remedial order shall persist, be rescinded, or be modified. 19 U.S.C. 1337(k). Specifically, subsection (k) provides:

(k) Period of effectiveness; termination of violation or modification or rescission of exclusion or order

(1) Except as provided in subsections (f) and (j) of this section, any exclusion from entry or order under this section shall continue in effect until the Commission finds, and in the case of exclusion from entry notifies the Secretary of the Treasury, that the conditions which led to such exclusion from entry or order no longer exist.

(2) If any person who has previously been found by the Commission to be in violation of this section petitions the Commission for a determination that the petitioner is no longer in violation of this section or for a modification or rescission of an exclusion from entry or order under subsection (d), (e), (f), (g), or (i) of this section--

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(A) the burden of proof in any proceeding before the Commission regarding such petition shall be on the petitioner; and

(B) relief may be granted by the Commission with respect to such petition--

(i) on the basis of new evidence or evidence that could not have been presented at the prior proceeding, or

(ii) on grounds which would permit relief from a judgment or order under the Federal Rules of Civil Procedure.

Id. Commission Rule 210.76 expands upon the statutory basis for rescission and provides:

(a) Petitions for modification or rescission of exclusion orders, cease and desist orders, and consent orders.

(1) Whenever any person believes that changed conditions of fact or law, or the public interest, require that an exclusion order, cease and desist order, or consent order, be modified or set aside, in whole or in part, such person may file with the Commission a petition requesting such relief. The Commission may also on its own initiative consider such action. The petition shall state the changes desired and the changed circumstances warranting such action, shall include materials and argument in support thereof, and shall be served on all parties to the investigation in which the exclusion order, cease and desist order, or consent order was issued. Any person may file an opposition to the petition within 10 days of service of the petition.

(2) If the petitioner previously has been found by the Commission to be in violation of section 337 of the Tariff Act of 1930 and if its petition requests a Commission determination that the petitioner is no longer in violation of that section or requests modification or rescission of an order issued pursuant to section 337 (d), (e), (f), (g), or (i) of the Tariff Act of 1930, the burden of proof in any proceeding initiated in response to the petition pursuant to paragraph (b) of this section shall be on the petitioner. In accordance with section 337(k)(2) of the Tariff Act, relief may be granted by the Commission with respect to such petition on the basis of new evidence or evidence that could not have been presented at the prior proceeding or on grounds that would permit relief from a judgment or order under the Federal Rules of Civil Procedure.

(b) Commission action upon receipt of petition. The Commission may thereafter institute a proceeding to modify or rescind the exclusion order, cease and desist order, or consent order by issuing a notice. The Commission may hold a public hearing and afford interested persons the opportunity to appear and be heard. After consideration of the petition, any responses thereto, and any information

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placed on the record at a public hearing or otherwise, the Commission shall take such action as it deems appropriate. The Commission may delegate any hearing under this section to the chief administrative law judge for designation of a presiding administrative law judge, who shall certify a recommended determination to the Commission.

(c) Comments. Parties may submit comments on the recommended determination within 10 days from the service of the recommended determination. Parties may submit responses thereto within 5 business days from service of any comments.

19 C.F.R. § 210.76. Accordingly, when the Commission finds that the conditions that lead to the issuance of its remedial orders no longer exist, those remedial orders shall cease to be effective. *See* 19 U.S.C. § 1337(k)(1). Additionally, persons that are subject to the Commission's remedial orders may petition the Commission for a determination that they are no longer in violation of Section 337 or for modification or rescission of those remedial orders. *Id.* at § 1337(k)(2). The Commission's rules also clarify that the Commission may also make that determination on its own initiative, without a petition from an affected person. 19 C.F.R. § 210.76(a)(1).

While disputed rescission proceedings at the Commission are uncommon, they are not unprecedented, and, in this case, *Certain Composite Wear Components and Products Containing Same*, 337-TA-644 is informative. In *Certain Composite Wear Components*, respondents AIA Engineering Limited and Vega Industries Ltd. (collectively "AIA") petitioned the Commission to rescind limited exclusion and cease and desist orders directed to AIA. The basis for AIA's rescission request was a decision by the United States District Court for the Middle District of Tennessee that found invalid the sole patent covered by the Commission's remedial orders. *Composite Wear Components*, Comm'n Op. at 1 (February 10, 2011). AIA's rescission request was opposed by the complainants Magotteaux International S/A and Magotteaux Inc. (collectively "Magotteaux"). Because the district court's decision was on appeal to the Federal Circuit, Magotteaux proposed temporary exclusion and cease and desist orders that would allow importation under bond. *Id.*

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The details of *Composite Wear Components* are similar to the instant case. There, as here, the petitioner informed the ALJ that it would not participate in the underlying violation investigation. *Id.* at 2. Instead, AIA, like Eko here, indicated that it would seek redress in a United States District Court. *Id.* In short order, AIA was found in default, the presiding ALJ found AIA in violation of section 337 through adverse inferences, and the Commission declined to review the ALJ's initial determination, while also noting that it would presume the facts in the violation complaint to be true with respect to AIA. *Id.* at 3. Thereafter, the Commission issued a limited exclusion order and a cease and desist order against AIA. *See 74 Fed. Reg.* 62814 (Dec. 1, 2009).

On September 3, 2010, the district court from which AIA sought relief issued an order granting summary judgment of invalidity to AIA. *Composite Wear Components*, Comm'n Op. at 4 (February 10, 2011). Under the Commission's interpretation, it was clear that the district court's ruling invalidated all of the claims of the asserted patent. *Id.* at 5. Magotteaux filed a notice of appeal from the district court's summary judgment ruling shortly thereafter. *Id.* On October 6, 2010, AIA filed its petition to rescind the Commission's remedial orders, which Magotteaux opposed. *Id.* at 5–6. Unlike the instant investigation, the Commission did not delegate consideration of the rescission petition to an ALJ.

Looking to the Restatement (Second) of Judgments, the Commission concluded that the district court's invalidity determination substantially changed the circumstances under which the orders were issued. *Id.* at 8–9. In light of that conclusion, the Commission “determined that the remedial order should be rescinded pending resolution of the appeal at the Federal Circuit.” *Id.* at 9. The Commission further indicated that it would either reinstate or permanently rescind the remedial orders depending on the outcome of the appeal to the Federal Circuit. *Id.*

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Similarly, in *SSIH Equip. S.A. v. U.S. Int'l Trade Comm'n*, 718 F.2d 365 (Fed. Cir. 1983), the Federal Circuit affirmed the Commission's modification of an exclusion order to remove reference to two patents that had subsequently been invalidated by a district court. *See id.* at 370. There, the Federal Circuit emphasized the Commission's obligation to maintain an active role in monitoring the impact of its orders on the public interest and concluded that the Commission acted properly in modifying its remedial orders. *Id.*

The primary difference between *Composite Wear Components* and *SSIH Equip.* and the instant investigation is the subject of the district courts' intervening decisions. In *Composite Wear Components* and *SSIH Equip.*, the subjects of the decisions were invalidity, while in the instant case, the subject of the district court's decision is noninfringement. The parties have not suggested, and the ALJ is not aware of, any reason that this difference should demand a different outcome in the instant investigation from the one the Commission reached in *Composite Wear Components*. Moreover, while ARM attempts to distinguish these cases from the instant investigation, its arguments are unpersuasive.

Section 337(k)(1) provides that the Commission's remedial orders only remain in effect until the conditions which led to those orders no longer exist. 19 U.S.C. § 1337(k)(1). Here, the district court's ruling of noninfringement occurred subsequent to the Commission's issuance of the remedial orders and has substantially changed the circumstances under which the orders were issued. *Cf.* Violation Comm'n Op. at 83 ("We do, nonetheless, issue a limited exclusion order and cease and desist orders against defaulted parties Eko Brands, LLC; Evermuch Technology Company Co., Ltd.; and Ever Much Company Ltd., **based on their infringement of claim 8 and 19.**" (emphasis added)). Accordingly, the ALJ recommends that the Commission take the same action as it did in *Composite Wear Components* and provisionally rescind the remedial

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orders until the district court's noninfringement decision is affirmed or reversed on appeal, or the time for appeal has passed.

ARM's suggestion that the district court's infringement order should not serve as a basis for rescission because it relies on an erroneous construction of certain claims is not persuasive. (See ARM IPHB at 28–31.) Just as the district court lacks the statutory authority to review the Commission's determinations, the ALJ and the Commission lack the authority to review the district court's orders. Congress has placed the authority to review the patent-related decisions of a district court with the Federal Circuit, just as it also placed the authority to review the Commission's determinations with Federal Circuit. 28 U.S.C. §§ 1295(a)(1), 1295(a)(6). Accordingly, the ALJ declines to engage in an unauthorized review of the district court's noninfringement or claim construction decisions.

Eko's second ground for rescission, *i.e.*, the invalidity of claims 8 and 19 by virtue of the Commission's decision invalidating the independent claims from which those claims depend is also unpersuasive. This argument was rejected by the ALJ in Order 34 and Eko has offered no justification for revisiting the issue. Moreover, the Commission's January 19, 2017 opinion rejected this very argument and described it as "an attempt to sidestep the Commission's finding that claims 8 and 19 are presumed valid." Comm'n Op. at 7 (Jan. 19, 2017). Going further, that same opinion stated that "neither the enforcement proceeding nor the rescission proceeding encompass the issue of whether claims 8 and 19 are invalid." *Id.* at 9. The Commission's opinion leaves no room for the ALJ to consider the validity of claims 8 and 19 as a basis for rescission.

The ALJ also finds Eko's third ground for rescission unpersuasive. While characterized as the assertion that "Eko Does Not Import Any Accused Product or Components," much of

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Eko's argument under this basis amounts to an attack on the Commission's determination in the violation phase of this investigation. (*See* Eko IPHB at 41 ("But the Commission did not sufficiently explain its findings that Eko infringed or that claims 8 and 19 were valid, particularly based on the remaining analysis in the Commission Opinion. Thus, Eko cannot be found to have violated the LEO/CDO to the extent that the issued Orders are beyond the authority of the Commission).) However, the time for seeking review of the Commission's violation determination has passed, and Eko cannot leverage these rescission proceedings to effect a full-blown appeal of the Commission's determination simply because it believes the Commission erred. By statute, rescission is only available where the conditions that led to the remedial orders no longer exist. 19 U.S.C. § 1337(k)(1). Eko's legal arguments criticizing the Commission's violation determination do not involve changed circumstances, and thus are beyond the scope of this rescission proceeding.

Additionally, to the extent Eko does argue that it has shifted its operations from importing brew capsules to manufacturing them domestically, the ALJ does not recommend rescinding the remedial orders on those grounds. As ARM notes, this line of reasoning essentially amounts to the proposition that Eko's compliance with the remedial orders justifies rescission of those orders. (ARM RPHB at 22.) Eko's approach here requires an overbroad interpretation of the rescission statute which would, if accepted, suggest that rescission is available to every respondent that complies with a remedial order. Moreover, as a factual matter, the ALJ finds that some of Eko's changes in manufacturing practices occurred prior to issuance of remedial orders, and thus do not constitute a change to the conditions that lead to the issuance of the remedial orders. (*See* RX-52C at Q14 (describing Eko's purchase and use of its own injection molding equipment in 2015).) In other instances, Eko's witness testified that, with

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respect to imported o-rings and mesh screens [REDACTED]

[REDACTED]

[REDACTED] Accordingly, the facts in this investigation do not support granting rescission on the basis of Eko's change in manufacturing processes.

Consistent with the reasoning above, the ALJ recommends temporarily rescinding the Commission's remedial orders in light of the district court's noninfringement order. The issuance of the district court's order represents a change in the conditions that lead to the Commission's original issuance of the remedial orders, as required by subsection 337(k)(1). The ALJ further recommends that the rescission should be made permanent if on appeal the Federal Circuit affirms the district court's order as to noninfringement, or if the time for appeal passes with no action from the parties.

V. ENFORCEMENT INITIAL DETERMINATION

In accordance with the discussion of the issues contained herein, it is the INITIAL DETERMINATION of the ALJ that the Commission's limited exclusion and cease and desist orders in this matter should not be enforced, that no penalty should be assessed, and that the enforcement proceeding should be terminated.

Further, this Initial Determination, together with the record of the hearing in this investigation consisting of:

- (1) the transcript of the hearing, with appropriate corrections as may hereafter be ordered, and
- (2) the exhibits received into evidence in this investigation, as listed in the attached exhibit lists in Appendix A,

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are CERTIFIED to the Commission. In accordance with 19 C.F.R. § 210.39(c), all material found to be confidential by the undersigned under 19 C.F.R. § 210.5 is to be given *in camera* treatment.

The Secretary shall serve a public version of this ID upon all parties of record and the confidential version upon counsel who are signatories to the Protective Order (Order No. 1.) issued in this investigation.

VI. RECOMMENDED DETERMINATION ON RESCISSION

In accordance with the discussion of the issues contained herein, it is the RECOMMENDED DETERMINATION of the ALJ that, even if the Commission finds the remedial orders against Eko to be enforceable, the Commission should nonetheless provisionally rescind its limited exclusion and cease and desist orders as to Eko Brands, LLC and Espresso Supply, Inc. pending final resolution of the United States District Court for the Western District of Washington's determination of no infringement by Eko Brands, LLC and Espresso Supply, Inc., including the exhaustion of all appeals. Should the district court's noninfringement ruling be overturned on appeal, the LEO and CDO should be reinstated. Otherwise, the rescission should become permanent after the time for appeal has passed, or the district court's noninfringement decision is affirmed on appeal.

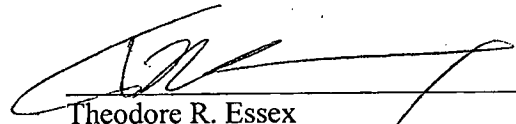
Within seven days of the date of this document, each party shall submit to the office of the Administrative Law Judge a statement as to whether or not it seeks to have any portion of this document deleted from the public version. The parties' submissions must be made by hard copy by the aforementioned date.

Any party seeking to have any portion of this document deleted from the public version thereof must submit to this office (1) a copy of this document with red brackets indicating any

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portion asserted to contain confidential business information by the aforementioned date and (2) a list specifying where said redactions are located. The parties' submission concerning the public version of this document need not be filed with the Commission Secretary.

SO ORDERED.


Theodore R. Essex
Administrative Law Judge

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C. 20436**

ADMINISTRATIVE LAW JUDGE THEODORE R. ESSEX

In the Matter of:

**CERTAIN BEVERAGE BREWING
CAPSULES, COMPONENTS THEREOF,
AND PRODUCTS CONTAINING THE
SAME**

Investigation
No. 337-TA-929
(Enforcement and Rescission Proceeding)

**COMPLAINANTS ADRIAN RIVERA AND ADRIAN RIVERA MAYNEZ
ENTERPRISES, INC.'S FINAL EXHIBIT LIST – PUBLIC EXHIBITS ONLY**

Complainants respectfully submit their final exhibit list of public exhibits only in the above-captioned investigation.

Exhibit No.	Confidential	Description	Purpose	Sponsoring Witness(es)	Status	Date
CX-0005	Public	Photograph - Brew & Save Products in Original Packaging Front	Magnitude of Fine	Ditta	Admitted	1.10.17
CX-0006	Public	Photograph - Brew & Save Products in Original Packaging Bottom	Magnitude of Fine	Ditta	Admitted	1.10.17