

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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May 8, 2009

By Hand Delivery

The Honorable Marilyn R. Abbott
Secretary
U.S. International Trade Commission
500 E Street, S.W.
Washington, D.C. 20436

Re: Investigation No. 337-TA-643; In the Matter of Certain Cigarettes and Packaging Thereof; Comments in Response to Notice of Commission Determination to Review the Presiding Administrative, 74 Fed. Reg. 17512 (April 15, 2009) Concerning Remedy, the Public Interest and Bonding

Dear Secretary Abbott:

The Chamber of Commerce of the United States of America (the "U.S. Chamber") submits these comments in response to the International Trade Commission's (the "Commission") Federal Register Notice (74 FR 17512) of April 15, 2009 (the "Notice"), concerning its determination to review the initial summary determination by the administrative law judge ("ALJ") in the above mentioned investigation. In this Notice, the Commission requests submissions from "interested parties" on the issues of "remedy, the public interest and bonding."

The Notice indicates that the Commission will consider the effect that a potential remedy will have on the public interest, including (1) the public health and welfare; (2) competitive conditions in the U.S. economy; (3) U.S. production of articles that are like or directly competitive with those subject to investigation; and (4) U.S. consumers. The ALJ has made an initial determination that the respondent violated Section 337 of the Tariff Act of 1930 by selling gray market cigarettes bearing valid trademarks for importation into the United States.

The U.S. Chamber is the world's largest business federation, representing an underlying membership of 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. More than 96% of U.S. Chamber members are small businesses with 100 employees or fewer. Many of our members hold intellectual property rights, including trademarks, that are critical assets for their business.

Intellectual property (“IP”) rights, including trademarks, are essential to the ability of U.S. businesses to compete and thrive in the global economy. IP-intensive industries employ 18 million Americans and account for 40% of economic growth.¹ IP rights are vital to creating jobs, advancing economic growth, and generating breakthrough solutions to global challenges. In particular, the value of trademarks is widely recognized to protect the reputation of companies and their products, and to prevent consumers from being confused by materially different, and potentially inferior, products improperly bearing the company logo. For many of our members, the brand itself, and its reputation built over years of providing quality goods and services, may be the most valuable asset of the company. The protection of these assets is a priority for the U.S. Chamber. The U.S. Chamber’s efforts through the Global Intellectual Property Center and the Coalition Against Counterfeiting and Piracy are illustrative of our extensive efforts to counter threats to these valuable assets.

The U.S. Chamber understands that the remedy applied in this case has implications for the protection of the trademarks for the tobacco products at issue, and, consequently, has significant public health and economic effects. Thus, the U.S. Chamber supports the ALJ’s recommendation that a general exclusion order should be issued in this case.

In the context of trademarks, “gray market” goods generally refer to products manufactured for legitimate sale in foreign markets, but which are then diverted into the United States market by third parties for domestic sale without the consent of the trademark right holder. As the ALJ found, tobacco products produced for foreign consumption are materially different from cigarettes intended for sale in the United States. These differences may have substantial impacts on public health and welfare of U.S. consumers, and on economic conditions in the United States. Moreover, failing to prohibit the import of gray market goods for one type of good may have a spillover effect and impact expectations in a manner that lowers the value of U.S. trademark rights, in general, for all classes of goods.

As recognized rightly in the ALJ’s initial determination, gray market goods may lack the public safety warnings that are required by law, and may otherwise be out of compliance with U.S. laws and regulations. Furthermore, such goods lack the quality control provided by the manufacturer and authorized distribution networks. The lack of such warnings and safeguards can subject the consuming public to inferior products with uncertain pedigree – products that may consequently have a significant impact on public health and welfare – despite the fact that these consumers are buying brand names that they believe they know and can trust.

Trade in “gray market” goods, whether with respect to tobacco products or other types of goods, has the potential to seriously undermine trademark and other intellectual

¹ GLOBAL INTELLECTUAL PROPERTY CENTER, INTELLECTUAL PROPERTY: CREATING JOBS, SAVING LIVES IMPROVING THE WORLD (2009).

property rights. This can deceive and confuse consumers as to the origin of the relevant products. More fundamentally to our members, trade in gray market goods can damage the overall value of U.S. trademarks, and of the business goodwill of manufacturers. The follow-on effects can be significant. The undermining of these rights has economic consequences on the businesses in question and on their suppliers, potentially resulting in lost revenues, lost jobs, and long term damage to the brand. In the case at issue, the company affected has hundreds of millions of dollars in capital investment in the United States, provides over 10,000 jobs, and generates billions of dollars in revenue. If the goodwill embodied in their trademarks is undermined by unauthorized products permitted to enter the U.S. market, there are likely to be significant economic consequences.

The U.S. Chamber urges the Commission to consider that the choice of remedy in individual cases such as this one can have spill-over implications for the overall efforts to strengthen U.S. intellectual property rights for American businesses. For the reasons expressed above, the U.S. Chamber has a keen interest in this topic. Furthermore, in the instant case, without a general exclusion order, there is a significant risk that companies and individuals will continue their efforts to import similar gray market cigarettes in the future. For these reasons, the U.S. Chamber urges the Commission to uphold the ALJ's initial determination of trademark infringement and to issue a general exclusion order.

Sincerely,



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