

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

GARMIN INTERNATIONAL, INC., GARMIN USA, INC.,
GARMIN CORPORATION

Appellants,

v.

INTERNATIONAL TRADE COMMISSION,

Appellee

and

NAVICO INC., NAVICO HOLDING AS

Intervenors.

ON APPEAL FROM THE UNITED STATES INTERNATIONAL TRADE COMMISSION
IN INVESTIGATION NO. 337-TA-921.

**OPPOSITION OF APPELLEE INTERNATIONAL TRADE COMMISSION
TO APPELLANT GARMIN'S EMERGENCY MOTION FOR AN INTERIM
STAY AND STAY PENDING APPEAL**

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TABLE OF CONTENTS

	Page
I. BACKGROUND	1
A. The Commission Investigation Finding a Violation of Section 337.....	1
B. Navico’s Petition to Modify the Exclusion Order to Provide Clarity as to Garmin’s New Importation Practices.....	6
C. Garmin’s Request to the Commission for a Stay	10
II. ARGUMENT	11
A. Garmin’s Motion Is Based on Misrepresentations About the Commission Decision, on Its Unilateral Assertion That Its Redesign Does Not Infringe, on a Navico Press Release That Binds Neither the Commission nor Customs, and on a Misapprehension of Trade Law	11
B. Garmin Has Failed to Meet Its Burden to Show that the Circumstances Justify a Stay of the Commission’s Exclusion Order	13
1. Garmin Has Failed to Show Irreparable Harm	14
2. Garmin Has Failed to Demonstrate a Likelihood of Success on the Merits.....	16
3. The Balance of Hardships Does Not Support Garmin.....	19
4. The Public Interest Does Not Warrant a Stay.....	19
III. CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allied Corp. v. USITC</i> , 850 F.2d 1573 (Fed. Cir. 1988).....	4, 10, 17
<i>Beard v. United States</i> , 451 F. App'x 920 (Fed. Cir. 2011)	14
<i>Celsis in Vitro, Inc. v. CellzDirect, Inc.</i> , 664 F.3d 922 (Fed. Cir. 2012)	17, 20
<i>Darrell Andrews Trucking, Inc. v. Fed. Motor Carrier Safety Admin.</i> , 296 F.3d 1120 (D.C. Cir. 2002).....	17
<i>Hyundai Elecs. Indus. Co. v. USITC</i> , 899 F.2d 1204 (Fed. Cir. 1990)	4, 17
<i>eBay Inc. v. MercExchange, LLC</i> , 547 U.S. 388 (2006)	16
<i>Illinois Tool Works, Inc. v. Grip-Pak, Inc.</i> , 906 F.2d 679 (Fed. Cir. 1990)	15
<i>Ninestar Technology Co. v. ITC</i> , 667 F.3d 1373 (Fed. Cir. 2012)	18
<i>Nken v. Holder</i> , 556 U.S. 418 (2009)	13, 14
<i>NSK Corp. v. USITC</i> , 495 F. App'x 51 (Fed. Cir. 2012).....	14
<i>Nutrition 21 v. United States</i> , 930 F.2d 867 (Fed. Cir. 1991)	15
<i>Polymer Techs., Inc. v. Bridwell</i> , 103 F.3d 970 (Fed. Cir. 1996).....	16
<i>Purdue Pharma LP v. Boehringer Ingelheim GmbH</i> , 237 F.3d 1359 (Fed. Cir. 2001)	16
<i>Standard Havens Prods., Inc. v. Gencor Indus., Inc.</i> , 897 F.2d 511 (Fed. Cir. 1990)	13, 14
<i>Robert Bosch LLC v. Pylon Mfg. Corp.</i> , 659 F.3d 1142 (Fed. Cir. 2011)	16
<i>Wisconsin Gas Co. v. FERC</i> , 758 F.2d 669 (D.C. Cir. 1985)	14

**TABLE OF AUTHORITIES
(CONTINUED)**

	Page(s)
Statutes	
5 U.S.C. § 551	17
19 U.S.C. § 1337	1, 17
19 U.S.C. § 1514	13
Code of Federal Regulations	
19 C.F.R. Part 177	13
19 C.F.R. § 210.15	10
19 C.F.R. § 210.76	4, 5, 6, 12
19 C.F.R. § 210.79	12, 18
Rules of Procedure	
Federal Circuit Rule 18(d)	10
Federal Rule of Appellate Procedure 18	10
Administrative Decisions	
<i>Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same, Inv. No. 337-TA-650, Notice of Commission Advisory Opinion (Feb. 9, 2012)</i>	12
<i>Certain Network Devices, Related Software and Components Thereof Inv. No. 337-TA-944, Comm'n Op. (July 26, 2016)</i>	8

On August 30, 2016, the Appellants (“Garmin”) filed an “Emergency Motion for an Interim Stay and Stay Pending Appeal.”¹ ECF No. 11 (“Stay Mot.”). Appellee International Trade Commission (“the Commission”) hereby opposes Garmin’s motion. As set forth herein, Garmin’s request for an interim stay and stay pending appeal should be denied. Garmin’s motion is unusually weak on the issues that most matter for its motion: why its harm (to the extent there is cognizable harm) is irreparable; and why this appeal warrants Garmin’s extraordinary request for a stay pending appeal. To fully understand Garmin’s egregious conduct, both in trying to circumvent an exclusion order, and, on appeal, characterizing its alleged right to do so as giving rise to an “emergency,” extensive background discussion is required. That background is presented first, before responding to Garmin’s motion.

I. BACKGROUND

A. The Commission Investigation Finding a Violation of Section 337

The Commission instituted the underlying investigation on July 14, 2014, based on a complaint filed by Navico, Inc., and Navico Holding AS (collectively, “Navico”).² 79 Fed. Reg. 40778 (July 14, 2014). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, by reason of the importation into the United States, the sale for importation, or the

¹ Garmin also filed two other “emergency” motions on August 30, 2016, one to expedite the briefing regarding the stay, ECF No. 13, and another to expedite the merits briefing schedule, ECF No. 14. The Court’s August 31, 2016, order denied the first as moot, and ordered responses to the second by September 6, 2016.

² Navico has intervened in the present appeal.

sale within the United States after importation of certain marine sonar imaging devices, including downscan and sidescan devices, products containing the same, and components thereof. 79 Fed. Reg. at 40778. The complaint alleged the infringement of certain claims of U.S. Patent Nos. 8,305,840 (“the ’840 patent”), 8,300,499 (“the ’499 patent”), and 8,605,550 (“the ’550 patent”). *Id.* The notice of investigation named Garmin (the Appellants here) as respondents. *Id.*

In a sonar system, a transducer sends sound waves through the water that reflect off of underwater objects, creating echoes. Appx94 at 1:24-29. The transducer receives the echoes and converts that information into electrical energy. *Id.* at 1:24-33. The electrical signal is then transmitted to a display, which shows an image of the underwater environment. *See id.* at 1:49-51. For present purposes, the display is part of a “head unit” (inside the boat) that also includes the user interface, processor, and other hardware and software for operating the system. Appx457-460. Also for present purposes, a “complete sonar system” or a “kitted system” is one that includes the transducers and the head unit. *See* Appx458.

During Commission proceedings, Garmin imported and sold after importation various accused recreational fishfinder sonar products. Those accused products included standalone transducers (Garmin’s “DownVü” and “SideVü” transducers)³ as well as complete sonar systems (those transducers along with Garmin’s “echo,” “echoMap” or “GPSMap” head unit). Appx457-460; Appx549-552; Appx784-785; Appx811-812.

³ By selling the transducers separately, Garmin’s customers can mix and match the transducers with their choice of head unit. *See* Appx549-550.

The patent claims at issue all come from the '840 and the '550 patents. All of the asserted claims in those two patents cover apparatuses. All of the asserted claims of the '840 patent (claims 1, 5, 7, 9, 11, 16-19, 23, 32, 39-41, 70-72), and certain of the asserted claims of the '550 patent (claims 32, 44), call for a “transducer element” as well as “a sonar signal processor.”⁴ Appx60 17:38, 56-61 ('840 patent independent claim 1); Appx61 19:14, 41-46 ('840 patent independent claim 23); Appx103 19:43, 20:11-12 ('550 patent independent claim 32). The “transducer element” was part of Garmin’s accused transducer assemblies, and the “sonar signal processor” was part of Garmin’s accused head units. Garmin’s complete sonar systems (transducer assemblies and head units together) were alleged to directly infringe these patent claims.

On December 1, 2015, the Commission found that Garmin’s complete sonar systems directly infringe the above-listed claims of the '840 patent. 80 Fed. Reg. 76040, 76041 (Dec. 7, 2015) (“the accused Garmin echo products, echoMAP products, and GPSMAP products with their respective transducers”). The Commission also found that one accused complete sonar system directly infringes claims 32 and 44 of the '550 patent (“the accused Garmin GT30 transducer, which comes with the GCV10 sonar module”).⁵ *Id.*

⁴ Other asserted claims of the '550 patent cover just the transducer assemblies, without the signal processor. *See, e.g.*, Appx102 17:40 ('550 patent independent claim 1). Those claims, which the Commission found to be invalid for obviousness, Appx819, are not at issue in the present appeal.

⁵ To avoid undue complexity in this response, we treat the combination of the GT30 transducer and the GCV10 sonar module as a complete sonar system. The GCV10 includes the accused signal processor and is designed to allow the GT30 transducer to operate with a head unit. Appx459.

The Commission found, however, that Navico failed to carry its burden to demonstrate contributory infringement by the standalone transducers imported and sold by Garmin. Appx796-798; *see also* Appx813 ('550 patent claims 32 and 44).

The Commission issued a limited exclusion order against the adjudged infringing products, Appx860-864, and cease and desist orders against each of the Garmin respondents, Appx865-889.⁶ The limited exclusion order excludes from entry for consumption in the United States “[m]arine sonar imaging devices, including downscan and sidescan devices, products containing the same, and components thereof that are covered by” the above-listed claims of the '840 and '550 patents. Appx861. The order carved out the accused stand-alone transducers: “The provisions of this Order shall not apply to marine sonar imaging devices . . . and components thereof, found to be non-infringing as detailed in the Commission Opinion dated December 1, 2015, at pages 28-31 and 45-46 [Appx795-798, Appx812-813].” Appx862 ¶ 4. The order included a certification provision to allow Garmin to certify to U.S. Customs and Border Protection that products to be imported do not infringe. Appx862 ¶ 3.⁷ The exclusion order also stated that the “Commission may modify this Order in accordance with the procedures” set forth in Commission Rule 210.76, 19 C.F.R. § 210.76. Appx863.

Each cease and desist order relates to “covered products,” which are defined to include those products that practice the claims of the '840 and '550 patents

⁶ The three cease and desist orders are identical but for the Garmin names.

⁷ On such certification provisions, *see, e.g., Hyundai Elecs. Indus. Co. v. USITC*, 899 F.2d 1204, 1207, 1209-10 (Fed. Cir. 1990); *Allied Corp. v. USITC*, 850 F.2d 1573, 1577 & n.5 (Fed. Cir. 1988).

found to have been infringed (all asserted claims of the '840 patent, and claims 32 and 44 of the '550 patent). Appx874 (¶ I.G). Such products were defined not to include the accused standalone transducers that were imported and sold separately from head units and which had been found to be non-infringing. *Id.* (“Covered products shall not include marine sonar imaging devices . . . and components thereof, found to be non-infringing as detailed in the Commission Opinion dated December 1, 2015, at pages 28-31 and 45-46.”). The forbidden conduct was standard in form and was defined as the following:

For the remaining terms of the '840 and '550 patents, Respondent shall not:

- (A) import or sell for importation into the United States covered products;
- (B) market, distribute, sell, 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.

Appx875.

Navico and Garmin each filed appeals to this Court from the Commission's final determination. The Court has ordered that the present appeal be considered a companion case to those two appeals. ECF No. 16 (Aug. 31, 2016). Navico's opening brief was filed on June 9, 2016. *Navico Inc. v. ITC*, No. 16-1533. The Commission's response brief in that appeal is due on the same day as this opposition. Garmin's opening brief in its first appeal (the present appeal is its

second) was filed on July 7, 2016. *Garmin Int'l, Inc. v. ITC*, No. 16-1572. That opening brief in the first appeal contended that the Commission construed the terms of the '840 and '550 patents too broadly and that under Garmin's construction there is no infringement. Garmin also argued that all of the claims that the Commission found to be infringed and not invalid (the asserted claims of the '840 patent, and claims 32 and 44 of the '550 patent) are invalid for obviousness. Garmin raised no other issues in the first appeal.

B. Navico's Petition to Modify the Exclusion Order to Provide Clarity as to Garmin's New Importation Practices

Meanwhile, on May 20, 2016, Navico filed a petition to modify the exclusion order pursuant to Commission Rule 210.76(a)(1), 19 C.F.R. § 210.76(a)(1), as authorized by the exclusion order, Appx863 ¶ 6. Navico alleged:

Prior to issuance of the [exclusion order], Garmin imported both fully kitted products [*i.e.*, complete sonar systems] as well as standalone transducers (*i.e.*, transducers that are both imported *and* sold after importation as a standalone product) After issuance of the [exclusion order], Garmin continued importing standalone transducers but [ceased importing] fully kitted products. . . . Garmin instead began importing the transducers separately from the remaining components (namely, the head units) and then "kitting" the components together in the United States (by simply placing the transducer component into the box containing the head unit) and selling the fully kitted products. This specific importation practice was not before the Commission in the underlying investigation

SAppx10-11 (emphasis in original).⁸ Navico provided examples of Garmin products that Navico had purchased that had been imported after the exclusion order took effect. For each such product, a single Garmin box (for sale to a consumer) enclosed a plastic bag with an imported transducer and another plastic bag with an imported head unit. SAppx11-15. As Navico explained, “[t]his combination requires no actual assembly; Garmin simply places the transducer in the box with the head unit and then sells the fully kitted product.” SAppx13. Thus, to “Navico’s knowledge, subsequent to December 1, 2015, Garmin has imported thousands of components in this fashion—importing transducers on one day, head units on another day (or in another shipment), and simply kitting them together post-importation and selling them as fully kitted products.” SAppx14.

Navico also explained that it had discussions with Customs, who explained that the separate parts were not excluded because “the language of Paragraph 4 of the [exclusion order] is ambiguous” SAppx11. Navico requested that the Commission modify the exclusion order in order to clarify that components of the excluded marine sonar imaging devices, including “standalone transducers,” are subject to exclusion when the components are intended to be included in a fully assembled infringing product after importation. SAppx5.

On June 1, 2016, Garmin filed an opposition to the petition, arguing, *inter alia*, that the Commission lacked jurisdiction to modify the exclusion order while

⁸ Navico’s petition for modification is appended hereto as SAppx1-23. Garmin appended to its stay motion an excerpt (Appx961-983) that excises discussion of Garmin’s conduct.

the earlier two Federal Circuit appeals were pending. Navico then filed a reply and Garmin a surreply.

On August 18, 2016, the Commission granted Navico's petition for modification and modified the exclusion order to clarify as follows:

The provisions of this Order shall not apply to marine sonar imaging devices . . . and components thereof, found to be non-infringing as detailed in the Commission Opinion dated December 1, 2015, at pages 28-31 and 45-46, and as clarified in the Commission Opinion leading to this modified limited exclusion order. Specifically, the provisions of this Order shall not apply to standalone products (for example, a standalone transducer product) that are, or will be, both imported as standalone products and sold after importation as standalone products. By contrast, the provisions of this Order shall apply to components (for example, a transducer component) of marine sonar imaging devices when such components are, or will be, imported or sold after importation as part of a marine sonar imaging system covered by one or more of the claims [of the '840 and '550 patents that Garmin was found to infringe].

Appx3 ¶ 4.

As will be recalled, the original exclusion order contained a certification provision (Appx862 ¶ 3) standard in form,⁹ which allowed Garmin to certify that any products imported “are not excluded from entry under paragraph 1 of this Order” because they do not infringe the claims of the '840 and '550 patents. In the modified exclusion order, the Commission relaxed the certification provision in

⁹ As the Commission recently explained, this “standard provision does not allow an importer to simply certify that it is not violating the exclusion order CBP only accepts a certification that the goods have been previously determined by CBP or the Commission not to violate the exclusion order.” *Certain Network Devices, Related Software and Components Thereof (I)*, Inv. No. 337-TA-944, Comm'n Op. at 53 n.19 (July 26, 2016) (public version).

order to permit Garmin to certify to Customs (and thus to allow entry) that transducers to be imported are intended for standalone sale following importation and, thus, are not subject to the modified exclusion order. Appx3 ¶ 3 (certification that the products being imported “are permitted to enter under Paragraph 4 of this Order as intended for sale other than in the infringing marine sonar imaging devices,” *i.e.*, to be sold as part of a complete sonar system).

The accompanying Commission opinion rejected Garmin’s argument that its circumvention of the original exclusion order is unredressable because of the pendency of the two earlier-taken appeals of the original exclusion order. Appx10-12. The Commission recognized that granting Navico’s petition “would solely entail clarifying the scope of the [exclusion order] as originally issued, thereby ensuring that the order is being executed properly to remedy the finding that Garmin’s accused products directly infringe the asserted claims of the ’840 and ’550 patents.” Appx11-12. The Commission further explained:

There was no evidence in the underlying investigation that Garmin was importing components for purposes other than individual sale—activity which the Commission found did not constitute indirect infringement. As such, there was no reason for the Commission to discuss in its opinion accompanying the original [exclusion order] the effect of importation of components intended to be kitted to comprise the infringing device. Since the facts concerning Garmin’s alleged new importation practices were not before the Commission prior to its finding a violation of section 337, they are not a part of the basis for the Commission’s determination, which is the matter on appeal.

Appx12. The Commission recognized that “its decision to issue a modified order is separately appealable,” *id.* (citing *Allied*, 850 F.2d at 1580), and the present appeal followed.

C. Garmin’s Request to the Commission for a Stay

On August 24, 2016, Garmin moved the Commission to stay the modified exclusion order pending an appeal to this Court. That motion remains pending before the Commission. Unlike the present motion to stay under consideration by this Court, Garmin did not seek to shorten the response times for its motion to the Commission. Navico’s response to the stay motion pending before the Commission is due on September 6, 2016. 19 C.F.R. § 210.15(c). After receiving the response, the Commission will consider the stay motion.

Under Federal Rule of Appellate Procedure 18 and Rule 18(d) of this Court, Garmin must demonstrate why it is impracticable to await the Commission’s ruling on that stay motion. Garmin has failed to do so. Rather, Garmin merely concludes without support that it is not practicable to await the Commission’s ruling because the modified order has triggered unspecified “immediate operational consequences” which are causing Garmin “irreparable harm.” Stay Mot. 1. Garmin has therefore failed to demonstrate why it should not be required to wait for the Commission to act on the stay motion currently pending before the Commission. In any event, Garmin’s allegations of irreparable harm are unsupported and noncognizable, as discussed below.

II. ARGUMENT

Garmin's arguments in support of its motion are premised—as they must be—on Garmin's description of the Commission's decision, the effect of that decision, and Garmin's avenues of recourse as a matter of straightforward trade law. Because Garmin obscures some matters and ignores others, we address Garmin's characterizations of the Commission proceedings before turning to why Garmin's motion fails under this Court's four-part test for the extraordinary remedy of a stay pending appeal.

A. Garmin's Motion Is Based on Misrepresentations About the Commission Decision, on Its Unilateral Assertion That Its Redesign Does Not Infringe, on a Navico Press Release That Binds Neither the Commission nor Customs, and on a Misapprehension of Trade Law

The introduction to Garmin's motion asserts: "Following the original remedial orders in this case, Garmin redesigned its transducers not to point down [under the boat] as required by the asserted claims, but rather to point sixteen degrees off vertical at a tilt ('the tilted redesign')." Stay Mot. 1. Garmin then asserts that "the Commission modified its original orders to exclude the tilted redesign unless Garmin submits a certification and Customs determines the certification is acceptable." *Id.* at 1-2. Garmin contends that the Commission's doing so was "fatally overbroad" because it "enjoins noninfringing products." *Id.* at 2. Garmin then relies on a Navico press release to argue that it has suffered irreparable harm. *Id.* at 3 (citing Appx1246-47); *see also id.* at 8, 16 (same). Each of these assertions is incorrect or irrelevant.

As will be recalled from the extensive background above, what the Commission did in its modification was to clarify that the Commission exclusion order covers Garmin's complete sonar system, whether it enters this country in one plastic bag or two. Nothing more. There is nothing in the orders about a "tilted redesign," much less that the Commission "modified its original orders to exclude the tilted redesign." Stay Mot. 1-2. As Garmin acknowledges, its tilted redesign "was not and could not have been adjudicated in the" Commission investigation. *id.* at 1; *see* Appx10 n.5. Thus, because the Commission did not decide that, Garmin instead trumpets (at Stay Mot. 3, 8, 16) Navico's press release that the tilted redesign "is deemed to infringe Navico's patent." Appx1246.

Garmin misapprehends the ordinary and longstanding operation of trade law in the context of section 337. Garmin has many avenues of redress should it wish to import its tilted redesign. It could, as the Commyvonmission opinion expressly notes, Appx10 n.5, file a petition for modification, 19 C.F.R. § 210.76. If the legal effect of Garmin's redesign is as straightforward as Garmin suggests, such a proceeding could be performed quickly, as was Navico's modification at issue in this appeal. Similarly, Garmin could seek an advisory opinion, 19 C.F.R. § 210.79(a). Advisory opinions are directed to "whether any person's proposed course of action or conduct would violate a Commission exclusion order."¹⁰ *Id.*

¹⁰ Proceedings for advisory opinions are handled flexibly by the Commission. When possible—such as when the request does not call for further discovery—the Commission will itself decide the matter without referral to an administrative law judge. *See, e.g., Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same*, Inv. No. 337-TA-650, Notice of Commission Advisory Opinion at 2 (Feb. 9, 2012).

Garmin's options do not stop there. As an alternative (or supplement) to engaging the Commission about the scope of the exclusion order, Garmin can engage Customs, and seek a binding administrative ruling about the redesign pursuant to 19 C.F.R. Part 177. Or, if its products are denied entry, Garmin can file a Customs protest under 19 U.S.C. § 1514, the denial of which would be reviewable by the Court of International Trade.

This, and not the emergency relief that Garmin now seeks, is the framework under trade law to address the types of concerns Garmin has about its redesigns.

**B. Garmin Has Failed to Meet Its Burden to Show that the
Circumstances Justify a Stay of the Commission's Exclusion Order**

In *Standard Havens Products, Inc. v. Gencor Industries, Inc.*, this Court borrowed from the law governing preliminary injunctions in determining whether to grant a motion for stay, and recited the following four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” 897 F.2d 511, 512 (Fed. Cir. 1990). As the movant for this Court's relief, Garmin bears the burden to meet this test. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). As discussed below, Garmin has failed to show that the *Standard Havens* factors favor a stay in this case. We

will address irreparable harm first because it is one of the two “critical” factors,”¹¹ and because Garmin’s showing—less than a page, Stay Mot. 18—is so lacking.

1. Garmin Has Failed to Show Irreparable Harm

“Perhaps the single most important prerequisite for the issuance of a preliminary injunction”—and thereby a stay under this Court’s test—“is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.” 11A Charles A. Wright *et al.*, Federal Practice & Procedure § 2948.1, at 129 (3d ed. 2013). “There must be a likelihood that irreparable harm will occur. Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant.” *Id.* Moreover, monetary loss is insufficient, the loss must be irreparable. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (explaining that “economic loss does not, in and of itself, constitute irreparable harm”).

Garmin argues that, absent a stay of the modified exclusion order, Garmin will suffer irreparable harm. Stay Mot. 18. Garmin, however, has failed to demonstrate that harm in the four sentences (plus citations) that it devotes to irreparable harm in its motion. *Id.* By way of comparison, this Court in *Standard Havens* viewed the award of a stay to be “a close question,” 897 F.2d at 516, despite the affidavits of the defendant’s “Executive Vice President and independent accountant” that “without a stay it is likely to suffer irreparable harm

¹¹ Likelihood of success on the merits is the other critical factor. *Nken*, 556 U.S. at 435; *see also, e.g., NSK Corp. v. USITC*, 495 F. App’x 51, 53 (Fed. Cir. 2012); *Beard v. United States*, 451 F. App’x 920, 921 (Fed. Cir. 2011).

in the form of employee layoffs, immediate insolvency, and, possibly, extinction,” *id.* at 515. Compare that to the vague statements in Garmin’s motion of “injury to [Garmin’s] reputation, loss of goodwill, and the loss of actual and potential customers,”¹² Stay Mot. 18, and it is clear that this case, unlike *Standard Havens*, is not close. Garmin then cites a declaration of an in-house attorney. Stay Mot. 18 (citing Appx1116 ¶¶ 26-27). All that he opined was that “[p]reventing Garmin from selling marine products, such as standalone transducers, would be especially damaging during the critical holiday shopping season, one of the most important parts of the annual sales cycle.”¹³ Appx1116 ¶ 27. The same is true for any seller, however. As this Court has explained in vacating a district court’s preliminary injunction:

[N]either the difficulty of calculating losses in market share, nor speculation that such losses might occur, amount to proof of special circumstances justifying the extraordinary relief of an injunction prior to trial. Indeed, the district court’s reliance on possible market share loss would apply in every patent case where the patentee practices the invention.

Nutrition 21 v. United States, 930 F.2d 867, 871 (Fed. Cir. 1991) (citation omitted); *see also Illinois Tool Works, Inc. v. Grip-Pak, Inc.*, 906 F.2d 679, 683 (Fed. Cir. 1990). Garmin’s showing is legally inadequate to demonstrate any irreparable harm, and thereby to demonstrate that this case warrants a stay.

¹² Garmin also tries to transform its injury into something irreparable by pointing to “Garmin loyalists who would have purchased Garmin products [but who] will instead purchase a competitor’s products.” Stay Mot. 18. Garmin does not identify who these “loyalists” are.

¹³ The Commission will move to strike any portion of Garmin’s forthcoming reply that attempts to introduce new matter in support of its motion.

The cases Garmin cites on page 18 of its motion are inapposite. *Celsis in Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922 (Fed. Cir. 2012) involved review of a district court’s preliminary injunction under the abuse of discretion standard. *Id.* at 925-26. “To substantiate its claims, Celsis presented fact and expert testimony as well as specific financial records.” *Id.* at 930. The record in that case on price erosion and harm was detailed, concrete, and unrebutted. *Id.* at 930-31. Garmin here offers nothing comparable.

Garmin’s two other cases, which are older than *Celsis*, applied a “presumption of irreparable harm” that the accused infringers were unable to rebut. *Polymer Techs., Inc. v. Bridwell*, 103 F.3d 970, 974-75 (Fed. Cir. 1996); *Purdue Pharma LP v. Boehringer Ingelheim GmbH*, 237 F.3d 1359, 1367-68 (Fed. Cir. 2001). That test, which excused the movant for relief from setting forth specific evidence of harm (putting the burden instead on the nonmovant to produce evidence of no irreparable harm), has been abrogated by the Supreme Court’s decision in *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391-92 (2006).¹⁴

2. Garmin Has Failed to Demonstrate a Likelihood of Success on the Merits

In view of Garmin’s failure to make any showing of irreparable harm, the Court need not dwell on Garmin’s arguments concerning the likelihood of success. The Commission will not either in this opposition.

¹⁴ See *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1149 (Fed. Cir. 2011) (holding that “*eBay* jettisoned the presumption of irreparable harm as it applies to determining the appropriateness of injunctive relief”).

Garmin argues that the Commission lacked the authority to clarify the exclusion order, to put a stop to Garmin's importation of its complete sonar systems in two plastic bags rather than one. Stay Mot. 9-10. As the Commission's order explains in detail, the Commission retains the authority to supervise the execution of its exclusion orders, including, as here, to clarify the orders. Appx 11-12. Any contrary result awards adjudged infringers free passes to infringe, not just in this investigation, but all investigations.

Garmin contends that the Commission's modification in this case had to be presented to the Commission's ALJ as part of the formal adjudication requirements for finding a violation of section 337. Stay Mot. 6-9 (citing 19 U.S.C. § 1337(c)). Garmin misapprehends section 337. The Commission's decision here to modify its exclusion order was an exercise of its remedial authority under section 337(d). *See Allied*, 850 F.2d at 1580. Section 337 provides that Commission remedial determinations are not subject to the requirements for formal adjudication under the Administrative Procedure Act,¹⁵ as discussed in *Hyundai Elecs. Indus. Co. v. ITC*, 899 F.2d 1204, 1208 (Fed. Cir. 1990) (noting that unlike formal adjudication findings, reviewed for substantial evidence, the Commission's decision regarding "the appropriate remedy" is reviewed for "abuse of administrative discretion").

¹⁵ Informal adjudications, such as the Commission determination of the appropriate remedy, are governed by the same requirements as the issuance of any order under the Administrative Procedure Act, 5 U.S.C. § 551(6), (7). As the D.C. Circuit has explained, for example, in rejecting a request for "an oral hearing and discovery" before the Federal Motor Carrier Safety Administration: "Nor is there anything in the APA or any relevant statute that requires these procedural incidents for informal adjudications like this one." *Darrell Andrews Trucking, Inc. v. Fed. Motor Carrier Safety Admin.*, 296 F.3d 1120, 1134 (D.C. Cir. 2002).

Garmin was heard through its opposition and its response to Navico's reply. Its submissions to the Commission did not dispute Navico's representations about Garmin's changed importation practices.

Garmin also contends that the Commission order is unacceptably vague as to the products that fall within it. But the form of the Commission's order is standard, and this exact form has been approved by this Court. In *Ninestar Technology Co. v. ITC*, 667 F.3d 1373 (Fed. Cir. 2012), this Court rejected the argument that a Commission cease and desist order was “‘unconstitutional on its face’ because it is ‘unclear’ in that it does not identify the specific [products] and model numbers that are affected.” *Id.* at 1384. This Court rejected that argument, noting that if a Commission respondent (such as Garmin) needs further clarity, there are ways to obtain it: “Ninestar did not invoke this procedure [for an advisory opinion under 19 C.F.R. § 210.79] or otherwise request clarification, or suggest a modified course of action.” *Id.* at 1384-85. The same is true for Garmin.

Garmin also contends that the Commission erred by finding that Garmin's two-plastic-bags strategy was undertaken after the original Commission proceedings, because Garmin undertook that strategy shortly before Commission proceedings were concluded. Stay Mot. 10. In support of this, Garmin cites a declaration of an in-house attorney dated after the completion of the original Commission proceedings. Appx1110 ¶ 8. The Commission is at a loss to understand how Garmin's bad acts, begun earlier, exculpate Garmin. This is especially so since Garmin was in the position, then, to apprise the Commission of its changed importation while the investigation was still ongoing.

Garmin further argues that the modified exclusion order “purports . . . to prevent Garmin from advertising its noninfringing standalone products,” Stay Mot. 12, which Garmin sets up as a question of free speech, *id.* at 17. The exclusion order, however, has no provision for advertising, Appx1-5, Appx860-864. Rather, the cease and desist orders do. And the cease and desist orders were never modified. Accordingly, any such grievance should have been made in Garmin’s earlier appeal, No. 16-1572, not here. In any event, Garmin’s argument is premised on Garmin’s assertion that its advertisements are for “noninfringing products.” Stay Mot. 17. Garmin’s argument is wholly circular, assuming its own conclusion that the importation of its products is lawful.

3. The Balance of Hardships Does Not Support Garmin

As noted above, Garmin’s assertion of irreparable harm is unsupported. Equally unsupported is its assertion that the requested stay “will cause no direct or immediate harm to Navico.” *Id.* at 19. To the extent that Garmin is harmed by the modified exclusion order, Navico (and its licensees to the asserted patents) are equally harmed by a stay of the order.

4. The Public Interest Does Not Warrant a Stay

Garmin argues that the “public interest is not served by allowing patent holders like Navico to exclude products that were found not to infringe, and have been redesigned to avoid risk of infringement.” *Id.* at 20. This statement unilaterally and incorrectly asserts that Garmin’s transducers do not infringe even when combined by Garmin in the United States to be sold as a complete sonar system. It also assumes that the redesign does not infringe. Moreover, there are

stronger public interests in the enforcement of valid patents, *see, e.g., Celsis in Vitro*, 664 F.3d at 931-32, and in preventing circumvention of section 337. Garmin is an adjudged infringer, and the modification of the Commission order, which addressed Garmin's attempted circumvention, should be allowed to stand.

III. CONCLUSION

Should the Court stay the exclusion order in this case, the Court should expect all future respondents to seek stays in those cases in which Commission remedial orders have issued. The Commission respectfully requests that the Court deny Garmin's motion.

Respectfully submitted,

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ADDENDUM

	Page No.
Complainants Navico Inc. and Navico Holding AS's Petition for Modification of the Limited Exclusion Order, Inv. No. 337-TA-921, <i>Certain Marine Sonar Imaging Devices, Including Downscan and Sidescan Devices, Products Containing the Same, and Components Thereof</i> (May 20, 2016)	SAppx001-0023

THE UNITED STATES INTERNATIONAL TRADE COMMISSION

In the Matter of

CERTAIN MARINE SONAR IMAGING
DEVICES, INCLUDING DOWNSCAN
AND SIDESCAN DEVICES, PRODUCTS
CONTAINING THE SAME, AND
COMPONENTS THEREOF

Investigation No. 337-TA-921

**COMPLAINANTS NAVICO INC. AND NAVICO HOLDING AS'S PETITION
FOR MODIFICATION OF THE LIMITED EXCLUSION ORDER**

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TABLE OF CONTENTS

I. INTRODUCTION. 1

II. BACKGROUND LEADING TO GARMIN’S CHANGED IMPORTATION PRACTICES. 2

 A. Procedural History of the Underlying Investigation. 2

 B. Garmin’s Importation Practices During the Underlying Investigation. 3

 C. The LEO Properly Excludes Infringing Products “and Components Thereof.” 5

 D. Components of Infringing Products Are Subject to Exclusion, While “Standalone” Components Are Permitted Entry..... 5

III. GARMIN’S NEW IMPORTATION PRACTICES FOR TRANSDUCERS CONSTITUTE CHANGED CIRCUMSTANCES THAT NECESSITATE MODIFICATION OF THE LEO..... 6

IV. MODIFICATION OF THE LEO IS APPROPRIATE. 11

 A. Modification Is Consistent with the Underlying Commission Holding. 11

 B. Modification Is Consistent with the Applicable Statute and Commission Precedent..... 12

 C. Garmin Is Intentionally Evading the LEO. 15

V. NAVICO REQUESTS A 60-90 DAY ADJUDICATION. 16

VI. CONCLUSION..... 17

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Certain Automated Media Library Devices,</i> Inv. No. 337-TA-746, Recommended Determination (June 20, 2012)	13
<i>Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles,</i> Inv. No. 337-TA-334, USITC Pub. 3063 (Sept. 1997).....	13
<i>Certain Glass Tempering Systems,</i> Inv. No. 337-TA-171, General Counsel Memorandum GC-84-186 (Nov. 8, 1984)	14
<i>Certain Hardware Logic Emulation Systems and Components Thereof,</i> Inv. No. 337-TA-383, EDIS Pub. 46684, Comm’n Op. at 16 (Mar. 1, 1998).....	1, 13
<i>Certain Ink Cartridges and Components Thereof,</i> Inv. No 337-TA-545 Consolidated Advisory Op. and Modification Proceedings, Feb. 21, 2012	13
<i>Certain Microlithographic Machines & Components Thereof,</i> Inv. No. 337-TA-468, Recommended Determination (Jan. 29, 2003)	13
<i>Certain Personal Computers and Components Thereof,</i> Inv. No. 337-TA-140, USITC Pub. No. 1504 (March 1984).....	14
<i>Certain Unified Comm’ns Sys, Prods. Used with Such Sys., and Components Thereof;</i> Inv. No. 337-TA-598, Recommended Determination, USITC Pub. 4136 (Mar. 1, 2010)	13
RULES	
Fed. R. Civ. P. 30(b)(6).....	10
Fed. R. Civ. P. 76(a)(2).....	16
STATUTES	
19 U.S.C. § 1337(d)	12
Section 337 of the Tariff Act of 1930	passim

OTHER AUTHORITIES

79 Fed. Reg. 40778 (July 14, 2014).....2

I. INTRODUCTION.

On December 1, 2015, the Commission ruled that Garmin violated Section 337 of the Tariff Act of 1930 by infringing Navico’s U.S. Patent Nos. 8,305,840 and 8,605,550. The Commission therefore issued a Limited Exclusion Order (“LEO”) ordering exclusion of Garmin’s covered DownVü sonar imaging products. Since the LEO became effective, however, Customs and Border Protection (“CBP”) has not excluded *any* products. Instead, Garmin has continued to import and sell thousands of DownVü products, evading the LEO by slightly adjusting its importation practices. Under Garmin’s new importation practices, it now imports DownVü products as two separate components in separate shipments and then “kits” the components together in the United States and sells the combination after importation as a complete DownVü product. By tweaking its importation practices in this manner, Garmin has rendered the LEO worthless and circumvented this body’s authority—despite the express holding in the underlying investigation that Garmin violated Section 337 via, *inter alia*, sale after importation of DownVü products and despite the clear intent of the LEO to ban importation.

Modification of the LEO is necessary in order to give effect to the Commission’s infringement ruling and concomitant order that covered DownVü products be excluded from entry. If the Commission and CBP were to allow Garmin’s revised importation practice to continue unabated, it would cast significant doubt on the value of a LEO and the value of a Section 337 investigation. It would also run afoul of the Commission’s precedent that “the central purpose of remedial orders is to ensure complete relief to the domestic industry.” *Certain Hardware Logic Emulation Systems & Components Thereof*, Inv. No. 337-TA-383, USITC Pub. 46684, Comm’n Op. at 16 (Mar. 1, 1998). Navico respectfully requests that the Commission modify the LEO to clarify that when components of DownVü products are imported and kitted together in the United States for sale after importation, such components should be excluded.

II. BACKGROUND LEADING TO GARMIN’S CHANGED IMPORTATION PRACTICES.

A. Procedural History of the Underlying Investigation.

This investigation was instituted on July 7, 2014 (79 Fed. Reg. 40778 (July 14, 2014)) in response to a Complaint filed with the Commission on June 9, 2014 pursuant to Section 337 of the Tariff Act of 1930, as amended. The Complaint by Navico, Inc. and Navico Holding AS asserted infringement of three patents, U.S. Patent Nos. 8,305,840 (“the ’840 patent”); 8,605,550 (“the ’550 patent”); and 8,300,499 (“the ’499 patent”).

ALJ David P. Shaw held an evidentiary hearing on March 18-24, 2015, during which Navico presented evidence of Garmin’s infringement of the following claims of the three Asserted Patents:

- The ’840 patent: Claims 1, 5, 7, 9, 11, 16-19, 23, 32, 39-41, 63, and 70-72;
- The ’550 patent: Claims 1, 7, 12, 13, 32, 44, and 57; and
- The ’499 patent: Claims 1, 2, 19-21, 24, 25, 42-44, 62, 66, 79, and 80.

On July 2, 2015 the ALJ issued his Final Initial Determination (“ID”) in which he found no violation of Section 337. All parties petitioned the Commission for review of the ID. On September 3, 2015, the Commission decided to review the ID in material part.

On December 1, 2015, the Commission issued its Final Determination and Commission Opinion. The Commission found that Garmin had indeed violated Section 337 by virtue of the “unlawful importation, sale for importation, and sale after importation by Garmin . . . of certain marine sonar imaging devices . . . and components thereof.” LEO at 1. The Commission found that Garmin infringed eighteen claims of the ’840 patent and two claims of the ’550 patent. As a result, the Commission issued the LEO as well as and Cease and Desist Orders (“CDO”) against Garmin.

B. Garmin’s Importation Practices During the Underlying Investigation.

During the underlying investigation, two particular importation practices were before the Commission, both of which were specifically addressed in the Commission’s Opinion:

- Garmin’s importation of fully kitted DownVü products (*i.e.*, those with the head unit and transducer in the same box); and
- Garmin’s importation of “*standalone*” DownVü transducers, meaning transducers that were both imported *and* sold after importation as *standalone* products (*i.e.*, neither imported nor sold after importation with a head unit).

The Commission found the former activity to directly infringe, but the latter not to indirectly infringe.

The Commission found that Garmin’s fully kitted DownVü products (“the accused Garmin echo products, echoMAP products, and GPSMAP products with their respective transducers” (Comm’n Op. at 31)) directly infringe two Navico patents. The Commission explicitly found a violation of Section 337 both via Garmin’s importation and via Garmin’s sale after importation of DownVü products. LEO at 1 (“The Commission found that there is a violation of section 337 . . . in the unlawful importation, sale for importation, *and sale after importation* by Garmin . . .”) (emphasis added). And the Commission explicitly found that “the limited exclusion order in the RD covers all of the ‘infringing articles’ imported, sold for importation, *or sold after importation* by Garmin.” Comm’n Op. at 80 (emphasis added). As a result, the plain language of the Commission’s Opinion and LEO dictates that products sold after importation in their fully kitted arrangement should be excluded.

On the other hand, the Commission found that Garmin’s “*standalone* transducers” did not indirectly infringe, and should not be excluded. Comm’n Op. at 31, 46. This finding concerned Garmin’s importation and sale of transducers as standalone finished products (*i.e.*, not

a component of a complete DownVu product), which end users purchase as replacements or as a custom option for higher-end installations requiring multiple transducers, for example. Throughout the underlying investigation, such “standalone” transducers were those that were *both* imported *and* sold after importation as a standalone product. For example, the ID made clear that Navico’s allegation in this regard involved “the DownVu transducer (GT20), when imported *and* sold separately from an infringing head unit.” ID at 95 (emphasis added). Similarly, the Commission stated that Navico’s indirect infringement allegations involved “Garmin’s importation *and* sale of the DownVu transducer (GT20) separately from a head unit.” Comm’n Op. at 17-18. During the underlying investigation, Garmin was not importing transducers as components of a complete DownVu product for subsequently kitting in the United States and sale after importation and kitting.

At the same time, though, no party has ever disputed that Garmin’s DownVu transducers have no substantial non-infringing use, and are not staple articles of commerce. All parties agree that there is no useful purpose of a DownVu transducer other than to connect it to a DownVu head unit for use as a DownVu sonar imaging product. (Hearing Tr., EDIS No. 553531, at 471:24-474:22 (agreeing the transducers have no use other than being used in an infringing system); Garmin Pre-Hearing Br., EDIS No. 551852 at 79-82 (not disputing transducers have no noninfringing uses); Garmin Post-Hearing Br., EDIS No. 554795 at 78-79 (same); Garmin Post-Hearing Reply Br., EDIS No. 555364 at 42-46 (same).)

In sum, the Commission held that Garmin’s fully kitted DownVu products, when imported or sold after importation, infringed Navico’s ’840 and ’550 patents in violation of Section 337, and therefore are to be excluded. On the other hand, the Commission found that *standalone* transducers, which are both imported and then subsequently sold after importation separately from a head unit, did not indirectly infringe and should be permitted entry.

C. The LEO Properly Excludes Infringing Products “and Components Thereof.”

The Commission’s LEO confirms that Garmin violated Section 337 “in the unlawful importation . . . *and sale after importation*” of its “marine sonar imaging devices, including downscan and sidescan devices, products containing the same, and components thereof.” LEO at 1 (emphasis added). In the operative order issued to CBP, the Commission ordered exclusion of Garmin’s “marine sonar imaging devices . . . *and components thereof*” that are covered by one or more enumerated claims of the ’840 and ’550 patents. LEO at 2, ¶ 1 (emphasis added). Thus, the LEO orders CBP to exclude from importation both complete, “fully kitted” infringing products as well as “components” of such fully kitted products.

D. Components of Infringing Products Are Subject to Exclusion, While “Standalone” Components Are Permitted Entry.

The infringing products—namely, complete, fully kitted marine sonar imaging devices—comprise multiple “components,” including a “head unit” and a “transducer.” This petition for modification concerns the exclusion *vel non* of the transducer component.

A transducer should be covered by the LEO, and thus subject to exclusion, when it constitutes a component of an infringing, fully kitted product. *See* LEO at 2, ¶ 1 (ordering exclusion of both complete products “and components thereof”). By contrast, an imported transducer is not covered by the LEO when it is a “standalone” transducer that is both imported *and* sold after importation as a standalone transducer. In other words, if a transducer is at all times a “standalone” transducer—meaning it is not a component of a fully kitted product and is not sold after importation in a fully kitted product—then the transducer is not excluded by the LEO. The Commission found that such standalone transducers do not infringe and therefore are not subject to exclusion from entry. *See* Comm’n Op. at 31 (concluding, as to the ’840 patent, that “Navico has not made the necessary showing to prove that Garmin contributorily infringes

by importing standalone transducers.”); *id.* at 46 (concluding, as to the ’550 patent, that “With respect to Navico’s indirect infringement claim, for at least the same reasons discussed *supra* [with respect to the ’840 patent], the Commission finds that Garmin’s standalone GT30 transducers do not contributorily infringe . . .”).

Paragraph 4 of the LEO addresses this exception to the scope of the exclusion order issued to CBP. Paragraph 4 carves out of the exclusion order the products and components “found to be non-infringing as detailed in the Commission Opinion dated December 1, 2015 at pages 28-31 and 45-46.” LEO at 3, ¶ 4. As described above, the cited pages are those that discuss *standalone* transducers that are both imported *and* sold after importation as standalone transducers. The interplay between Paragraph 1 and Paragraph 4 of the LEO has proven to be ambiguous for purposes of implementation by CBP, since a transducer can either be a component of an infringing product—and thus subject to exclusion—or be a standalone product—and thus permitted entry.

Modification of Paragraph 4 of the LEO is therefore warranted in order to clarify that components of a fully kitted product (whether the fully kitted product is imported as such or sold after importation as such) are subject to exclusion. Applied to the circumstances at issue here, the requested modification of the LEO clarifies that a transducer is to be excluded when it is a component of a fully kitted product but is not to be excluded when it is a standalone transducer.

III. GARMIN’S NEW IMPORTATION PRACTICES FOR TRANSDUCERS CONSTITUTE CHANGED CIRCUMSTANCES THAT NECESSITATE MODIFICATION OF THE LEO.

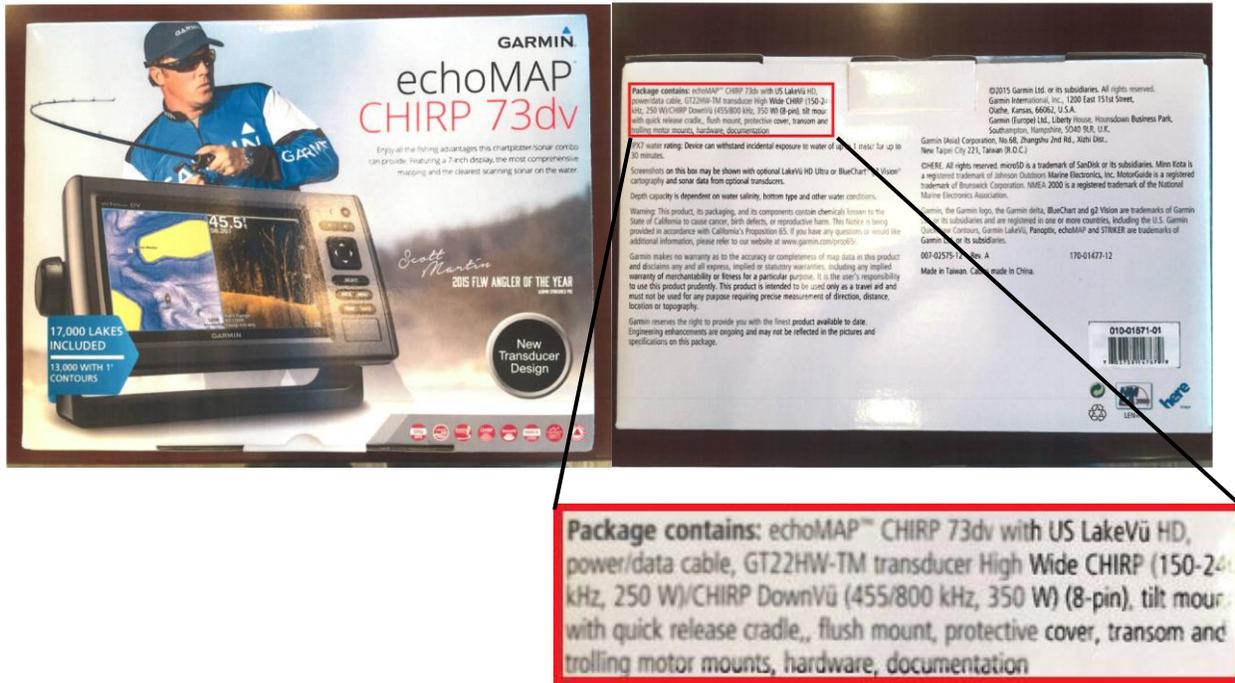
After the issuance of the LEO on December 1, 2015, Garmin altered its importation practices in an apparent attempt to evade the LEO by exploiting an ambiguity in the wording of Paragraph 4 of the order. Prior to issuance of the LEO, Garmin imported both fully kitted products as well as standalone transducers (*i.e.*, transducers that are both imported *and* sold after

importation as a standalone product), as described above. After issuance of the LEO, Garmin continued importing standalone transducers but changed its importation practices for fully kitted products. As to the fully kitted products, Garmin ceased importing the products as complete, fully kitted products. Garmin instead began importing the transducers separately from the remaining components (namely, the head units) and then “kitting” the components together in the United States (by simply placing the transducer component into the box containing the head unit) and selling the fully kitted units. This specific importation practice was not before the Commission in the underlying investigation because, prior to the LEO, Garmin was not shipping transducer components separately from the remaining components of a fully kitted product. This change in circumstances warrants the requested modification of the LEO.

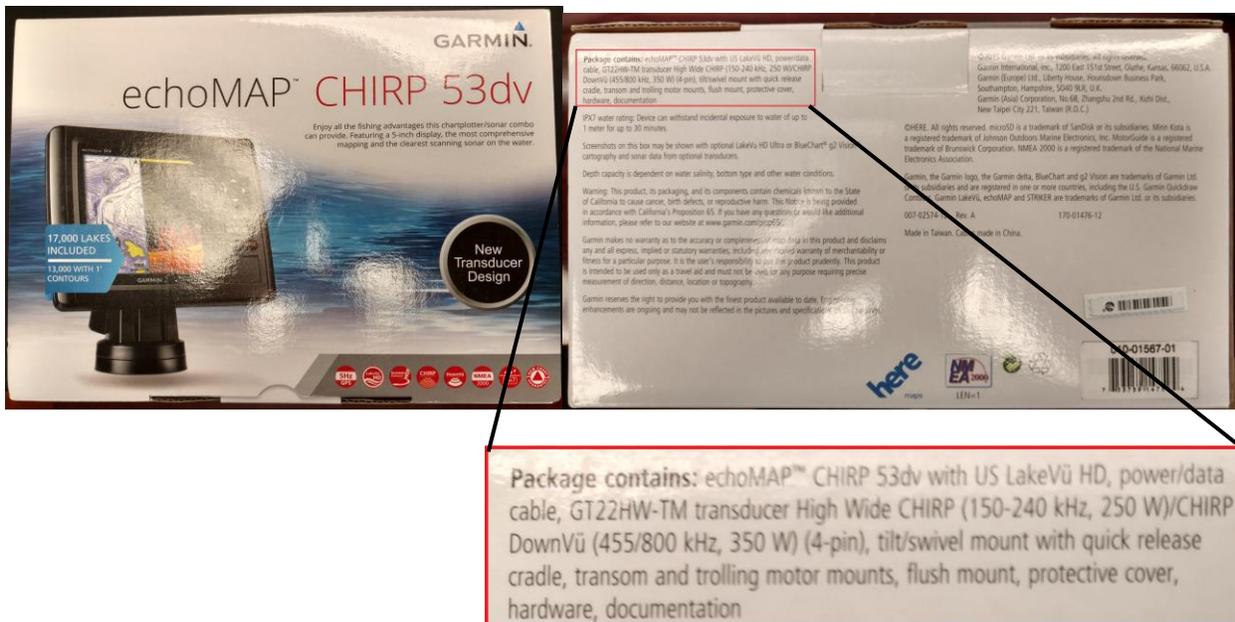
To provide specific examples of Garmin’s altered importation practice, Navico purchased an echoMAP CHIRP 73dv product on February 17, 2016 and an echoMAP CHIRP 53dv on March 18, 2016. Ex. B, Stevens Decl. at ¶¶ 2-3. These units bear indications of importation after December 1, 2015. *Id.* at ¶¶ 2-4. CBP has refused to exclude either product because their respective transducers were imported separately from the head units, and because the language in Paragraph 4 of the LEO is ambiguous since a transducer can be either a component of an infringing product (subject to exclusion) or instead a standalone product (not subject to exclusion). *Id.* at ¶ 5. CBP has informed Navico that but for the language in Paragraph 4 of the LEO, and the Commission’s subsequent guidance to CBP, the products’ components would have been excluded.¹ *Id.*

¹ The transducer design of Garmin’s DownVü products has been modified slightly. Upon modification of the LEO to exclude transducers that are imported or sold after importation as part of a fully kitted product as requested herein, Garmin would have the opportunity to file a protest in the event that it wants to attempt to demonstrate that the revised transducer design does not infringe. The revised design is not part of, and has no bearing upon, the requested modification of the LEO.

The box for the echoMAP CHIRP 73dv product purchased by Navico demonstrates that Garmin intended to kit the individually imported components after importation. The following image is a photograph of the outside of the box, which repeatedly indicates that a DownVü transducer *is included in the box*.



The same is true for the echoMAP CHIRP 53dv purchased by Navico:



Stevens Decl, at ¶¶ 2-3 and Ex. 1 & Ex. 2 (indicating that each “Package contains” a GT22 transducer). The fact that each box states that the transducer is included within the box confirms that the transducer, although imported separately from the head unit, is a component of the complete product (and not a “standalone” transducer).

Thus, when Garmin imported the transducer for each product shown above, Garmin knew that the transducer was a component of an infringing product. Per the labeling on the boxes, each transducer was slated to be placed into a box and sold after importation as a component of a fully kitted unit. This combination requires no actual assembly; Garmin simply places the transducer in the box with the head unit and then sells the fully kitted product. No connections are required or made. The following picture demonstrates the manner in which the head unit and the transducer are found in a box for a fully kitted DownVü product.



Stevens Decl. at Ex. 2 (showing a clear plastic bag containing the transducer—wrapped in pink bubble wrap—placed into the box on top of a clear plastic bag containing the head unit).

The Commission specifically found that importation *and sale after importation* of a fully kitted product directly infringes Navico’s ’840 and ’550 patents in violation of Section 337. *See, e.g.*, LEO at 1; Comm’n Op. at 80. As a result, Paragraph 1 of the LEO properly orders exclusion of such products. LEO at 2, ¶ 1. Consistent with long-standing Commission practice, the LEO further covers “components thereof,” meaning it covers components of the infringing products. *See infra*, Section IV.B.

To Navico’s knowledge, subsequent to December 1, 2015, Garmin has imported thousands of components in this fashion—importing transducers on one day, head units on another day (or in another shipment), and simply kitting them together post-importation and selling them as fully kitted products. This new importation practice is an attempt to evade the Commission’s LEO in order to continue importing and selling after importation infringing products, to the detriment of Navico and its domestic industry. While Navico respectfully submits that this activity violates the existing words of the LEO, there can be no reasonable dispute that it violates the spirit of the LEO, particularly in light of the finding of infringement and the concomitant exclusion of both infringing products “*and components thereof.*” LEO at 2, ¶ 1 (emphasis added). Modification of the LEO is warranted to make clear that importation of components of what will become fully kitted products should be excluded, while at the same time allowing importation of true *standalone* products.

Navico could not have brought evidence of this evasive conduct during the underlying investigation, as the conduct began after issuance of the LEO on December 1, 2015. During the underlying investigation, Garmin’s Rule 30(b)(6) corporate designee testified that the components in the box at the time of importation were the same as at the time of subsequent sale,

and that Garmin did not have an operation whereby it imported components and kitted them together post-importation. In fact, in response to a question from Garmin's own counsel, Garmin's corporate designee testified as follows:

Q. So if I was to take a given product number, look at what is in the box on the web site, is that what is imported in each box, or is it changed after it is imported?

A. ***No, no, no, it is not changed after it is imported.*** So if the finished good box had three items in it, when it is imported it has three items in it and when it leaves it has three items in it. As far as I know. I'm not aware of Garmin -- we don't really have -- ***we don't have an operation where we will bring in multiple things and then put them together,*** kind of get them as a general thing

CX-136C.0049 (Preis Dep. at 50:2-17) (emphasis added). As a result, Garmin's current importation practice is new, and was not present during the underlying investigation, thus constituting changed circumstances that warrant modification of the language of the LEO.

IV. MODIFICATION OF THE LEO IS APPROPRIATE.

A. Modification Is Consistent with the Underlying Commission Holding.

The Commission explicitly held that Garmin violated Section 337 by its sale after importation of its DownVü products. *See, e.g.*, LEO at 1. Navico seeks a modification of the wording of the LEO in order to provide Navico with an exclusion remedy that is consistent with that finding. *See Ex. A*](proposed modified LEO). While Paragraph 1 of the LEO properly excludes the infringing products and the "components thereof," Paragraph 4 introduces an ambiguity for circumstances where the component is a transducer. As described in detail above, when a transducer is a component of an infringing DownVü product, it is subject to exclusion under Paragraph 1. Paragraph 4, by contrast, concerns only "standalone" transducers that are both imported and sold after importation as standalone transducers. Under the current language of the LEO, there is a lack of clarity to CBP as to how it should treat a transducer that is imported as a component of an infringing product. Without modification, the LEO (as interpreted by CBP) is hollow, meaning Garmin undoubtedly will continue to import transducer

components separately from the remaining components, as if the underlying investigation never occurred and as if there were no infringement finding or LEO at all. Such an interpretation of the LEO cannot be countenanced.

The requested modification will provide Navico with the remedy to which it is entitled while, importantly, still respecting the Commission's finding of no indirect infringement by the importation or sale of *standalone* transducers.² Under the terms of the modified LEO, Garmin could continue to import and sell after importation true *standalone* transducers, consistent with the Commission's finding that standalone transducers do not infringe Navico's patents. Thus, Navico's proposed modification is entirely consistent with the ruling and reasoning set forth in the Commission opinion.

B. Modification Is Consistent with the Applicable Statute and Commission Precedent.

Section 337 requires the Commission to exclude the "articles concerned" in the violation (absent public-interest concerns). Specifically, Section 337 states that when the Commission determines "that there is a violation of this section, it *shall* direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States." 19 U.S.C. § 1337(d) (emphasis added). Here, the Commission found a violation as to Garmin's fully kitted DownVu products, and thus ordered the exclusion of such products and "components thereof." LEO at 2, ¶ 1. But Garmin's modified importation practices and the current wording of the LEO have led to the exclusion of no products whatsoever, contrary to the statutorily mandated consequence of a finding of violation of Section 337.

² While the issue is beyond the scope of this modification proceeding, Navico respectfully disagrees with the Commission's holding that Garmin does not contribute to infringement by importing standalone transducers. Navico will address this via appeal to the U.S. Court of Appeals for the Federal Circuit.

As the Commission has noted, “[T]he central purpose of remedial orders is to ensure complete relief to the domestic industry.” *Certain Hardware Logic Emulation Systems & Components Thereof*, Inv. No. 337-TA-383, USITC Pub. 46684, Comm’n Op. at 16 (Mar. 1, 1998). The Commission has a long history of excluding components of the final product in question. The Commission typically excludes infringing products and the “components thereof” specifically to avoid the very situation that has arisen here—an evasion of the LEO by importing components and putting them together in the United States and selling the combination product after importation. *See, e.g., Certain Condensers, Parts Thereof & Products Containing Same, Including Air Conditioners for Automobiles*, Inv. No. 337-TA-334 (remand), Comm’n Op. at 38, USITC Pub. 3063 (Sept. 1997) (“We also find it reasonable to include a provision covering condenser parts, since the evidence suggests that infringing condensers can be assembled in the United States from imported parts.”); *see also Certain Ink Cartridges & Components Thereof*, Inv. No. 337-TA-545 Consolidated Advisory Op. and Modification Proceedings, Feb. 21, 2012 (modifying exclusion order to add express exclusion of components given the evasion tactics); *Certain Automated Media Library Devices*, Inv. No. 337-TA-746, Recommended Determination (June 20, 2012) (“[T]he Commission should not allow [respondent] to circumvent this order by importing unassembled products.”); *Certain Unified Comm’ns Sys., Prods. Used with Such Sys., & Components Thereof*, Inv. No. 337-TA-598, Recommended Determination, USITC Pub. 4136 (Mar. 1, 2010) (“[T]he ALJ recommends that components of said articles should be barred from importation if they will be assembled in the United States into infringing products.”) (rev’d on other grounds); *Certain Microlithographic Machines & Components Thereof*, Inv. No. 337-TA-468, Recommended Determination (Jan. 29, 2003) (“[P]arts, components and subassemblies necessarily must be excluded because they are the only form in which the infringing ASML machines reach U.S. ports of entry Since [respondent’s] machines are imported only in

disassembled form, it is necessary to exclude parts, components and subassemblies of infringing [respondent] machines in order to afford [complainant] complete relief (if any) and to avoid evasion of the exclusion order.”); *Certain Glass Tempering Systems*, Inv. No. 337-TA-171, General Counsel Memorandum GC-84-186 (Nov. 8, 1984) (recommending exclusion of components, observing that, “Although prior importations have generally involved complete systems, including ‘components thereof’ could avoid an attempted circumvention of the order by shipping the principle parts individually.”); *Certain Personal Computers & Components Thereof*, Inv. No. 337-TA-140, USITC Pub. No. 1504 (Mar. 1984), Commission Action and Order at 45 (components associated with imports of infringing ROMs or intended to receive infringing ROMs in the U.S. are excluded “[t]o avoid evasion of our order”); Tom M. Schaumberg, A LAWYER’S GUIDE TO SECTION 337 INVESTIGATIONS BEFORE THE U.S. INT’L TRADE COMM’N 161 (2010) (stating that “the Commission has indicated that several components, combined to form an infringing product, should be excluded,” while true “staple goods” fall outside the scope of an exclusion order; and stating, “[I]t is likely that if it were proven a respondent imported the various individual components of the product with the intent to combine them into an infringing good, the Commission would expand the scope of the exclusion order.”).

The same logic applies here. The Commission should exclude not just complete DownVü products, but also the transducer components when they are imported for kitting and sale after importation as part of a complete DownVü product. At the same time, because the Commission found that true “standalone” transducers do not infringe, the Commission should not exclude transducers when they constitute standalone products. The Commission should modify the LEO to clarify the proper treatment of transducers by CBP.

C. Garmin Is Intentionally Evading the LEO.

If every respondent could evade a LEO simply by importing the product in question as two components (and combining them for sale post-importation), then the entire goal of Section 337 and the ITC is for naught. Common sense dictates that these tactics cannot be allowed to occur; otherwise, the LEO would be an empty remedy.

In this case, Garmin hired the inventors of the Asserted Patents from Navico, infringed Navico's patented DownScan Imaging technology, and gained significant market share by its widespread and extensive infringement. Navico chose the ITC specifically for the exclusionary remedy and the expediency of the ITC. And Navico succeeded in proving Garmin's infringement. Nonetheless, not a single product has been excluded since the LEO became effective. And now Navico must continue to wait to achieve the remedy it plainly deserved months ago. Garmin's evasive importation tactics cannot be permitted any longer. In order to prevent Garmin's continued mockery of the LEO and the ITC's authority, modification of the LEO is warranted.

To be sure, Garmin's revised importation practices independently violate the CDO, but that remedy is insufficient given the ruling of infringement and the finding of Navico's entitlement to a LEO. While Navico has the ability seek enforcement of the CDO, adjudication of a CDO violation via an enforcement complaint is typically a year-long process. Allowing Garmin's current conduct to continue during that time is no substitute for the exclusion that is required by Section 337. Thus, the LEO should be modified, and the modification should be adjudicated and implemented as quickly as feasible.

V. NAVICO REQUESTS A 60-90 DAY ADJUDICATION.

Navico respectfully requests that the Commission institute a modification proceeding pursuant to Rule 210.76(a)(1) as well as the Pilot Program announced on February 23, 2015. Additionally, Navico respectfully requests that the proceeding be assigned to the most expeditious track with a resolution targeted within 60-90 days.

This proceeding requires no adjudication of fact. The only changed circumstance is Garmin's revised importation practice as described herein, which Garmin cannot dispute since it is evident in the marketplace and in the packaging of the imported products themselves. The evidence is clear and undisputed: Garmin's DownVu products are being imported as two components, and CBP has not excluded entry due to the current language of the LEO in light of the importation of the components in separate shipments. Thus, there are no material facts necessary for the Commission to address or decide. As a result, the question presented here is purely a legal one: Does Garmin's revised importation practice warrant modification of the LEO to fully implement the Commission's finding of a violation of Section 337? The clear answer is yes, modification is both warranted and necessary to give meaning to the Commission's infringement findings.

Because CBP has not excluded a single product since the LEO went into effect, Navico and its domestic industry are continuing to be harmed on a daily basis. This unintended consequence warrants prompt attention and assignment to the fastest track available for the Commission's adjudication—the 60-90 day review.

Garmin is likely to advocate for slower resolution—for the obvious goal of continuing to evade the LEO and continuing to flood the market with infringing products to the detriment of Navico. Garmin may also attempt to confuse the narrow relief requested herein by asking the Commission to address infringement by its revised transducer design (sometimes referred to as

the “tilt” design for Garmin’s DownVü transducers). This modification proceeding is not the proper place for such an adjudication. In its Opinion, the Commission put the burden on *Garmin* to initiate an advisory action or a ruling request with CBP prior to the attempted importation of any subsequent design. Comm’n Op. at 80-81. To Navico’s knowledge, Garmin has not done so. If Garmin wishes to have that issue adjudicated, it can request a separate advisory action or it can seek a ruling from CBP. This petition for modification does not—and need not—address any issue concerning the revised transducer design. Instead, this modification proceeding addresses a very narrow issue arising from changed circumstances that are not in dispute. Modification is appropriate to curtail Garmin’s evasion of the LEO.

VI. CONCLUSION.

As demonstrated in this Petition, Garmin has modified its importation practices in order to evade the Commission’s LEO as currently worded, thus avoiding any consequence for infringing Navico’s patents. Instead of importing its infringing DownVü products as a fully kitted product in one box, Garmin has altered its importation practice by importing the two primary components in different shipments and subsequently kitting them together in the United States after importation for sale after importation. The Commission specifically held that Garmin violated Section 337 via sale after importation, and the Commission likewise noted that products that infringe via sale after importation should be excluded. Nonetheless, Garmin preys upon an apparent ambiguity in the interplay between Paragraph 1 and Paragraph 4 of the LEO, contrary to the Commission’s ruling and the clear intent of the LEO. Navico’s proposed modification closes this loophole while respecting the Commission’s finding of no indirect infringement by true standalone products. For the reasons identified herein, Navico respectfully requests that the Commission institute a modification proceeding and issue a modified LEO that redresses the changed circumstances.

Dated: May 20, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day, a true and correct copy of the foregoing document was served by the indicated means to the persons at the addresses below:

<p>The Honorable Lisa R. Barton Secretary to the Commission U.S. International Trade Commission 500 E Street, S.W., Room 112 Washington, DC 20436</p>	<p>Via Electronic Filing (EDIS) and</p>
<p>Reginald Lucas, Esq. Office of Unfair Import Investigations U.S. International Trade Commission 500 E Street, S.W., Suite 401 Washington, D.C. 20436 Tel: (202) 205-2036</p>	<p>Via Electronic Mail to: Reginald.Lucas@usitc.gov</p>
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Date: September 1, 2016

/s/ M. Scott Stevens
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CERTIFICATE OF SERVICE

I certify that I served a copy of the attached **OPPOSITION OF APPELLEE INTERNATIONAL TRADE COMMISSION TO APPELLANT GARMIN'S EMERGENCY MOTION FOR AN INTERIM STAY AND STAY PENDING APPEAL** on counsel of record on September 6, 2016, by the Court's CM/ECF system.

A copy will also be emailed to counsel for Appellants (Nicholas Groombridge) and counsel for Intervenors (Scott Stevens).

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