

ALERT

Federal Circuit Patent Bulletin: *Lelo Inc. v. Int'l Trade Comm'n*

May 15, 2015

"The purchase of so called 'crucial' components from third-party U.S. suppliers are insufficient to satisfy the 'significant investment' or 'significant employment of labor or capital' criteria of § 337 where there is an absence of evidence that connects the cost of the components to an increase of investment or employment in the United States."

On May 11, 2015, in *Lelo Inc. v. Int'l Trade Comm'n*, the U.S. Court of Appeals for the Federal Circuit (Moore, Clevenger, Reyna*) reversed the U.S. International Trade Commission's (ITC) determination that Lelo infringed Standard Innovation Corp.'s U.S. Patent No. 7,931,605, which related to kinesiotherapy devices, but did not violate 19 U.S.C. § 1337(a)(3). The Federal Circuit stated:

This appeal turns on the single question of whether qualitative factors alone are sufficient to satisfy the "significant investment" and "significant employment" requirements of § 337. To answer this question, we look first to the plain meaning of the statute. A claimant asserting patent rights under § 337 must satisfy the "domestic industry" requirement set out in the statute and establish, "with respect to the articles protected by the patent," that there is: (A) significant investment in plant and equipment; (B) significant employment of labor or capital; or (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

The plain text of § 337 requires a quantitative analysis in determining whether a petitioner has demonstrated a "significant investment in plant and equipment" or "significant employment of labor or capital." First, the terms "significant" and "substantial" refer to an increase in quantity, or to a benchmark in numbers. The plain meaning of an "investment" is "an expenditure of money for income or profit or to purchase something of intrinsic value." An "investment in plant and equipment" therefore is characterized quantitatively, i.e., by the amount of money invested in the plant and equipment. Similarly, "capital" is "a stock of accumulated goods" and "labor" is "human activity that produces goods or provides the services in demand in an economy." All of the foregoing requires a quantitative analysis in order to determine whether there is a "significant" increase or

attribution by virtue of the claimant's asserted commercial activity in the United States. . . .

In this case, the U.S. suppliers are neither contractors nor subcontractors. They are retailers and the components are off-the-shelf. There is no evidence of any investment made in capital or labor as a result of the purchased components. Standard Innovation provides only generic purchase prices it paid for the off-the-shelf items. These pricing data do not reflect the magnitude of labor expended to produce the components, or the amount the suppliers invested in their equipment to fulfill Standard Innovation's orders. The record contains no data indicating the share of labor and capital costs attributable solely to purchases made by Standard Innovation. The ITC has generally applied prong (B) of the domestic industry requirement to capital investments in domestic facilities.

The Commission determined that Standard Innovation's investment and employment under prongs (A) and (B) were quantitatively "modest," which we take to mean "insignificant." The Commission also found that Standard Innovation did not establish prong (C). We agree with the Commission's finding that investment and employment under prongs (A) and (B) were modest and insignificant. The Commission erred when it disregarded the quantitative data to reach its domestic industry finding based on qualitative factors. Qualitative factors cannot compensate for quantitative data that indicate insignificant investment and employment. As such, Standard Innovation did not establish a "significant" "investment" or "employment" under prongs (A) or (B), and did not set forth evidence of relevant investments under prong (C). Accordingly, Standard Innovation did not satisfy the domestic industry requirement of § 337.

We hold that qualitative factors alone are insufficient to show "significant investment in plant and equipment" and "significant employment of labor or capital" under prongs (A) and (B) of the § 337 domestic industry requirements. The purchase of so called "crucial" components from third-party U.S. suppliers are insufficient to satisfy the "significant investment" or "significant employment of labor or capital" criteria of § 337 where there is an absence of evidence that connects the cost of the components to an increase of investment or employment in the United States. Because the ITC's assessment of domestic industry contravenes § 337, we hold that the ITC's Final Determination was not in accordance with law. Accordingly, we reverse the ITC's Final Determination.