



INTERNATIONAL TRADE COMMISSION

Investigation No. 337-TA-487 (Second Remand)

CERTAIN AGRICULTURAL VEHICLES AND COMPONENTS THEREOF FINAL DETERMINATION; REINSTATEMENT OF GENERAL EXCLUSION ORDER AND CEASE AND DESIST ORDERS; TERMINATION OF THE INVESTIGATION

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined that there is a violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), by respondents Bourdeau Bros., Inc., Sunova Implement Co., and OK Enterprises in the above-captioned remand investigation. The Commission has reinstated the general exclusion order with respect to subject self-propelled forage harvesters and the cease and desist orders against Bourdeau and OK Enterprises and certain other firms that it had issued in the original investigation, and has terminated the investigation.

FOR FURTHER INFORMATION CONTACT: Mark B. Rees, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW, Washington, DC 20436, telephone (202) 205-3116. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW, Washington, DC 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS)

at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The remand of this investigation involves the gray market claims of Deere & Co. ("Deere") that Bourdeau Bros., Inc., Sunova Implement Co., and OK Enterprises (collectively, "the Bourdeau respondents") violated section 337 of the Tariff Act of 1930 in the importation into the United States, the sale for importation, and the sale within the United States after importation of Deere's European version ("EV") self-propelled forage harvesters ("SPFHs") by reason of infringement of U.S. Registered Trademarks Nos. 1,254,339; 1,502,103; 1,503,576; 91,860; and 2,729,766. In the original investigation, the Commission determined that there was a violation of section 337 and issued, in relevant part, a general exclusion order covering EVSPFHs and cease and desist orders directed to certain of the Bourdeau respondents and other respondents.

On appeal to the United States Court of Appeals for the Federal Circuit, the Court vacated the determination of violation against the Bourdeau respondents and remanded for findings on whether domestic sales of EVSPFHs by official Deere dealers were authorized by Deere and whether all or substantially all of the SPFH's authorized by Deere for sale in the domestic market were of its North American version ("NA") SPFHs. *Bourdeau Bros., Inc. v. Int'l Trade Comm'n*, 444 F.3d 1317 (Fed. Cir. 2006).

Following receipt of the mandate, the Commission rescinded its remedial orders with respect to EVSPFHs and referred the investigation to the original presiding administrative law judge ("ALJ"). The ALJ considered and denied cross-motions for summary determination on the remanded issues, conducted an evidentiary hearing, and issued an initial determination on

remand (“RID”) of violation of section 337. The Bourdeau respondents petitioned for review. The Commission determined to review the ALJ’s summary determination order and the RID. Based on additional rounds of briefing and its review of the entire record, the Commission issued a final determination that there was no violation of section 337. The Commission found that Deere failed to prove that sales of EVSPFHs in the United States by its official dealers were not authorized and also failed to prove that substantially all of the authorized sales of Deere SPFHs in the United States were NASPFHs.

Deere appealed. On appeal, the Court vacated and remanded for further proceedings. *Deere & Co. v. Int’l Trade Comm’n*, 605 F.3d 1350 (Fed. Cir. 2010). The Court upheld the Commission’s consideration of official Deere dealer sales and found that substantial evidence supported the determination that sales of EVSPFHs in the United States by official U.S. and European Deere dealers were authorized. *Id.* at 1355-58. The Court further ruled, however, that the Commission misapplied the “all or substantially all” test by using the wrong denominator and taking into consideration the ratio of authorized sales of EVSPFHs to the total number of EVSPFHs sold in the United States. *Id.* at 1358-62. The Court remanded for consideration, based on its instructions, of whether Deere satisfied the requirement that substantially all of its SPFH sales in the United States were of NASPFHs. *Id.* at 1362. The Court’s mandate, issued July 19, 2010, was received by the Commission on July 23, 2010.

On October 14, 2010, the Commission requested briefing by the parties on the merits of the remand. Deere and the Bourdeau respondents completed briefing on December 10, 2010.

Based on the record of this investigation, including the Court’s instructions on remand and the parties’ briefing on remand, the Commission determined that Deere has established that

substantially all of its U.S. SPFH sales were of NASPFHs and therefore has met its burden of proof on remand to satisfy the “all or substantially all” test for gray market trademark infringement and, accordingly, is entitled to a determination of violation of section 337 and the reinstatement of the exclusion order and cease and desist orders with respect to EVSPFHs issued by the Commission in the original investigation.

The Commission has terminated the investigation in accordance with the above findings on remand. The authority for the Commission’s determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and Part 210 of the Commission’s Rules of Practice and Procedure (19 CFR Part 210).

By order of the Commission.

James R. Holbein
Secretary to the Commission

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