PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC 20436

In the Matter of	)	
CERTAIN LENS-FITTED FILM PACKAGES	)	**Inv. No. 337-TA-406** **Enforcement Proceeding (II)**

OPINION ON ENFORCEMENT MEASURES

Introduction

On April 6, 2004, the presiding administrative law judge (ALJ) issued his Enforcement Initial Determination (EID) in the above-captioned proceedings in which he found that enforcement respondents Jazz Photo Corp. (Jazz), Jack Benun, and Anthony Cossentino (collectively, respondents) violated the general exclusion order and the cease and desist order issued to Jazz at the termination of Inv. No. 337-TA-406, *Certain Lens-Fitted Film Packages*. The ALJ ruled that each were each subject to civil penalty liability for violation of the cease and desist order. He then made recommendations regarding the penalty amounts that he found were warranted. He further declined a request by complainant Fuji Photo Film Co. Ltd. (complainant or Fuji) to recommend modification of the existing remedial orders.

Fuji, Jazz, Mr. Benun, and Mr. Cossentino timely filed petitions for review. All parties, including the investigative attorney (IA), filed responses. Based on the petitions and responses, and the record developed below, which fully supported the EID's violation findings (including

that Messrs. Benun and Cossentino were subject to individual liability under the circumstances), the Commission determined not to review the violation findings and thereby adopted them on July 27, 2004. 69 *Fed. Reg.* 46179-80 (Aug. 2, 2004). The Commission requested separate briefing on whether to adopt the specific enforcement measures recommended by the ALJ. The Commission received briefs and replies from all parties. The remedy issue was therefore ripe for determination, as were complainant's new request for additional injunctive relief and respondents' request for stay of any civil penalty order. Upon consideration of all issues, the Commission issued its final notice and order in this proceeding on January 14, 2005, and indicated that the instant opinion on enforcement measures would follow.

Background

The original *Certain Lens-Fitted Film Packages*, Inv. No. 337-TA-406, was instituted in March 1998, based on the complaint of Fuji. 63 *Fed. Reg.* 14474 (March 25, 1998). Fuji's complaint alleged unfair acts in violation of section 337 in the importation and sale of certain lens-fitted film packages (LFFPs) (*i.e.*, disposable cameras). These cameras were both new construction and used LFFPs that had been reloaded with film. Fuji alleged that 26 respondents had infringed one or more claims of 12 utility patents and three design patents held by complainant Fuji.

On February 24, 1999, the ALJ issued his final ID, finding a violation of section 337 by all 26 respondents. The ALJ found that Fuji had established that all 12 of Fuji's utility patents were infringed, but that Fuji had not carried its burden of proof in showing infringement of its three design patents.

The Commission largely adopted the ID, but reversed the finding of noninfringement of the design patents. On June 2, 1999, the Commission determined that an appropriate form of relief was a general exclusion order prohibiting the unlicensed entry for consumption of lens-fitted film packages that infringe the claims in issue of the 15 patents asserted by Fuji. 64 *Fed. Reg.* 30541 (June 8, 1999).

The Commission also issued cease and desist orders to 20 domestic respondents, including Jazz. *Id.* The orders provided, *inter alia*, that the respondents shall not:

> (A) import or sell for importation into the United States products covered by the general exclusion order, or
>
> (B) sell, market, distribute, offer for sale, or otherwise transfer (except for exportation) in the United States imported covered product.

Section II of the order issued to Jazz made the order applicable to Jazz's

> principals, stockholders, officers, directors, employees, agents, licenses [sic], distributors, controlled (whether by stock ownership or otherwise) and/or majority owned business entities, successors and assigns, and to each of them, insofar as they are engaging in conduct prohibited by Section III, infra, for, with, or otherwise on behalf of Respondent [Jazz].

Jazz and three other respondents appealed the Commission's determination to the United States Court of Appeals for the Federal Circuit.[1] Their appeals concerned only the portions of the Commission's determination that held that the reloaded used cameras were infringing

---

[1] Prior to the appeals, Fuji commenced an action for damages and injunctive relief against Jazz, Jazz Photo Hong Kong Ltd., and Mr. Benun in the United States District Court for the District of New Jersey for the direct and indirect infringement of its LFFP patents. Following a jury trial, the district court ultimately awarded Fuji $29.8 million in damages including interest, and denied Fuji's request for permanent injunctive relief. *Fuji Photo Film Co. Ltd. v. Jazz Photo Corp.*, 249 F. Supp. 2d 434 (D. N.J. 2003). The Federal Circuit affirmed. – F. 3d – , Nos. 03-1324, -1331, slip op. at 24 (Fed. Cir. Jan. 14, 2005).

reconstructions of cameras covered by Fuji's patents, rather than repaired, and therefore non-infringing, cameras. Jazz moved for, and was granted, a stay of the Commission's orders as to Jazz during the period of appeal.

On August 21, 2001, the Federal Circuit affirmed the Commission's orders and lifted its stay. *Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d 1094 (Fed. Cir. 2001), *cert. denied,* 536 U.S. 950 (2002) (*Jazz v. ITC*). While the Court found that adequate proof of the performance of eight refurbishment steps (on used cameras first sold in the United States with Fuji's authorization) would satisfy the affirmative defense of repair, it upheld the Commission's orders based on its further finding that the respondents did not carry their burden to establish that they were repairing rather than reconstructing the cameras. *See id.* at 1098-99, 1109 (affirming Commission orders insofar as evidentiary burden not met).

On June 27, 2001, Fuji filed its Complaint for Enforcement Proceedings under Rule 210.75, naming Jazz and Messrs. Benun and Cossentino as respondents. Fuji alleged that respondents were infringing the same patents that Fuji had asserted in the original investigation. Based on Fuji's complaint, the Commission determined to institute enforcement proceedings on September 24, 2002. 67 *Fed. Reg.* 61152 (September 27, 2002). The Commission referred the matter to the ALJ to rule on the question whether the enforcement respondents violated the general exclusion order and/or cease and desist order issued on June 2, 1999, and to recommend appropriate enforcement measures.[2]

---

[2] The order further provided that the Commission would determine whether to review the EID within 90 days of its issuance in accordance with rule 210.75. The order also stated that the Commission would decide whether to accept the ALJ's recommendations on enforcement

The ALJ conducted a hearing over six days in December 2003. Briefing by the parties before the ALJ was completed in February 2004 and, as noted above, the EID issued on April 6, 2004.

Summary of EID

During the period relevant to the subject of the enforcement proceeding,[3] Jazz sold approximately 27 million LFFPs in the United States that generated revenues in excess of $68 million ($68 million through August 2003). The ALJ found that these 27 million LFFPs were covered by at least one claim of the asserted patents, and were therefore infringing unless respondents could prove the affirmative defense of permissible repair. This defense required proof of two criteria:

(1) all LFFPs in issue originated from LFFPs first sold in the United States with Fuji's authorization which the Federal Circuit found would exhaust Fuji's patent rights; and

(2) the activities performed in processing such LFFPs did not involve prohibited reconstruction.

EID at 24. The ALJ found that if respondents could not prove that their refurbished LFFPs originated from LFFPs first sold in the United States with Fuji's authorization, it was not necessary to consider whether the activities performed in processing those LFFPs involved permissible repair. *Id.*

Jazz relied heavily on its so-called "informed compliance program" (ICP) to try to show

---

measures at a later time after it had given the parties an opportunity to brief the issue.

[3] The relevant time period was August 21, 2001 (the date of the Federal Circuit's opinion in *Jazz v. ITC*) through December 12, 2003.

that the LFFPs in issue were first sold in the United States with Fuji's authorization. The ICP prescribed twelve steps to trace the purchase of empty LFFP shells in the United States, through refurbishment in China/Hong Kong back to Jazz Photo U.S., and ending with the sale of finished product to Jazz's customers in the United States. Mr. Benun and others conceived of and formalized the ICP within 10 to 14 days after *Jazz v. ITC* issued, and Jazz implemented the ICP during the first half of September 2001. EID at 27. According to Jazz, the ICP requires specific documentation at each of the twelve steps. The documentation traces the chain of custody and path to and from refurbishment, from the time the shells are collected in the United States until the finished product returns to the United States. EID at 27-28.

The ALJ found that Jazz maintained the ICP in a disorganized fashion and that documentation for many of its files was incomplete. EID at 28-35. Moreover, the ICP at most simply tracked LFFP shells collected in the United States; it did not identify shells from those cameras that had been first sold in the United States, a task for which the ALJ found there were various practical solutions. For example, Jazz could have discarded its own camera shells, which it knew were of 90 percent foreign origin, and it could have discarded shells that had foreign languages on the outer packaging. Jazz took no such measures and instead claimed in litigation that only five percent of the shells it collected in the United States were from cameras that were not first sold in the United States. EID at 35-39.

Jazz's five-percent figure was based on a sample of 68 cameras, and the ALJ found this figure not credible. Relying on, *inter alia*, a different sampling of 2,700 camera shells, the ALJ determined that 40 percent of all LFFPs that Jazz refurbished during the relevant period (a total

of 10,783,092 LFFPs) were first sold *outside* the United States and thus infringed the patents in issue. He found that the remaining 60 percent of LFFPs would not infringe Fuji's patents if they were refurbished by means of a process that constituted repair rather than reconstruction. EID at 67.

Applying the law of repair and reconstruction as enunciated by the Court in *Jazz v. ITC*, the ALJ determined that Jazz permissibly repaired 1,740,750 LFFPs that it sold in the United States in 2003. As for the remaining 9,259,250 LFFPs that Jazz sold in 2003 and the 15,957,730 LFFPs that Jazz sold between August 21, 2001 and December 31, 2002, the ALJ ruled that the evidence was insufficient to prove that Jazz engaged in permissible repair. Accordingly, the ALJ found that 25,216,980 infringing LFFPs (the 9,259,250 LFFPs sold in 2003 plus the 15,957,730 LFFPs sold from August 21, 2001 to December 31, 2002) were sold by Jazz in the United States during the relevant period in violation of the cease and desist order. EID at 67-93.

Relying on Supreme Court and other precedent, including prior Commission determinations, the ALJ further found that Messrs. Cossentino and Benun were not automatically shielded from liability for cease and desist order violations insofar as the order was issued in Jazz's name. The ALJ found that each faced exposure for the role he played or should have played in the implementation of the remedial orders.

With respect to Mr. Cossentino, the ALJ found that he was employed by Jazz from May 2001 to mid-September 2003. Mr. Cossentino was the president and chief executive officer and served on the board of directors of Jazz; his duties extended to "supervision and control over, and responsibility for all aspects of the Company's operations." As such, Mr. Cossentino was legally

identified with Jazz throughout his tenure and had the power to effect compliance with the cease and desist order. Mr. Cossentino thus bore responsibility for the order's violation and was personally liable for his conduct in the non-compliance.[4] EID at 99-100.

Mr. Benun's responsibility within the company was even greater. Mr. Benun was legally identified with Jazz in various capacities since 1995 and, at all relevant times, had the power to effect compliance with the cease and desist order. Mr. Benun founded Jazz in 1995, and served as its president until April 1997, following which he held the title of principal consultant until September 17, 2003, when he assumed the position of chief operating officer of Jazz upon Mr. Cossentino's resignation. EID at 101-103.

Mr. Benun's consultation services to Jazz were arranged through JCB Consulting, Inc. (JCB), an outfit run by Mr. Benun out of his residential address. The agreement between Jazz and JCB provided that the consulting services were to be provided by Mr. Benun personally. Mr. Benun retained control of Jazz even after his relinquishment of officer status in 1997.[5] EID at

---

[4] The ALJ also rejected Mr. Cossentino's argument that his due process rights had been violated because he was not a party to the original investigation and did not have an opportunity to defend himself against the original infringement allegations. The ALJ noted that the question in this enforcement proceeding is whether Mr. Cossentino violated the Commission's cease and desist order, not whether that order was appropriate in the first place. The ALJ found that in this enforcement proceeding, Mr. Cossentino had every opportunity to defend himself against all issues relevant to violation of the Commission's cease and desist order (including the patent infringement issues) and noted that Mr. Cossentino is not being held responsible for the events leading to the issuance of the cease and desist order, but only for the violations of the order that occurred under his direction during his tenure at Jazz.

[5] Mr. Benun's change of job titles in 1997

> was not a relinquishment of control over the company at all. Rather, it was designed to facilitate the public offering of Jazz stock, as Mr. Benun had previously been

102-103.

The ALJ found that the difference between Mr. Benun's functions as a consultant and his current position as chief operating officer is that he is now more involved in the cash flow and some of the legal aspects of the company's business operation. He is principally responsible for the selection of suppliers and product and the acquisition of empty camera shells, and he also directs Jazz's purchasing of such parts and directs Jazz as to which camera parts it can replace. EID at 103. Similarly, pursuant to the consulting contract, Mr. Benun assisted Jazz in virtually all aspects of its business. His duties extended to: (1) all aspects of the development and procurement of camera and other photographic products for marketing distribution and sale in the United States and other markets; (2) obtaining institutional debt and equity financing; (3) finding and recommending desirable acquisitions for Jazz; (4) guaranteeing the obligations of Jazz; and (5) the development of its business generally. Consistent with such responsibilities, his

---

> barred from serving as a director and officer of any public company.
>
> After becoming a "consultant," Mr. Benun continued to exert substantial control over Jazz. Mr. Benun remained intimately involved in virtually all aspects of Jazz's business. He hand-picked his own successor, Mr. Lorenzini. Mr. Benun's family continued to own the overwhelming majority of Jazz stock under a voting agreement, pursuant to which they agreed to grant him an irrevocable proxy to vote their shares in the event the bar preventing him from serving as an officer or director of the company was ever lifted.
>
> Perhaps most probative of Mr. Benun's control, during the post-1997 time period when Mr. Benun was purported "consultant" to Jazz, the company paid him over $10 million in direct payments and loans, representing more than four times the company's retained earnings during that time period. This evidence tends to prove that Mr. Benun was the moving force behind Jazz's infringement of Fuji's patents.

EID at 102-103, *quoting from* 249 F. Supp. 2d at 458-459 (emphasis in original) (internal citations omitted).

consulting contract required Jazz's provision of "key man" life insurance. EID at 103-104.

Mr. Benun considered himself part of the management team at Jazz, and other Jazz employees considered Mr. Benun to be a decision-maker at Jazz. He made and continues to make the ultimate decisions as to the sourcing of shells, including the selection of suppliers (whether in Asia, the United States, or Europe) used in Jazz's LFFPs, and he handles all business with such suppliers. EID at 104.

Mr. Benun also holds up to a twenty-five percent stake in any recovery from Jazz's ongoing lawsuit against Imation Corporation, which recovery he has estimated will exceed $250 million. As a consultant, Mr. Benun personally guaranteed Jazz's obligations on short-term loans advanced to Jazz that were secured by its accounts receivable. Moreover, his immediate family (wife, son, and daughter) holds legal title to the company. Mr. Benun and Jazz, the ALJ held, are therefore closely linked, if not alter egos. He concluded that the circumstances thus warranted holding Mr. Benun liable for civil penalties for the violation of the cease and desist order issued to Jazz. EID at 101-105, 128.

The EID recommendations and analysis concerning enforcement measures are summarized below in connection with our discussion of each issue presented. Based upon our consideration of the EID, the submissions of the parties, and the entire record in this proceeding, we adopt those recommendations and analysis, except as otherwise noted or supplemented. Further, as set forth below, we decline to issue the cease and desist order against Mr. Benun that Fuji has newly requested in briefing remedy[6] and, in view of our decision to defer collection

---

[6] Fuji did not raise the issue before the ALJ or in its petition for review of the EID.

proceedings until after all direct appeals of our enforcement determinations have been exhausted, deny as moot respondents' request to stay the order of civil penalties.

Discussion

I. Civil Penalties

Section 337 and its legislative history "clearly authorize the Commission to determine liability and assess a penalty for violation of its orders, subject to appeal to the Federal Circuit." *San Huan New Materials High Tech, Inc. v. International Trade Comm'n*, 161 F. 3d 1347, 1352 (Fed. Cir. 1998). Subsection 337(f)(2) makes mandatory the imposition of a penalty for each day of violation of a cease and desist order, and sets a ceiling of the greater of $100,000 or twice the domestic value of the articles entered or sold on such day in violation of the order.[7] *Certain Lens-Fitted Film Packages,* Inv. No. 337-TA-406 (Consolidated Enforcement and Advisory Opinion Proceedings), Commission Opinion at 20 (June 2003) (*Film Packages Enforcement I*), *vacated and remanded in part on other grounds, Fuji Photo Film Co., Ltd. v. International Trade Comm'n*, 386 F. 3d 1095, *VastFame Camera, Ltd. v. International Trade Comm'n*, 386 F. 3d 1108 (Fed. Cir. 2004)

The Commission has applied a six-factor test in determining the appropriate penalty amount in the four prior cases in which it has levied penalties, a test the Federal Circuit has

---

[7] This subsection provides in pertinent part that:
> any person who violates an order issued by the Commission under paragraph (1) [*i.e.*, a cease and desist order] after it has become final shall forfeit and pay to the United States a civil penalty for each day on which the importation of articles, or their sale, occurs in violation of the order of not more than the greater of $100,000 or twice the domestic value of the articles entered or sold on such day in violation of the order.

19 U.S.C. § 1337(f)(2).

approved as reasonable.[8] *See San Huan,* 161 F. 3d at 1362, 1364-65. The test entails balancing (1) the good or bad faith of respondent; (2) the injury to the public; (3) respondent's ability to pay; (4) the extent to which respondent has benefitted from its violations; (5) the need to vindicate the authority of the Commission; and (6) the public interest. Applying this test, the Commission takes into account "'the three overarching considerations enumerated by Congress in the legislative a history [of section 337(f)(2)], *viz.*, the desire to deter violations, the intentional or unintentional nature of any violations, and the public interest.'" *Id.* at 1362 (*quoting from* the Commission opinion in *Magnets*).

While each of the private parties has urged the Commission to reject the ALJ's penalty recommendations,[9] none takes issue with the legal framework under which the ALJ considered

---

[8] *See Certain Erasable Programmable Read Only Memories, Components Thereof, Products Containing Such Memories and Processes for Making Such Memories*, Inv. No. 337-TA-276 (Enforcement Proceeding), Commission Opinion at 23-24, 28 (Aug. 1991) (*EPROMs*) (ALJ recommended a penalty against respondent of $929,574.80 for violation of a cease and desist order that the Commission increased to $2.6 million); *Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing Same*, Inv. No. 337-TA-372 (Enforcement Proceeding), USITC Pub. 3073, Commission Opinion at 16-17, 34 (Nov. 1997) (*Magnets*) (ALJ recommended a penalty of $1,625,000 for violation of a consent order that the Commission reduced to $1,550,000), *aff'd San Huan,* 161 F.3d at 1362; *Certain Agricultural Tractors Under 50 Power Take-Off Horsepower*, Inv. No. 337-TA-380 (Enforcement Proceeding), USITC Pub. 3227, Commission Enforcement Opinion at 45, 47 (August 1999) (*Tractors*) (ALJ recommended a penalty of $652,476; the Commission found that a civil penalty of $40,000 per violation day was necessary and sufficient, resulting in a total penalty of $2,320,000); and *Film Packages Enforcement I* at 21-22 (Commission adopted ALJ's recommendation that penalties be levied against three respondents, in amounts ranging from $200,000 to $1.6 million). *Cf. Magnets*, Commission Opinion at 22 ("We do not intend, by application of this framework in this case, to foreclose consideration of a modified analytical framework for establishing penalties in future cases.").

[9] The IA, in contrast, argues in full support of the EID recommendations and analysis.

those recommendations, or his math in calculating the maximum penalty.

A. Statutory Maximum Penalty

To determine his recommended penalty amount, the ALJ first calculated the applicable statutory ceiling, that is, the maximum *per diem* penalty that 19 U.S.C. § 1337(f)(2) would allow under the circumstances.[10] To determine the statutory ceiling, he applied the $100,000 cap set in § 1337(f)(2) for any given violation day for which twice the domestic sales value of the infringing LFFPs was less than $100,000. (He relied upon domestic sales values rather than entry values because the former better reflected the effects of the infringing sales on the U.S. camera market and, moreover, the record as to these amounts was more complete.) For any given violation day for which twice the domestic sales value of infringing LFFPs exceeded $100,000, he capped the penalty at this higher amount (twice the domestic sales value of infringing LFFPs) *per* § 1337(f)(2). EID at 110-111.

Based on Jazz's daily sales figures, the ALJ found that there were 319 "violation days" (days on which Jazz made infringing sales) for the period August 21, 2001 through December 31, 2002. According to his calculations, the ALJ found that the total maximum penalty amount for this period is $104,207,411. *Id.*

With respect to the remaining period of January 1 through December 12, 2003, the ALJ determined that 84.2 percent of the 11 million LFFPs sold were infringing. The daily sales data were incomplete after August 28, 2003. The ALJ thus analyzed the 2003 period in two parts, pre- and post-August 28. For the first part, he subtracted 15.8 percent from the daily sales figures

---

[10] This statutory provision is quoted *supra* note 7.

to account for the sales that he found were non-infringing. Based on a finding of 160 violation days, and calculations using the statutory formula for the ceiling on penalties, the ALJ found that the total maximum penalty for the first part of 2003 is $36,428,495. EID at 111-112. With respect to the second part (August 29 through December 12, 2003), he found that there were 68 violation days based on a calculation using the same percentage of violation to non-violation days from the first part (such calculation also assumes the same pattern of infringing versus non-infringing sales). He then multiplied this figure by the average maximum daily penalty amount of $227,678 from the first part of 2003 (the total maximum penalty through August 28 divided by the number of violation days) to arrive at $15,382,110 for the total maximum penalty for the second part of 2003. EID 111-112.

Summing the totals for 2002 and the two parts of 2003, the ALJ concluded that there were 547 violation days during the relevant period and that the statutory maximum penalty assessment for Jazz's sales of infringing LFFPs is $156,118,017.[11] EID 112-113.

In reaching this conclusion, the ALJ applied the correct legal standard to well-supported factual findings. We adopt his conclusion and its supporting analysis respecting the maximum civil penalty.

B. Six-Factor Test

The ALJ next turned to consideration of the evidence on each of the six factors with respect to each of the respondents.

---

[11] He reiterated that this calculation of the maximum potential penalty applied the statutorily prescribed $100,000 *per* violation day for days on which doubling the value of actual infringing LFFP sales resulted in less (even significantly less) than $100,000. EID at 119-120.

1. Good or Bad Faith of Respondents

(a) EID

The ALJ found that Jazz had a clear understanding of the requirements of the Federal Circuit opinion, including the knowledge that used LFFPs had to be sold originally by Fuji or its licensees in the United States, and that the reloading of any LFFP that had been first sold outside the United States was barred, even if they were sold by a vendor that possessed the legal right to sell those LFFPs in the United States. He found that Jazz instituted no competent procedures to comply with those requirements, failed to request an advisory opinion or clarification from the Commission regarding the Commission's practices after the issuance of the Federal Circuit opinion, and failed to obtain any opinion of counsel regarding possible violations of Commission orders in light of the Federal Circuit opinion. He thus concluded that Jazz acted in bad faith and that consideration of the first factor weighed in favor of a significant penalty. EID at 113-115.

The ALJ made the same finding with respect to Mr. Benun. Mr. Benun was legally identified with Jazz at all relevant times and was principally responsible for Jazz's selection of products, suppliers, refurbishing factories, and acquisition of empty shells. Mr. Benun had actual notice of the cease and desist order and bears significant responsibility for its violation, as he effectively directed the company and received most of the profits it earned by its infringing conduct. EID at 101-105, 126-128.

The ALJ found that Mr. Cossentino was also legally identified with Jazz as its president, CEO and a member of its board, and had the power to insure the company's compliance with the cease and desist order. Mr. Cossentino was aware of the legal requirements imposed upon Jazz

by the Commission orders, and yet the compliance program that he oversaw was ill-conceived and mismanaged. Although he periodically monitored its implementation through senior management, Mr. Cossentino undertook insufficient steps to insure the ICP's compliance with the cease and desist order and, for that matter, Jazz's compliance with the ICP. Despite overseeing legal affairs, Mr. Cossentino also allowed Jazz to represent to the U.S. Bureau of Customs and Border Protection (Customs) that the ICP "guaranteed" that used LFFPs collected in the United States were first sold in the United States when, in fact, many were not. Accordingly, the ALJ found that consideration of the first factor supported the imposition of a penalty against Mr. Cossentino. He found that such a penalty, however, needed to reflect that Mr. Cossentino did not show the same level of disdain and disregard for the Commission's orders and process as found in other enforcement proceedings (*e.g.*, *Tractors*). Moreover, Mr. Cossentino was not an owner of Jazz and he removed himself from the company and the industry in September 2003. EID at 100, 122-123, 125.

(b) Analysis

We find that the ALJ's findings as to the first factor are supported by the record and his conclusion is well reasoned. Mr. Benun and Jazz and, to a lesser but still significant extent, Mr. Cossentino, failed to heed fundamental principles of compliance with a Commission remedial order. Respondents subject to such an order have "an affirmative duty to take energetic steps to do everything in their power to assure compliance, and . . . this duty not only means not to cross the line of infringement, but to stay several healthy steps away." *Tractors* at 32 (internal quotations and citations omitted).

Rather than complying strictly with the orders, Jazz and Mr. Benun took the position in this enforcement litigation that a *mere* 5 percent of the approximate 27 million LFFPs that Jazz sold were manufactured from shells of illegal reloads. Their defense in this proceeding thus appears to be that *only* 1.35 million of the LFFPs they sold were infringing. The cease and desist order's proscriptions, however, did not contemplate a margin of error, much less one involving one million-plus illegal sales. Moreover, this was their strongest defense on this point, and the ALJ found it not credible. The credible evidence, he found, showed that foreign-sold LFFPs comprised 40 percent of the shells refurbished by Jazz for the U.S. market and the primary source of such foreign shells were Jazz-brand LFFPs and those of other reloaders. EID at 65. Yet Jazz never attempted to exclude even its own brand-name shells from collection following issuance of *Jazz v. ITC*. Jazz and Mr. Benun effectively made a choice between good faith compliance with the Commission's orders and satisfying domestic demand for LFFPs that generated healthy profits.

Respondents' communications with Customs, in this light, appear to have been less than the necessary good faith effort to insure compliance with the orders. Furthermore, respondents never sought a legal opinion from counsel on whom they placed reasonable reliance, which would have mitigated consideration of this first factor. The record thus supports the finding that Mr. Benun and Jazz engaged in bad faith warranting a substantial penalty.

The record also supports a finding of bad faith on the part of Mr. Cossentino, although to a lesser degree. Any claim of a belief or understanding that all shells collected in the United States were first *sold* in the United States is not credible or is the product of reckless or wilful

indifference. Even if Mr. Benun or others made promises to Mr. Cossentino respecting compliance, Mr. Cossentino's obligation as CEO and president of Jazz was to make sure that the ICP kept Jazz "several healthy steps away from infringement," not simply to gather representations of non-infringement.[12] His dereliction of duty, particularly with respect to the entire shell collection issue, and the unsupported guarantee of compliance to Customs that he authorized, establish his bad faith rather than mere negligence in insuring compliance with the cease and desist order. Consideration of the second factor thus merits the imposition of a civil penalty against him that is not, as Mr. Cossentino would have us adopt, merely nominal.

For all of these reasons, we adopt the ALJ's conclusions and analysis respecting factor one.

2. Injury to the Public

(a) EID

The ALJ stated that the Commission's focus is not on harm to the public at large, but on whether respondents' violation of a remedial order caused sufficient injury to the domestic industry to warrant the maximum penalty. EID at 115, *citing Tractors* at 38. He noted that in *EPROMs* the Commission found that respondent's unlicensed sales harmed the complainant by depriving it of sales to which its patent rights otherwise entitled it, and that no specific quantification of such harm was required to demonstrate harm to the public. EID at 115, *citing EPROMs* at 25 and also *Magnets* at 25 (in which the Commission held that harm to the domestic

[12] Despite his arguments to the contrary, Mr. Cossentino's leadership positions at Jazz clearly distinguished his responsibilities from those under him.

industry and, by extension, the public, could be measured in terms of respondents' unlicensed sales). EID at 115.

The ALJ found that Jazz directly competes with Fuji and Fuji's licensee, Kodak, and unlawfully deprived them of over 25 million LFFP sales during the period that is the subject of this proceeding. Moreover, Jazz's competition during this period, he found, is depressing Fuji's prices. Based on the large number of importations and sales of infringing LFFPs, he concluded that the harm to the domestic industry and, thereby, to the public, weighs in favor of imposing a substantial penalty against Jazz. EID at 115-116. The same reasoning, he found, applies to consideration of the public injury factor with respect to Messrs. Benun and Cossentino and supports imposing a civil penalty against each. EID at 123, 127.

(b) Analysis

The ALJ properly relied on *EPROMs, Magnets*, and *Tractors* for the proposition, among others, that harm to the public may be considered in terms of the harm to the domestic industry. *EPROMs* and *Magnets* were both patent-based cases in which a sale made by the respondent was a sale lost to the complainant, and such losses were found to demonstrate injury to the public. *Tractors*, on the other hand, was trademark based and concerned harm to complainant's reputation, not to complainant's sales figures. Because of the limited nature of direct competition, the lack of lost sales in that case was not viewed as a mitigating consideration.

Here, direct competition and the taking of a sale away from Fuji or its licensees (and thereby a lost royalty) for each infringing sale made by Jazz are not realistically disputed. These losses, as the ALJ found, were numerous and substantial in the relevant period. Coupled with his

finding of price erosion caused by Jazz's unlawful sales, the ALJ's conclusion that the domestic industry and, consequently, the public, were injured to a degree warranting the imposition of a significant penalty against respondents, is amply supported.

We reject Jazz's contention that there was no injury to Fuji or the public because the LFFPs could have been loaded in a non-infringing manner. The ALJ, in fact, found that the LFFPs were loaded in a infringing manner. If the affirmative defense of permissible repair were satisfied with a showing not of how the respondent actually refurbished the particular article but of the ways in which respondent could have done so, there would be no need to draw the very distinctions the Court took pains to identify in *Jazz v. ITC*. No legal consequence would flow from characterizing the actual refurbishment as repair versus reconstruction, and a respondent would have no incentive to stop engaging in the impermissible if the permissible were simply "possible." Moreover, as a factual matter, Jazz has not shown that it would have sold the number of cameras that it did were it not for the foreign-sold shells it used in making the infringing reloaded reloads. The harm to the public is the same regardless of whether Jazz could have sold the same product without violating the Commission's orders.[13] This factor accordingly favors, as the ALJ recommended, the imposition of a substantial penalty.

For all of these reasons, we adopt the ALJ's conclusion and analysis respecting the second factor.

---

[13] The district court opinion in the parallel damages action is not to the contrary, as Jazz alleges; indeed, that case held that each and every infringing sale by Jazz caused injury to Fuji.

3. The Respondents' Ability to Pay

(a) EID

The ALJ found that Jazz's gross profit from its founding in 1995 through 2002 exceeded $93 million. In 2001, revenues totaled $63.4 million in the United States and $70.7 million worldwide; in 2002, revenues totaled $47.9 million in the United States and $55.9 million worldwide. As of May 2003, Jazz's inventory and accounts receivable were worth approximately $7 million. While Jazz has no insurance to cover the assessment of a civil penalty and is exposed to ongoing significant legal fees in defending its patent law violations, the ALJ concluded that Jazz could pay a substantial penalty based on the performance of its camera business. He found that setting the appropriate amount, however, would require balancing such hampering factors as Jazz's status as a debtor-in-possession under protection of the U.S. bankruptcy code, and its approximate $30 million exposure from the judgment entered against it in the district court litigation. EID at 116-119.

The ALJ similarly found that Mr. Benun could pay a substantial civil penalty. Mr. Benun's assets include a $5 million home owned jointly with his wife subject to a mortgage of $1.3 million. Jazz has made payments to his consulting firm, JCB, of $9.9 million since 1997 for Mr. Benun's services. Including auto lease payments made by Jazz for the car he used, Mr. Benun has received 11.6 percent of Jazz's gross profit during this period. While in bankruptcy, Jazz has consistently paid Mr. Benun between $7,000 and $15,000 a week in compensation. EID at 127.

Mr. Cossentino, the ALJ found, is also able to pay a civil penalty, albeit not a substantial one. He has approximately $[ ] in assets and, in his employ with Jazz, earned $[ ] per year, plus benefits and the use of a company car. [

]. EID at 124.

(b) Analysis

The ability to pay is a mitigating factor in this case. Based on his assessment of the financial situation and assets of each respondent, the ALJ properly concluded that imposing the statutory maximum would be excessive. On the other hand, the bankruptcy filings of Jazz and Mr. Benun do not support their claim that no funds will be available to pay any penalty imposed. Indeed, Jazz's filing was pursuant to Chapter 11, under which it seeks to continue doing business as a going concern. Jazz has a significant revenue stream, profits, inventory, and accounts received from which it could pay a penalty. It has generated significant compensation for Mr. Benun, who holds sizeable personal assets. The two also share interests in what Mr. Benun represents will be an enormous recovery in the damages action brought by Jazz against Imation. Jazz and Mr. Benun point to no credible evidence in the record demonstrating an inability to pay a significant penalty.

Mr. Cossentino's financial situation and assets, in contrast, are more limited. The ALJ's measured consideration of them is based on record evidence and is reasonable. Accordingly, this

factor also supports imposition of a penalty against Mr. Cossentino.

For all of these reasons, we adopt the ALJ's conclusions and analysis respecting factor three.

4. Extent to Which the Respondents Benefitted from Their Violations

(a) EID

The ALJ noted that consideration of this factor is meant to insure that the penalty amount is not disproportional to the benefit that respondents obtained as a result of the infringing conduct. He pointed out that the Commission may measure such benefits in a variety of ways, including revenue from infringing sales, profits from those sales, or revenues from sales of related products that would not have taken place but for the sales of infringing products. EID at 117. He found that Jazz had generated in excess of $65 million from the sale of infringing LFFPs in the United States, and that such violations of the cease and desist order enabled Jazz to prolong its operations before filing for bankruptcy protection. Throughout the relevant period, infringing LFFPs constituted a significant and increasing proportion of Jazz's business. Since 1999, LFFPs have represented at least 50 percent of Jazz's sales. In 2001, they constituted 65 percent of Jazz's sales and, by May/June of 2003, their share of sales had increased to 80 percent. The ALJ thus found that, while there is a question whether they may be sustained long term in view of the company's bankrupt state, the benefits Jazz received from its sales of infringing LFFPs weigh in favor of a substantial penalty. EID at 117-119.

Due to Mr. Benun's close relationship with and control over Jazz, the ALJ found that a similar benefits analysis applied to him. Mr. Benun effectively directed Jazz and he received a

sizeable portion of the profits that Jazz earned from the infringing conduct. Insofar as his compensation was a function of Jazz's gross profits, Mr. Benun personally received compensation on each sale of an infringing LFFP. EID at 127-128.

Mr. Cossentino, on the other hand, made a flat salary of $[ ]. His total gross earnings from August 2001 until September 2003 were approximately $[ ]. He benefitted from LFFP sales in that they enabled Jazz to stay in business and pay his salary; however, his compensation at Jazz was not directly tied to such sales and, with those sales accounting for roughly [ ] percent of Jazz's revenues during the relevant period, the ALJ found that at most [ ] of Mr. Cossentino's compensation could be attributed to them. The relatively small benefit conferred upon Mr. Cossentino in comparison to Jazz as an entity supports a relatively modest penalty, he concluded. EID at 124-126.

(b) Analysis

We find that the ALJ properly applied the principles set forth in *Magnets*.[14] The volume of infringing conduct and its value in terms of sales by Jazz are of a degree unmatched in the

---

[14] In *Magnets,* the Commission stated:

> We have examined the record evidence relating to this factor in an effort to ensure that the penalty amount is not disproportionate to the extent of the benefit derived by the respondents from their violations of the order. We do not believe that this factor requires the Commission to establish with precision the extent of the benefit derived by respondents. Rather, we have considered this factor with a view to determining the general order of magnitude of the infringing conduct. We also recognize that there are several means by which benefit can be evaluated. Given that respondents should not have made any sales in violation of the order, we think at least one appropriate measure of the benefit is the value of the sales made in violation of the order.

Magnets, Commission Opinion at 28.

Commission's previous enforcement proceedings. So too are the benefits that accrued to Jazz and Mr. Benun, as found by the ALJ and supported by the record developed in the proceeding. Jazz and Mr. Benun nevertheless repeat the argument, with slight variation, that since Jazz could have engaged in permissible repair, the Commission should consider the fourth factor (as they contend it should consider the second factor) mitigating. They claim that not only have they not benefitted from the alleged infringement, they had no reason to infringe because they could have engaged in permissible repair. We reject this argument for the same reasons discussed above. The legal premise is without merit in that it erodes the dichotomy between permissible repair and impermissible reconstruction that the Federal Circuit preserved in *Jazz v. ITC*. The factual premise is erroneous because Jazz had every reason to use foreign-sold shells for its reloads: it has not shown that it could have met demand, and reaped the profits it did, without them. The ALJ thus correctly found that Jazz and Mr. Benun benefitted from the infringement, and had reason to engage in impermissible repair.

Mr. Cossentino's benefits are less direct, as the ALJ found. He did not have an ownership interest in Jazz, or any other entity benefitting from Jazz's sale of the LFFPs at issue, and his salary was not tied to the LFFP sales performance. He has removed himself from Jazz and the LFFP business. Infringing sales, however, helped keep Jazz a going concern during his employment there, and his tenure in this respect was buoyed by those sales. Mr. Cossentino claims that he was simply another salaried employee at Jazz, and that Mr. Benun actually

controlled and continues to control reload activities at Jazz.[15] The ALJ found that he was, to the contrary, in a position to effect Jazz's compliance with the orders and in all events was obligated not to authorize misrepresentations to Customs. A modest penalty in keeping with the proportionality of Mr. Cossentino's benefit from the infringement is thus warranted under this factor.

For all of these reasons, we adopt the ALJ's conclusions and analysis respecting factor four.

5. Need to Vindicate the Authority of the Commission

(a) EID

The ALJ noted that this is the second enforcement proceeding in this investigation and that three former respondents have already been held to have violated Commission cease and desist orders. He found that the need to vindicate the Commission's authority and deter Jazz and Mr. Benun and others from discounting the Commission's resolve is accordingly strong. Thus, he found that this factor supports a significant penalty against Jazz and Mr. Benun, particularly given the bad faith nature of the violations. EID at 119-120, 128.

The ALJ also found that this factor supports the imposition of a penalty against Mr. Cossentino, but the ALJ discounted the deterrence value as applied to Mr. Cossentino because he has removed himself from Jazz and the LFFP business, and therefore no longer acts in any

---

[15] Were this the arrangement, it would put Mr. Cossentino in the unflattering light of having agreed to figurehead positions that enabled Mr. Benun to act as a controlling officer in everything but title, despite the prohibition on Mr. Benun holding such a position in any public company including his own, had he successfully taken it public. *See Fuji v. Jazz*, 249 F. Supp. 2d at 458. Being party to such an arrangement would hardly exculpate Mr. Cossentino of all responsibility.

capacity that would relate to the subject matter of this investigation. EID at 124-125.

(b) Analysis

We agree with the ALJ that there is an interest in vindicating the authority of the Commission in this case, particularly given the evidence of respondents' bad faith. Respondents did not simply make infringing sales here, they did so knowingly or, perhaps in the case of Mr. Cossentino, with reckless or wilful indifference, and then represented to Customs Jazz's full compliance. Had they seriously intended such compliance, they would have, among other things, removed Jazz-brand and other reloaded cameras from the collection pool after *Jazz v. ITC* was handed down. The ALJ found that this and other feasible alternatives were readily available for distinguishing foreign-sold shells.

The need for deterrence in this case is heightened by the history of this investigation. This is the second enforcement proceeding, with three previous respondents having been found to have violated the Commission's orders. Moreover, the deterrence signal sent by civil penalties would not be lost insofar as it applies to Mr. Cossentino, who is no longer working in this industry. Permitting an otherwise culpable top executive to escape liability simply because he has taken a new job erodes accountability and, as the IA has warned, might well leave no one accountable for violations of Commission remedial orders when a company is in bankruptcy. Based on the record, therefore, the need to vindicate the Commission's authority is an aggravating factor with respect to the penalty amount in this case.

For all of these reasons, we adopt the ALJ's conclusions and analysis respecting factor five.

6. The Public Interest

(a) EID

The ALJ noted that the public interest lies in protecting intellectual property rights. The repeated infringement evidenced here, he stated, strikes at the heart of the Commission's mission. Accordingly, he found that imposition of a significant penalty against Jazz and Mr. Benun would confirm the Commission's resolve in protecting the integrity of section 337 remedial orders that are designed to safeguard domestic industries and thereby protect the public interest. EID at 120, 128. He found that the public interest also supports the imposition of a modest penalty against Mr. Cossentino. EID at 125-126.

(b) Analysis

The public interest at issue in this case, as in most section 337 investigations, is the protection of intellectual property rights. Contrary to the claim of Jazz and Mr. Benun that legitimate competition (and thereby the public interest) in the reloaded LFFP business would be quashed by the levying of a substantial penalty, there is no absolute right to reload LFFPs, only the right to do so lawfully. If lawful reloading on a mass scale may be achieved only through the implementation of a comprehensive, well-managed compliance program, then the public interest favors such a program. If lawful reloading simply cannot be accomplished on a mass scale, then, as the IA has argued, the public interest favors protection of the intellectual property right over illegitimate competition.

The deterrence value to other top executives responsible for programs of compliance with Commission remedial orders supports the imposition of a civil penalty against Mr. Cossentino

under this factor as well. Such executives must take seriously the obligation not simply to avoid crossing the line when it comes to Commission remedial orders, but to implement measures that keep the business several "healthy steps" from that line. The public interest thus supports civil penalties in this case.

For all of these reasons, we adopt the ALJ's conclusions and analysis respecting factor six.

C. Appropriate Amount of Civil Penalties

(1) EID

Taking into consideration his analysis of each of the six factors as applied to each of the respondents, the ALJ determined that imposing the statutory maximum penalty was unwarranted on this record. With respect to Jazz, and due largely to the ALJ's concerns respecting its ability to pay (factor three), he concluded that a *per diem* penalty of $25,000, for a total civil penalty assessment of $13,675,000 ($25,000 x 547 violation days), was appropriate. Such a penalty, he found, would meet the goal of deterring future violations without driving the company out of business. This figure represents 20 percent of Jazz's revenues that were attributable to its sales of infringing LFFPs during the relevant time period. EID at 121.

The ALJ found that, because Mr. Benun directed Jazz and received most of the profits the company earned by its infringing conduct, he should be treated as closely related to the company, if not its alter ego. As such, and based upon the six factors as applied to Mr. Benun, the ALJ concluded that the appropriate penalty was joint and several liability for the civil penalties assessed against Jazz. In other words, each would be responsible for the payment of the entire

$13,675,000 so long as any part remained unpaid. EID at 128, *citing United States v. Scop*, 940 F. 2d 1004, 1010 (7th Cir. 1991).

With respect to Mr. Cossentino, the ALJ concluded that, on balance, a "modest" penalty was warranted. He derived his recommended penalty amount based first on [

]. The ALJ then [ ] to arrive at the recommended $154,000. EID 125-126.

(2) Analysis

The amount of the penalty levied, up to the statutory maximum, lies within the Commission's discretion. The Commission may adopt a penalty that is less than the statutory maximum, and it may use the six-factor analysis to determine the appropriate amount. *See San Huan*, 161 F.3d at 1362-65. This is precisely how the ALJ calculated the penalty amounts in his recommendations. Fuji nevertheless claims that adopting anything less than the statutory maximum penalty with respect to Jazz and Mr. Benun would be tantamount to condoning infringement. Where precisely the balance is struck in considering the six factors, including in terms of the proportionality of the penalty, is a delicate task. The ALJ appropriately evaluated the relevant evidence and drew reasonable conclusions from that evidence. We therefore adopt his recommendations and supporting analyses as regards the appropriate penalty for Jazz and Mr. Benun.

Mr. Cossentino contends that the civil penalty against him should be nominal, but we reject this argument given his bad faith in not assuring compliance with the cease and desist

order during his tenure as president and CEO of Jazz. Under the circumstances of this case, however, we find that his exposure should terminate with his departure from Jazz in September 2003, rather than at the end of the period in December 2003 that is the subject of this proceeding. The number of violation days during Mr. Cossentino's tenure thus needs to be determined. The EID demonstrates a conservative estimation of this number[16] because the ALJ, as noted above, ran a separate calculation for the number of violation days that occurred before and after late August 2003 (479 and 68, respectively). We adopt the former as the number of violation days applicable to Mr. Cossentino given his work separation and our conclusion that his control and responsibility did not extend beyond it.

We further find that the appropriate penalty for each violation day for Mr. Cossentino is $250, which amounts to a total penalty against him of $119,750 (479 x $250). This penalty takes into consideration the compensation Mr. Cossentino received that may be attributable to the sale of infringing LFFPs, amounts to one percent of the rate assessed against Jazz and Mr. Benun on a *per diem* basis, and recognizes that Mr. Cossentino's influence ended with his voluntary departure from the company and the industry. We find that such a penalty is fully supported by consideration of the six factors and the ALJ's thorough analysis.

II. Other Injunctive Measures

A. EID

Fuji argued before the ALJ that Customs is ill-equiped to make a decision as to the scope of permissible repair, and that it is appropriate for the Commission to amend the exclusion order

---

[16] Reflective of a period just short of Mr. Cossentino's full tenure at Jazz.

and cease and desist order to insure that all substantive determinations respecting permissible repair are made by the Commission. The IA argued that it was unnecessary and inappropriate to modify the Commission's existing orders, or issue any new orders to explain *Jazz v. ITC* or to set forth specific protocols to be followed by Customs in admitting or refusing entry to refurbished LFFPs. EID at 130.

The ALJ found that as of the beginning of 2003, Customs began stopping Jazz shipments every week, subjecting such shipments to intensive exams, and requiring the production of additional information from Jazz respecting its shipments. In view of this action, the guidance provided by *Jazz v. ITC*, the EID, and the Commission determination that would follow, the ALJ found that Customs will be advised as to the proper scope of the existing Commission orders and have adequate enforcement assistance. Accordingly, he denied Fuji's request. EID at 130-31.

Fuji's petition for review of the EID included a claim that the ALJ's consideration of this request was in error. However, in separately briefing the remedy issue, Fuji has not pursued the challenge and, instead, raised a new issue respecting appropriate relief. Fuji requests that the Commission issue an order to cease and desist to Mr. Benun individually. Fuji contends that, since the existing cease and desist order applies to Mr. Benun individually only as to his acts on behalf of Jazz, Mr. Benun has an incentive following this proceeding to cause the liquidation of Jazz and to start again with a new entity that is not subject to the existing order that will engage in infringing conduct. Mr. Benun and the IA oppose such a request.

B. Analysis

Fuji appears to have abandoned its original challenge to the ALJ's denial of its request for modified orders to aid Customs in its enforcement of the Commission's existing exclusion order and cease and desist order. The ALJ's ruling on this issue, in any event, has ample support in the record and we adopt it.

With respect to the new request before the Commission, raised here for the first time in this enforcement proceeding, we also deny it. The Commission has "warned parties that in a section 337 investigation, evidence regarding remedy 'should, whenever possible, be presented to the ALJ, so that its accuracy and probative value can be evaluated by the ALJ and other parties prior to its presentation to the Commission in the remedy phase.'" *Certain Flash Memory Circuits and Products Containing Same,* Inv. No. 337-TA-382, Commission Opinion at 32 (June 9, 1997) (citation omitted). The risk of prejudice to other parties associated with the late timing of Fuji's request warrants denying the request. Moreover, the request appears premised on speculation. Fuji solicits injunctive relief for events that have not yet happened and for which there is no concrete evidence that they will happen. When and if such events take place or there exists evidence, rather than mere conjecture, to support the issuance of an appropriate remedial order, Fuji may attempt to seek relief from the Commission at that time. For all of these reasons, we deny Fuji's request.

III. Request For A Stay

Jazz and Mr. Benun request that the Commission stay any order for civil penalties pending the outcome of the appeal of this enforcement proceeding, and the appeal of the judgment in the parallel district court litigation.[17] They contend that delaying collection efforts against them is warranted here. Fuji and the IA oppose the request on the grounds that the criteria for such a stay are not met here.

To warrant the stay of an order pending appeal, the burden is on the moving party to establish (1) a likelihood of success on the merits of the appeal; (2) irreparable harm absent a stay; (3) insubstantial harm to the opposing party if the stay is granted; and (4) that the public interest supports the stay. *EPROMS* at 89, *citing Standard Havens v. Gencor Industries, Inc.*, 897 F. 2d 511 (Fed. Cir. 1991). Because an agency may be hard pressed to find the requisite likelihood of success in the challenge to its decision-making, the first factor is considered at the agency level in terms of whether there is a "difficult legal question" presented. *Id.*

The Commission need not decide the merits of the request, however, because for administrative as opposed to legal reasons, the Commission has decided not to pursue collection efforts against enforcement respondents prior to the resolution of any direct appeals of its determination to levy civil penalties. The Commission notes that it has similarly delayed collection efforts in prior penalty cases. The Commission's decision to forego immediate collection efforts eliminates the need for respondents' proposed relief, and renders the request for

---

[17] Mr. Cossentino joins the request without argument. The district court's judgment, as noted above, was subsequently affirmed.

a stay moot.

By order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: April 4, 2005

CERTAIN LENS-FITTED FILM PACKAGES **337-TA-406(ENFORCEMENT 2)**

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **OPINION ON ENFORCEMENT MEASURES,** was served upon the Commission Investigative Attorney, Karen Norton, Esq., and the following parties via first class mail and air mail where necessary on April 4, 2005.

Marilyn R. Abbott, Secretary
U.S. International Trade Commission
500 E Street, SW., Rm. 112
Washington, D.C. 20436

ON BEHALF OF FUJI PHOTO FILE COMPANY, LTD:

Lawrence Rosenthal, Esq.
Stroock and Stroock and Lavan LLP
180 Maiden Lane
New York, NY 10038

Will E. Leonard, Esq.
Adduci, Mastriani and Schaumberg LLP
1200 Seventeenth Street, NW
Fifth Floor
Washington, DC 20036

ON BEHALF OF JAZZ PHOTO CORP. AND JACK BENUM:

Jeffrey I. Kaplan, Esq.
Kaplan & Gilman, LLP
900 Route 9 North
Woodbridge, NJ 07095

George W. Thompson, Esq.
Neville Peterson, LLP
1900 M Street, NW
Suite 850
Washington, DC 20036

ON BEHALF OF ANTHONY COSSENTINO:

Arthur K. Purcell, Esq.
Sandler Travis & Rosenberg, P.A.
561 Fifth Avenue
New York, NY 10176