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ALJ Reverses Prior Domestic Industry Finding In Light of Lelo Inc. v ITC

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In a significant development in ITC domestic industry law, ALJ Pender has reversed his prior ruling in Certain Sleep-Disordered Breathing Treatment Systems and Components Thereof (337-TA-890) that Complainants had established a U.S. industry in their products—a prerequisite for investigations under Section 337. The reversal is based on the intervening Federal Circuit authority in *Lelo Inc. v. ITC*, 786 F. 3d 879 (Fed. Cir. 2015), which overturned the ITC's violation finding in *Certain Kinesiotherapy Devices and Components Thereof*, Inv. No. 337-TA-823 (June 17, 2013) on the ground that the ITC had not undertaken a "quantitative" analysis of the alleged domestic industry's investment in plant and equipment. If it stands, the ALJ's ruling will be important for its interpretation of the *Lelo* decision and for highlighting *Lelo's* potential impact on Section 337's domestic industry requirement by showing *Lelo's* effect in a case that had previously been decided in favor of Complainants.

The ALJ's original August 2014 ruling, which included a finding of violation of Section 337 based on patent infringement, was adopted by the Commission in December 2014. Respondents appealed to the Federal Circuit seeking review, *inter alia*, of the domestic industry determination. While their appeal was pending, the Federal Circuit decided the *Lelo* case. Almost one year later, on March 17, 2016, the ITC moved the Federal Circuit to remand the appeal in light of *Lelo*, and that motion was granted. The ITC then itself remanded the investigation back to ALJ Pender to apply *Lelo* to the existing record and to reconsider the prior conclusion that there was "significant investment" in plant, equipment, or labor as required by the statute.

Applying *Lelo*, the ALJ found that the domestic industry requirement was not satisfied and, therefore, there could be no violation of the statute. First, the ALJ considered the evidence of domestically supplied components, finding it "axiomatic" under *Lelo* that "the amount a complainant spends to purchase components manufactured in the United States is immaterial to the economic prong analysis." Next, the ALJ considered the claims that investments in "clinical education, service and repair, and customer service" were "quantitatively significant." Here, the ALJ found that Complainants' arguments "conflate[d]" qualitative arguments with quantitative arguments. The ALJ found a "comparative analysis" of investment to costs of goods sold "indicative" of "the quantitative insigni?cance of [complainants'] domestic expenditures in clinical education, service and repair, and customer service."

The ALJ's decision is subject to discretionary review by the ITC. Because the domestic industry requirement is a so-called "gatekeeping" requirement unique to Section 337, many of the legal developments worth tracking occur at the agency level, in cases such as this one. It will be interesting to see whether the ITC decides to review the decision and, if so, what it says about the ALJ's application of *Lelo* to this case and whether it provides more general guidance for the application of *Lelo* in future cases.

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