UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC

Before the Honorable Charles E. Bullock
Chief Administrative Law Judge

In the Matter of

CERTAIN INK APPLICATION DEVICES AND COMPONENTS THEREOF AND METHODS OF USING THE SAME

Investigation No. 337-TA-832

COMPLAINANTS' PRETRIAL BRIEF

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Pursuant to the Procedural Schedule (Order No. 9) and Ground Rule 8.2, Complainants' MT. Derm GmbH and Nouveau Cosmetique USA, Inc. ("Complainants") submit their Pre-Trial Brief.

I. INTRODUCTION

A. Procedural History

On January 30, 2012, Complainants filed a Complaint alleging, *inter alia*, that Respondent T-Tech Tattoo Device, Inc. ("T-Tech") has violated Section 337 by reason of the sale for importation of certain ink application devices and components thereof and the practice of methods of using the same that infringe certain claims of U.S. Patent No. 6,505,530 ("the '530 Patent"). (Document No. 470267.) The Commission issued a Notice of Institution of Investigation on February 29, 2012, which was published in the Federal Register on March 6, 2012. *See* 77 *Fed. Reg.* 13351 (Mar. 6, 2012).

A claim construction hearing was held on January 4, 2013. On February 8, 2013, the Chief Judge issued Order No. 21, construing the disputed terms of the asserted claims of the '530 Patent.

On January 7, 2013, Complainants filed a motion for sanctions against T-Tech for failure to cooperate in discovery. (Document No. 500548.) The Chief Judge determined that T-Tech's discovery responses were "incomplete and inconsistent" and imposed sanctions pursuant to 19 C.F.R. § 210.33(b)(3) and (4). (Order No. 24 at 3-5.) Specifically, Order No. 24 precludes T-Tech from introducing into evidence any documents not yet produced or identified or otherwise rely upon testimony by any T-Tech witness in support of its position in this Investigation where T-Tech has indicated that such documents or information do not exist. *Id.* at 4-5. In addition, T-Tech cannot

object to the introduction and use of secondary evidence to show what the missing documents would have shown. *Id.* at 5.

On March 26, 2013, the Chief Judge issued Order No 27, which denied T-Tech's third motion for summary determination of invalidity. In that Order, the Chief Judge determined that T-Tech had failed to plead the affirmative defense of invalidity, and the issue was therefore waived. *Id.* at 2. Accordingly, T-Tech will not be permitted to introduce evidence or otherwise raise an invalidity defense in this Investigation. *Id.*

On March 20, 2013, Complainants filed their motion for summary determination of violation of Section 337. (Document No. 506140.) That motion asserts that no genuine factual disputes exists as to T-Tech's "EZ Needle Cartridge" and "EZ Grip" products (collectively, the "Accused Products") infringement of the asserted claims of the '530 Patent, as supported by unrebutted expert testimony of Complainants' technical expert.[1] Complainants' motion further contends that summary determination is appropriate because the importation requirement is satisfied (and admitted to), that Complainants satisfy both the economic and technical prongs of the domestic industry requirement, and that the '530 Patent is not invalid. In the event of a finding of violation of Section 337, Complainants' motion further requested the entry of a limited exclusion order as to the infringing products and the imposition of a 100% bond during the Presidential review period. On March 28, 2013, T-Tech filed its opposition to Complainants motion for summary determination. (Document No. 506591.) As discussed herein, T-Tech's Opposition did not challenge a number of issues raised in

[1]T-Tech is accused of infringing apparatus claims 1-3, 7, and 8 and method claims 19 and 20 of the '530 Patent. Claims 1-3, 7, 8, 19 and 20 are referred to collectively as "the asserted claims."

Complainants' motion for summary determination, including, *e.g.*, jurisdiction, importation, technical prong, remedy and bonding. Nor did T-Tech challenge that the T-Tech EZ Needle Cartridges infringe the '530 patent when used with MT.Derm's Cheyenne Hawk Tattoo Machine. Because each of Complainants arguments and evidence on these issues were unopposed, T-Tech should not be heard from at trial on any of these issues. Additionally, T-Tech is precluded from challenging patent validity by virtue of Order No. 27. The Commission Investigate Staff ("Staff") filed its response to Complainants' motion on April 2, 2013 supporting summary determination that T-Tech violated Section 337.[2] (Document No. 506804.)

On April 5, 2013, Complainants served their proposed direct exhibits, including direct witness statements of its fact witnesses Joern Kluge, Robert Waters, and Dado Dzigal, along with the witness statement of Complainants' expert Dr. David L. Trumper addressing infringement and Complainants' satisfaction of the technical prong of domestic industry. T-Tech served no exhibits and no witness statements by the required deadline. T-Tech has not otherwise identified any exhibits, witnesses, or experts in the manner specified by the Procedural Schedule for this Investigation (Order No. 9). Thus, to the extent T-Tech is permitted to participate at the hearing,[3] it is expected that T-Tech

[2] In its Response, the Staff opposed the motion only to the extent it sought summary determination that sales of the T-Tech EZ Grip alone contribute to infringement. (Document No. 506804 at 16-17 and 21-22.) However, the Staff supported Complainants' motion as to T-Tech's sales of the EZ Grip inducing infringement. (*Id.*)

[3] As set forth in Complainants' concurrently filed Pre-Trial Statement, T-Tech failed to respond to Complainants' request for an estimated time of cross examination of Complainants' witnesses. T-Tech has further failed to respond to Complainants' efforts to arrange for a fourth settlement conference, which Order No. 28 directed both private parties to conduct. In addition, Order No. 25 directed T-Tech to secure the services of a translator mutually acceptable to all parties for the hearing, but Complainants have to date received no communication regarding a proposed translator.

would be precluded from introducing any evidence on its behalf. Indeed as of the date of this filing, Complainants are unaware of what documents, witnesses, exhibits, proposed testimony or substantive or procedural issues T-Tech plans to raise or will be permitted to raise at the hearing.

B. The Parties

1. Complainants MT.Derm and Nouveau Cosmetique

MT. Derm GmbH ("MT.Derm") is a privately held German company located in Berlin, Germany. MT. Derm designs, produces, and markets apparatuses and related components for use in the permanent makeup, medical, and tattooing industries. MT.Derm's products are sold primarily in Western Europe, the United States, Asia, Eastern Europe and the Middle East. MT.Derm is the owner by assignment of the asserted '530 Patent. (CX-49C at Q1, Q5-Q10.)

With respect to the permanent makeup field, MT.Derm manufactures a line of permanent makeup (PMU) devices that utilize its disposable needle cartridge design. These PMU devices, and the associate needle cartridges, are sold in the United States by Nouveau Cosmetique USA, Inc. ("Nouveau Cosmetique") under an exclusive license of the '530 Patent from MT.Derm. These PMU products are sold by Nouveau Cosmetique under the Nouveau Contour brand, including the Intelligent, Digital and Simplicity machines and associated needle cartridges. (CX-49C at Q12 and Q14.)

In the tattooing field, MT.Derm commercializes products under its Cheyenne product line, including its Cheyenne Hawk tattoo machines and MT.Derm's disposable needle cartridges designed specifically for use with these machines. (CX-49C at Q14.)

Nouveau Cosmetique is a joint venture between principals of MT.Derm and NouveauContour BV (located in the Netherlands) and is a provider of ink application

device products and services to customers throughout the United States. Nouveau Cosmetique maintains an office location in Orlando, Florida, where it provides a number of services related to the Nouveau Contour PMU products, including importation, marketing, sales, customer and product support, and repair services. Nouveau Cosmetique also operates the Nouveau Contour Academy from its Orlando location, which is a state certified training facility that is devoted exclusively to training permanent makeup professionals on the use of the Nouveau Contour PMU products for permanent makeup application. (CX47C at Q7 to Q10, Q36 to Q40.)

2. Respondent T-Tech

Respondent T-Tech Tattoo Device, Inc. is a located Ontario, Canada. Long Xiao is the owner of T-Tech and the designer of its products. T-Tech designs and sells tattooing equipment, such as needle cartridges used in tattoo machines and grips for tattoo machines. T-Tech operates a website (www.ttechtattoo.com) that advertises, promotes, and accepts orders for its products, including the accused T-Tech EZ Needle Cartridge and EZ Grip products. (CX-13.)

C. Overview of the Technology

As Complainant's technical expert Dr. Trumper explains, the technology of the '530 Patent and at issue in this Investigation relates to devices for applying ink to the skin for tattooing or permanent makeup procedures. These devices are conventionally referred to as "tattoo machines," and their basic purpose is to inject ink, dye, or some other marking fluid below the surface of the skin so that the ink is retained in the skin and that the design formed by the ink is visible. (CX-48 at Q33.)

Tattoo machines are typically constructed with some form of needle that will penetrate the skin while conveying a quantity of ink beneath the skin surface. A

mechanism is provided to drive the needle in a reciprocating fashion such that the needle repeatedly punctures the skin and the ink is injected under the surface. Typically this would include a small electric motor and mechanical linkage that converts the rotary motion of the motor into the reciprocating motion needed to drive the needle. Alternately, some machines use coils and an interrupted current path to cyclically drive an iron bar which drives the needle. (CX-48 at Q33.)

The process of applying tattoos and permanent makeup poses significant health risks. The repeated puncturing of the skin by the reciprocating needle in a tattooing procedure results in the release of blood and other bodily fluids. Exposure to these fluids presents a potential for components of the tattoo machine to become contaminated during use, thereby exposing subsequent customers to these bodily fluids. If appropriate steps are not taken to either replace or sanitize the potentially contaminated components, the tattoo machine may inadvertently transmit infectious diseases such as HIV and hepatitis to customers receiving tattoos or permanent makeup procedures. (CX-48 at Q33.)

D. The Patent at Issue

U.S. Patent No. 6,505,530 ("the '530 Patent"), entitled "Ink Application Device for Tattooing or for Making Permanent Make-up," issued on January 14, 2003. The application for the '530 Patent (Application Serial No. 10/072,991) was filed on February 12, 2002 as a continuation of an earlier filed application. (CX-2.) That application, Application Serial No. 09/671,553, was filed on September 28, 2000 and ultimately issued as U.S. Patent No. 6,345,553 ("the '553 Patent") on February 12, 2002. (CX-1.) Both the '530 Patent and the '553 Patent claim priority to a German application (DE 299 19 199 U) filed October 22, 1999. (CX-1; CX-2; CX-48 at Q31.)

The disclosure of the '530 Patent is directed to a unique disposable needle cartridge design for an ink application device, such as the type used for tattooing or applying permanent makeup. The practice of tattooing and applying permanent makeup involves an operator using a machine with a reciprocating needle that repeatedly pierces the customer's skin to apply ink to the treated area. As a result of the needle piercing the skin in this process, bodily fluids from the customer, including blood or blood serum, can be transmitted from the customer's skin to the needle of the tattoo machine as well as other parts of the tattoo machine that come into contact with the needle and/or the customer's skin. (CX-2 at 1:18-37; CX-48 at Q33.)

Due to these hygienic concerns, certain parts of the tattoo machine, such as the needle, are removed and disposed after each use. Other parts that could potentially become contaminated must be disassembled in order to carefully clean and sterilize them before reassembling the components for another tattooing procedure. This process of disassembling multiple components of the tattoo machine after each use, cleaning and sterilizing the contaminated reusable parts, replacing the disposable needle, and reassembling all the components for use with another customer entailed a considerable amount of time, particularly when multiple tattoo procedures are performed during the course of a day. Also, the user was required to expend considerable effort to ensure that all the reusable parts were properly decontaminated and sanitized so that subsequent customers were not exposed to contagions from another's bodily fluids. (CX-2 at 1:37-67; CX-48 at Q33.)

Considering these problems with conventional tattoo machines, the '530 Patent discloses a modular or ink application device design in which a basic module comprises

reusable components of the device, such as the handle and the components that drive the needle. In addition, a disposable module is provided that is removably attached to the basic module. The disposable module contains the components of the ink application device that are capable of being infected by bodily fluids during a tattoo procedure. After use, the contaminated disposable module is simply removed and discarded. Then, a new disposable module is attached to the basic module, ensuring the sterility of the device and ink for each customer. This modular design also improves the efficiency of the preparing the ink application device for a new procedure, as compared to prior approaches requiring extensive disassembly and cleaning of individual components, by providing for a simple removal of the used needle cartridge and replacement with a new, sterile cartridge. (CX-48 at Q33.)

The '530 Patent describes an embodiment of such an ink application device with reference to Figure 1. The structure includes a basic module, which is described as a "conventional handle," and a detachable disposable module that is attached to the basic module. The basic module includes the components for driving the needle, such as an electric motor together with mechanical linkage to convert the rotary motion of the motor into reciprocal motion for driving a needle. Figure 1 shows a portion of this drive structure as element 21, which is a rod that contacts the needle shaft of the disposable module when it is inserted. (CX-48 at Q36.)

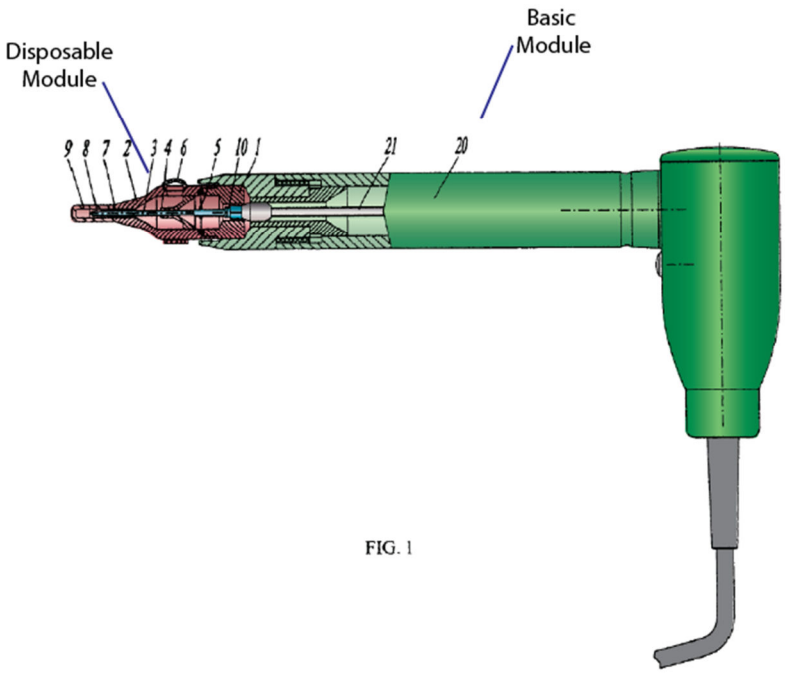
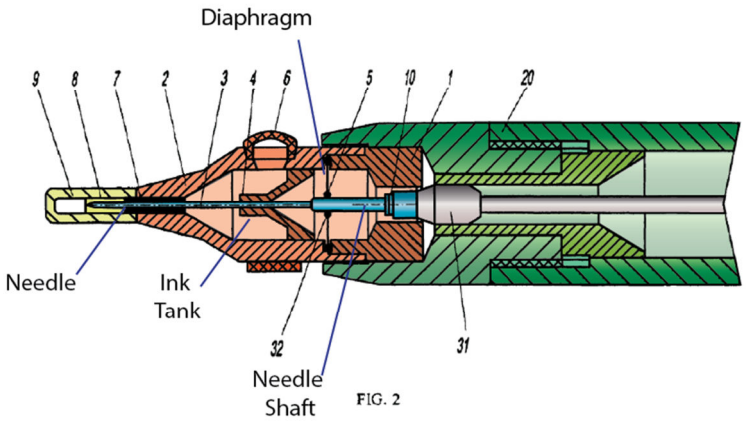


FIG. 1

CDX-5-001

Details of the design of the disposable module are shown in Figure 2 of the '530 Patent. The disposable module structure includes a housing with a rear housing part 1 and a front housing part 2. Within the housing, a needle 3 is supported by a sealing and bearing element 4 and by bearing sleeve 7. The bearing sleeve is structured so that reciprocating movement of the needle will transfer ink from within the housing to outside the disposable module for injection into the skin. (CX-48 at Q37.)

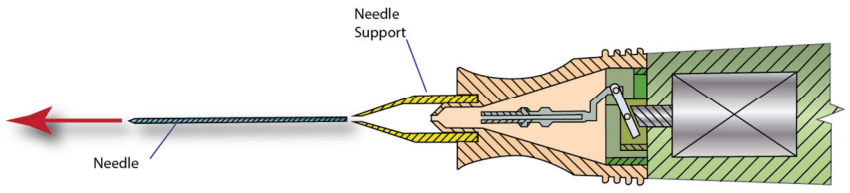
According to the '530 Patent, the disposable module is operatively installed into the basic module for use in a tattooing procedure by inserting the rear housing part of the disposable module into the basic module. The basic module is provided with a generally cylindrical cavity at its end that receives the corresponding outer dimension of the rear housing of the disposable module. This connection between the basic module and the disposable module provides a simple one-piece installation and disposal operation. (CX2 at 2:49-52; CX-48 at Q39.)



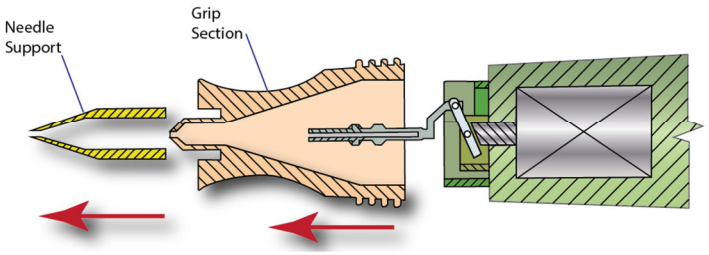
CDX-5-002

The claimed ink application device (and method for using it) at issue in this Investigation represents a significant advance over prior approaches, such as in U.S. Patent No. 5,473,449 ("Chou '449") (CX-37), which was relied upon during the prosecution of the '530 Patent application (CX-28-037 to -042). As Dr. Trumper explains, Chou '449 describes a tattoo device that consists of multiple components that required separate removal and disassembly. As shown in annotated Figure 1 at CDX-6-001, the pigment application device of Chou includes a disposable finger grip section 14 that is attached to the housing 12. The grip section 14 is inserted over a flange 46 of the housing, which retains the grip by a friction fit. (CX-48 at Q40 to Q42.)

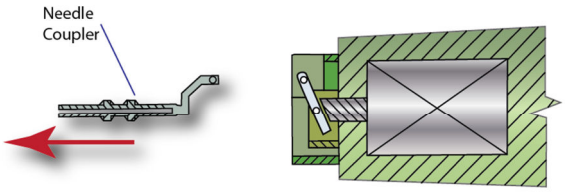
The device of Chou '449 consisted of multiple components that were individually assembled in order to perform an ink application procedure. (CX-48 at Q45.) Thus, removal of each of these components involved multiple discrete steps. (CX-48 at Q46.)



CDX-6-007



CDX-6-008

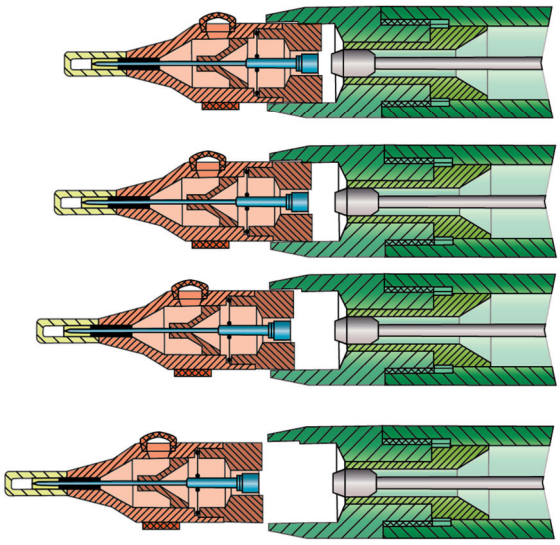


CDX-6-009

During prosecution, the applicant of the '530 Patent pointed to this disadvantage of Chou '449's design, arguing that Chou '449 did not disclose the feature of "simultaneously removing the entire disposable module from the basic module directly following an application of ink using the ink application device." The Applicant explained that Chou '449 did not disclose this simultaneous removal of the entire disposable module because the Chou '449 "device comes apart in pieces and he does not have the ability to remove the entire disposable module simultaneously." (CX-28-061; CX-48 at Q47.)

The Applicant further explained that Chou's device required that the needle and grip portion be "separately connected and detached from the body portion 62." In contrast, the claimed disposable module included a needle and needle nozzle "connectable to an integrated needle drive as one single unit." As the Applicant pointed out, the claimed arrangement provided the option to "replace all those potentially infected components in a single step by replacing the disposable module," which saved time and resulted in a hygienically safer procedure. (CX-28-062; CX-48 at Q47.)

In contrast, the disposable module design of the '530 Patent allows for a single step removal of the entire needle cartridge. (CX-48 at Q82.)



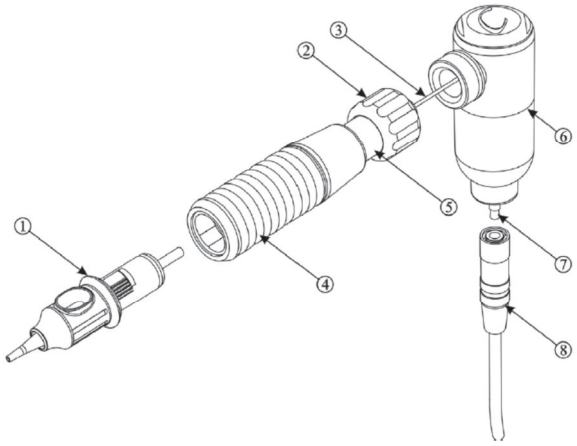
CDX-5-004

E. The Products at Issue

1. Complainants' Domestic Industry Products

a) MT.Derm's Cheyenne Hawk Tattoo Machines and Needle Cartridges

MT. Derm designs, manufactures and sells ink application devices under the Cheyenne® product line, including the Cheyenne® Hawk Tattoo Machine and the Cheyenne® Needle Cartridges designed for use with the tattoo machine. The Cheyenne® Hawk Tattoo Machine includes a drive unit and detachable grip, or handle. The disposable Cheyenne® Needle Cartridges are inserted into the grip of the tattoo machine for use in a tattooing procedure. Following use, the cartridge can be easily removed, disposed of, and replaced with a new needle cartridge.



CX-10-003

The basic design of the Cheyenne® Hawk Needle Cartridge includes a self-contained module (cartridge) with a needle that is movable relative to the outer housing of the cartridge. In operation, when installed on the Cheyenne® Hawk Tattoo Machine, the reciprocating needle of the needle cartridge will deliver ink to the dermis of the skin. (CX-49C at Q19 to Q22.)

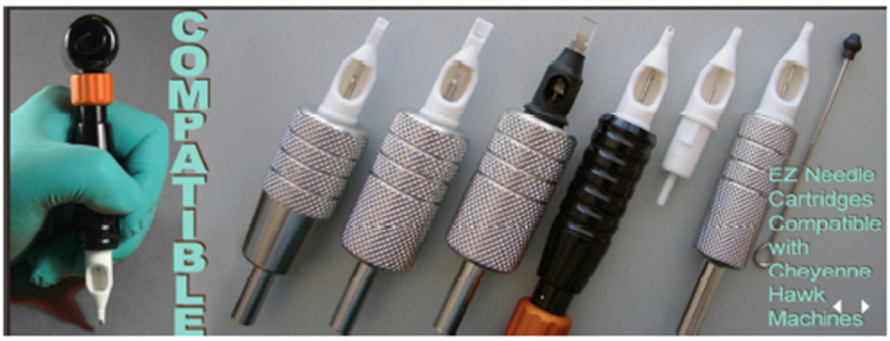
b) Nouveau Contour PMU Devices and Needle Cartridges

The Nouveau Contour PMU Devices manufactured by MT. Derm utilize the same cartridge technology of the Cheyenne® Hawk, but on a slightly smaller scale. As with the Cheyenne® Hawk, the Nouveau Contour PMU Devices utilize disposable needle cartridges that are designed to be inserted into the handle of the PMU Device, which includes a motor for driving the needle in a permanent make-up application procedure. After use, the entire needle cartridge is removed from the PMU Device for disposal. (CX-49C at Q19 to Q22.)

CX-44-011

2. The Accused T-Tech Products

T-Tech sells needle cartridges under the "EZ Needle Cartridge" brand that it markets as being compatible with MT. Derm's Cheyenne® Hawk Tattoo Machine. (CX-49C at Q79-81; CX-13-089; Document No. 482356, Request of T-Tech Tattoo Device, Inc., dated June 5, 2012, at p. 1.)



CX-13-089

These EZ Needle Cartridges, which are referred to as the "T-Tech Accused Needle Cartridges," include:

Super Long Taper Liner 1203RLT
Super Long Taper Liner 1205RLT
Super Long Taper Liner 1207RLT
Super Long Taper Liner 1209RLT
Round Liner 1203RL
Round Liner 1205RL
Round Liner 1207RL
Round Liner 1208RL
Round Liner 1209RL

Round Liner 1214RL
#10 Bugpin Round Liner 1003RL
#10 Bugpin Round Liner 1005RL
#10 Bugpin Round Liner 1007RL
#10 Bugpin Round Liner 1009RL
Round Shader 1205RS
Round Shader 1207RS
Round Shader 1208RS
Round Shader 1209RS
Round Shader 1214RS
Magnums / Short Taper 1205M1
Magnums / Short Taper 1207M1
Magnums / Short Taper 1209M1
Magnums / Long Taper 1205M1-L
Magnums / Long Taper 1207M1-L
Magnums / Long Taper 1209M1-L
Magnums / Long Taper 1211M1-L
Magnums / Long Taper 1213M1-L
Magnums / Long Taper 1215M1-L
EZ Needle Cartridge 1207MR
EZ Needle Cartridge 1209MR
EZ Needle Cartridge 1211MR
EZ Needle Cartridge 1213MR
EZ Needle Cartridge 1215MR
Curved Magnums / Long Taper 1207RM-L
Curved Magnums / Long Taper 1209RM-L
Curved Magnums / Long Taper 1211RM-L
Curved Magnums / Long Taper 1213RM-L
Curved Magnums / Long Taper 1215RM-L
Curved Magnums / Long Taper 1223RM-L
Flat Needles / Long Taper 1205F
Flat Needles / Long Taper 1207F
#10 Bug Pin Curved Magnums / Long Taper 1011RM-L
#10 Bug Pin Curved Magnums / Long Taper 1013RM-L
#10 Bug Pin Curved Magnums / Long Taper 1015RM-L
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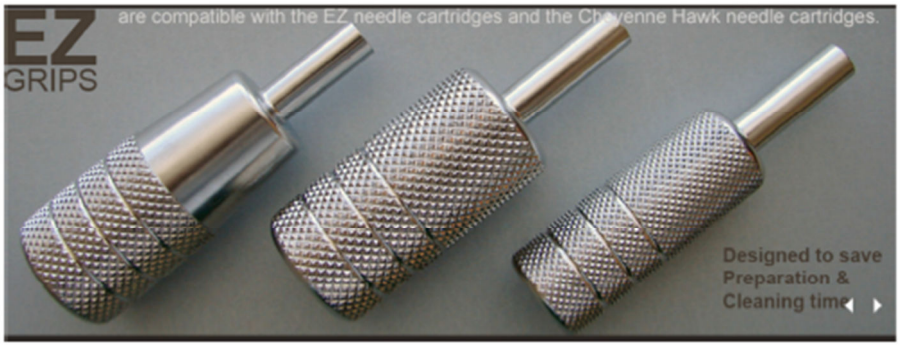
#10 Bug Pin Magnums / Long Taper 1013M1-L
#10 Bug Pin Magnums / Long Taper 1015M1-L

(CX-39-001 to -002.)

T-Tech also offers "EZ Grip" products, which is used with a "Drive Bar" provided by T-Tech to allow the EZ Needle cartridges to be used with conventional tattoo machines. (CX49C at Q82; CX-13-089 and -090.)



CX-13-090

The EZ Grip products, which are referred to as the "T-Tech Accused Grips," include:

EZ Standard Grips 19mm
EZ Standard Grips 25mm
EZ Contoured Grips 25mm
EZ Needle Drive Bar L84D65
EZ Needle Long Drive Bar L88D65
(CX-39-001 to -002.)

Collectively, the T-Tech Accused Products include the T-Tech Accused EZ Needle Cartridges and the T-Tech Accused EZ Grips. (CX-39-001 to -002.)

II. JURISDICTION

Section 337(a)(1)(B) declares unlawful:

> (B) The importation into the United States, the sale for importation, or the sale within the United State after importation by the owner, importer, or consignee of articles that (i) infringe a valid and enforceable United States patent or a valid and enforceable United States [registered] copyright . . . .
>
> 19 U.S.C. § 1337(a) (1)(B).

A complainant "need only prove importation of a single accused product to satisfy the importation element." *Certain Purple Protective Gloves*, ITC Inv. No. 337-TA-500, Order No. 17 (Sept. 23, 2004); *Certain Trolley Wheel Assemblies*, ITC Inv. No. 337-TA-161, Comm'n Op. at 7-8, USITC Pub. 1605 (Nov. 1984) (finding importation requirement satisfied by the importation of single trolley wheel assembly of no commercial value.) It is well-settled that section 337 extends not only to articles that directly infringe, but also to those products that contributorily infringe or induce infringement.[4]

In its Opposition to Complainants' Motion for Summary Determination, T-Tech did not dispute Complainants' showing as to the importation requirement. (Document No. 506591.). T-Tech has conceded importation.

Further, through its responses to Complainants' discovery requests, T-Tech has confirmed that it has imported the Accused Products into the United States. Specifically, T-Tech admitted that it received orders for the accused products from customers located in the United States, that it accepted those orders, that the accused products were actually sold to customers located in the United States, that it shipped one or more of the accused products from Canada to customers located in the United States, further admitting that T-Tech specifically caused the Accused Products to be imported from Canada into the United States as a result of sales to customers located in the United States. (CX-42 at RFA Nos. 60-66.)

[4] *See Certain Hardware Logic; Emulation Systems*, Inv. No. 337-TA-383, USITC Pub. No. 3089, 1998 ITC LEXIS 64, at *36-37 (April 1, 1998); *Certain Sputtered Carbon Coated Computer Disks and Products Containing Same, Including Disk Drives*, USITC Pub. No. 2701, Inv. No. 337-TA-350, Comm'n Op. at 11 (Nov. 1993).

Apart from these admissions, there is further evidence of a sale by T-Tech to a customer in New York of the accused T-Tech EZ Needle Cartridges. (CX-49C at Q77 to Q78; CX-18C; CX-19.) This evidence shows that T-Tech shipped 50 accused T-Tech EZ Needle cartridges to a customer in New York City, New York in November 2010. *Id.*

In view of T-Tech's admitted importation of the Accused Products into the United States and the evidence of an actual shipment from Canada to New York submitted with the Complaint, there can be no dispute that Complainants have satisfied the jurisdictional importation requirement. *See Certain Mobile Communication and Computer Devices and Components Thereof*, ITC Inv. No. 337-TA-704, Order No. 48, 2010 WL 4790000 at *2 (Oct. 5, 2010).

Also, T-Tech has submitted to personal jurisdiction of the Commission by responding to the Complaint in the above referenced investigation.[5] Moreover, T-Tech has participated in this Investigation, including filing numerous summary determination motions, which were all denied. This satisfies the jurisdictional requirements of 19 U.S.C. § 1337.

III. THE '530 PATENT

A. Claim Construction

The claim terms of the '530 Patent were previously construed by the Chief Judge in Order No. 21 as follows:

- The term "means for allowing simultaneous removal of the entire disposable module from the basic module" was construed as a "means-plus-function" limitation. The function was identified as "allowing

[5] *See Certain NOR and NAND Flash Memory Devices and Products Containing the Same*, USITC Pub. No. 4013, Inv. No. 337-TA-560, Comm'n Op. at 17 (June 2008).

simultaneous removal of the entire disposable module from the basic module." The structure was identified as "(1) a rear housing part 1 of the disposable module that is connected to, and detachable from, the basic module, as shown in Figures 1 and 2 of the '530 patent; (2) an optional magnetic connection between elements 10 and 31, as shown in Figure 2 and discussed at col. 4, lines 26-34; and (3) an optional clamping device provided in the basic module to connect with the needle." (Order No. 21 at 7-8.)

- The term "integrated needle drive" was construed to mean "needle drive incorporated into the basic module." (Order No. 21 at 18-19.)
- The term "simultaneous removal of the entire disposable module from the basic module" was construed to mean "removal of the entire disposable module in a single step." (Order No. 21 at 26.)
- The term "simultaneously removing the entire disposable module from the basic module" was construed to mean "removing the entire disposable module in a single step." (Order No. 21 at 26.)

All other terms were deemed undisputed and to be interpreted in accordance with "their plain and ordinary meaning as viewed by one of ordinary skill in the art." (Order No. 21 at 2.) The Chief Judge's claim construction ruling also found that, as to the '530 Patent, one of ordinary skill in the art would have a bachelor's degree in mechanical engineering, or an equivalent field, with at least two years of experience in the design of fluid-handling mechanisms. Further, one of ordinary skill in the art would be commensurate with the time of the invention. (Order No. 21 at 5.)

B. Infringement

A finding of infringement requires a two-step analytical approach. First, the asserted patent claims must be construed as a matter of law to determine their proper scope. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) (*en banc*), *affd*, 517 U.S. 370 (1996); *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1455 (Fed. Cir. 1998). Second, a factual determination must be made as to whether the properly construed claims read on the accused devices. *Markman*, 52 F.3d at 976.

In a Section 337 investigation, a complainant bears the burden of proving infringement of the asserted patent claims by a preponderance of the evidence. *Certain Flooring Products*, Inv. No. 337-TA-443, Commission Notice of Final Determination of No Violation of Section 337, 2002 WL 448690 at 59, (March 22, 2002); *Enercon GmbH v. Int'l Trade Comm'n*, 151 F.3d 1376 (Fed. Cir. 1998). Proof of direct infringement requires the complainant to establish, by a preponderance of the evidence, that one or more claims of the asserted patent read on the accused device literally or under the doctrine of equivalents. *Spansion, Inc. v. Int'l Trade Comm'n*, 629 F.3d 1331, 1349 (Fed. Cir. 2010).

Literal infringement of a claim occurs when every limitation recited in the claim appears in the accused device, *i.e.*, when the properly construed claim reads on the accused device exactly. *Amhil Enters., Ltd. v. Wawa, Inc.*, 81 F.3d 1554, 1562 (Fed. Cir. 1996); *Southwall Tech. v. Cardinal IG Co.*, 54 F.3d 1570, 1575 (Fed Cir. 1995).

If the accused product does not literally infringe the patent claim, infringement might be found under the doctrine of equivalents. Under the doctrine of equivalents, infringement may be found if the accused product or process performs substantially the same function in substantially the same way to obtain substantially the same result.

Valmont Indus., Inc. v. Reinke Mfg. Co., 983 F.2d 1039, 1043 (Fed. Cir. 1993). Infringement under the doctrine of equivalents may also be demonstrated by the insubstantial differences test, where "[a]n element in the accused device is equivalent to a claim limitation if the only differences between the two are insubstantial." *Honeywell Int'l Inc. v. Hamilton Sundstrand Corp.*, 370 F.3d 1131, 1139 (Fed. Cir. 2004).

Direct infringement occurs where a party to performs or uses each and every step or element of a claimed method or product. 35 U.S.C. § 271(a); *BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1378 (Fed. Cir. 2007). Direct infringement may be proven by direct evidence or circumstantial evidence that the accused device necessarily infringes the patent in suit. *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 700 (Fed. Cir. 2008); *ACCO Brands, Inc. v. ABA Locks Mfr. Co.*, 501 F.3d 1307, 1313 (Fed.Cir.2007). Further, direct evidence of direct infringement is unnecessary where circumstantial evidence indicates that direct infringement occurs. *Certain Foam Masking Tape*, Inv. No. 337-TA-528, Order No. 41, 2005 WL 1597282 at *7 (June 21, 2005) (citing *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261, 1272 (Fed. Cir. 1986).)

Although an accused party might not directly infringe a claim, such as by practicing the steps of a method claim, the party may be liable for inducement or contributory infringement under 35 U.S.C. §§ 271(b) or (c). *See, e.g., Linear Tech. Corp. v. Impala Linear Corp.*, 379 F.3d 1311, 1326 (Fed. Cir. 2004); *see also Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc.*, 145 F.3d 1303, 1311-12 (Fed. Cir. 1998). Indirect infringement requires proof of direct infringement, which may be proven by circumstantial evidence including evidence which shows that the accused device has no practical use other than in an infringing system. *See Preemption Devices, Inc. v.*

Minnesota Min. & Mfg. Co., 803 F.2d 1170, 1173 (Fed. Cir. 1986); *see also Moleculon Research Corp.*, 793 F.2d at 1272.

Section 271(b) of the patent statute provides that one who "actively induces infringement of a patent shall be liable as an infringer." Under § 271(b), inducement exists if the alleged inducer (1) knowingly caused the acts that constituted direct infringement, and (2) possessed specific intent to encourage those acts of direct infringement. *DSU Medical Corp. v. JMS Co.*, 438 F.3d 1354, 1364 n.4 (Fed. Cir. 2006) (citing *MEMC Elec. Materials, Inc. v. Mitsubishi Materials Silicon Corp.*, 420 F.3d 1369, 1378 (Fed. Cir. 2005)). The intent requirement for inducement may be shown by circumstantial evidence. *DSU Med. Corp.*, 471 F.3d at 1306 (quoting *Water Techs. Corp. v. Calco, Ltd.*, 850 F.2d 660, 668 (Fed. Cir. 1988) ("While proof of intent is necessary, direct evidence is not required; rather, circumstantial evidence may suffice.")); *Broadcom Corp.*, 543 F.3d at 699. The Supreme Court recently held that "induced infringement under §271(b) requires knowledge that the induced acts constitute patent infringement." *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S.Ct. 2060, 2068 (2011). Liability for induced infringement also exists where a defendant "willfully blinds itself to the infringing nature" of the actions it encourages. *Id*. at 2070-71.

"Under 35 U.S.C. § 271(c), a party who sells a component with knowledge that the component is especially designed for use in a patented invention, and is not a staple article of commerce suitable for substantial non-infringing use, is liable as a contributory infringer." *Spansion*, 629 F.3d at 1353 (quoting *Wordtech Sys., Inc. v. Integrated Networks Solutions, Inc.,* 609 F.3d 1308, 1316 (Fed. Cir. 2010)). To prevail on contributory infringement in a Section 337 case, the complainant must establish: (1) an

act of direct infringement in violation of Section 337; (2) the accused device has no substantial non-infringing uses; and (3) the accused infringer imported, sold for importation, or sold after importation within the United States, the accused components that contributed to another's direct infringement. *Spansion,* 629 F.3d at 1353. A purported non-infringing use that is "unusual, far-fetched, illusory, impractical, occasional, aberrant, or experimental" does not qualify as a "substantial non-infringing use." *Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1327 (Fed. Cir. 2009).

In addition to the foregoing factors, the Federal Circuit has explained that the patentee must also demonstrate that the alleged infringer "knew that the combination for which its components were especially made was both patented and infringing." *Golden Blount, Inc. v. Robert H. Peterson Co.*, 365 F.3d 1054, 1061 (Fed. Cir. 2004) (quoting *Preemption Devices, Inc. v. Minn. Mining & Mfg., Co.*, 803 F.2d 1170, 1174 (Fed. Cir. 1986)).

Under contributory infringement, a device may be found to infringe if it is reasonably capable of satisfying the claim limitations, even though it may also be capable of non-infringing modes of operation. *Hilgraeve Corp. v. Symantec Corp.*, 265 F.3d 1336, 1343 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 906 (2002) ("the sale of a device may induce infringement of a method claim, even if the accused device is capable of non-infringing modes of operation in unusual circumstances"); *Vesture Corp. v. Thermal Solutions, Inc.*, 284 F. Supp. 2d 290, 317 (M.D.N.C. 2003) ("Although it is certain that there are possible non-infringing uses for Vesture's product, '[i]t is not enough... that a product or service be physically capable, as it were, of a noninfringing use.' *In re Aimster Copyright Litig.*, 334 F.3d 643, 653 (8th Cir. 2003)."); *D.O.C.C. Inc. v. Spintech Inc.*, 36

U.S.P.Q.2d 1145, 1155 (S.D.N.Y. 1994) ("Contributory infringement liability is not meant for situations where noninfringing uses are common as opposed to farfetched, illusory, impractical or merely experimental"). A respondent must show that the suitability of the product for the alleged noninfringing use is actual and substantial. *Fromberg Inc. v. Thornhill*, 315 F.2d 406, 415 (5th Cir. 1963).

In this Investigation, Complainants' expert testimony demonstrates that direct infringement of the asserted claims occurs when the T-Tech EZ Needle Cartridges in either of two configurations: (1) with MT. Derm's Cheyenne® Hawk tattoo machine or, (2) in combination with T-Tech's EZ Grip product and a conventional tattoo machine. The Accused EZ Needle Cartridges are incapable of being used in any fashion that is not infringing. (CX48 at Q26.) T-Tech neither disclosed an expert witness, provided an expert report on the dates specified in the Procedural Schedule (Order No. 9), nor otherwise rebutted the testimony of Dr. Trumper.

In addition to Dr. Trumper's analysis, direct and circumstantial evidence confirms that direct infringement of these claims has occurred in the United States and continues to occur by tattoo artists that are using the T-Tech Accused Products. T-Tech's own admissions regarding its knowledge of the '530 Patent, its copying of the patented technology, its promotion of the Accused Products as being directly compatible with Complainants' tattoo machine, and related evidence demonstrate T-Tech both contributes to and induces infringement of the '530 Patent by its ongoing sales and importation of the Accused Products into the United States.[6]

[6] In addition to Dr. Trumper's testimony, as well as testimony of Complainants' witnesses Joern Kluge and Dado Dzigal pertaining to infringement, Complainants intend

The presence of the claimed elements in the T-Tech accused products is readily confirmed by a visual inspection of the components, as provided in Dr. Trumper's testimony. T-Tech largely admits that the Accused Products include these elements. For instance, as to claims 1 and 19, T-Tech has conceded that the accused EZ Needle Cartridges include: an outer housing (CX-42 at RFA No. 1), a needle (CX-42 at RFA No. 2), the needle being supported at one end by a needle nozzle (CX-42 at RFA No. 3), the needle is supported at another end by a portion that contacts the needle drive (CX-42 at RFA No. 4), that the needle is movable relative to the outer housing (CX-42 at RFA No. 5), an ink receiving portion disposed around the needle (CX-42 at RFA No. 6). Further, as to claim 19, T-Tech has admitted that the Accused EZ Needle Cartridges are designed for applying ink to a surface. (CX-42 at RFA No. 28.) As to claims 7 and 8, T-Tech admits that its EZ Needle Cartridges include a needle shaft that can contact an integrated needle drive (CX-42 at RFA No. 25) and that the needle shaft being cylindrical (CX-42 at RFA No. 26).

To the extent that T-Tech has identified the basis of its non-infringement contentions, its arguments are based on claim construction positions that have been rejected. In particular, T-Tech identified only the features of the "integrated needle drive" and the "simultaneous removal of the entire disposable module" as being disputed. (CX-41 at No. 12.) Further, T-Tech only disputes the presence of the "integrated needle drive" limitation in the "EZ Grip" configuration, but makes no such challenge when the accused EZ Needle cartridges are used with the Cheyenne® Hawk tattoo machine. (CX-41 at No. 12.) However, when the Administrative Law Judge's construction of the

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to call T-Tech's owner Long Xiao as a direct adverse witness at the Hearing and expect his testimony to further support a finding of infringement.

"integrated needle drive" and the "simultaneous removal of the entire disposable module" terms are properly considered, as applied in Dr. Trumper's testimony (CX-48 at Q48 to Q53), the evidence will establish that T-Tech has no reasonable basis to challenge infringement.

Dr. Trumper's analysis confirms that every element of the asserted claims is present in the Accused T-Tech products, when used as designed and intended for their only purpose. Dr. Trumper performed an analysis for the two configurations that the EZ Needle cartridge is capable of being used in. First, Dr. Trumper analyzed the T-Tech EZ Needle cartridge used with MT. Derm's Cheyenne® Hawk tattoo machine.[7] Dr. Trumper then analyzed the T-Tech EZ Needle cartridge used with the T-Tech EZ Grip (and associated T-Tech Drive Bar) in connection with a "conventional" tattoo machine.

1. Infringement Analysis for the T-Tech EZ Needle Cartridge with the Cheyenne Hawk Tattoo Machine

Dr. Trumper's testimony provides his element-by-element analysis comparing the claim limitations to the T-Tech EZ Needle Cartridge, as used with the Cheyenne® Hawk tattoo machine. (CX-48 at Q54 to Q95; CDX-7.)

a) Claim 1

Claim 1 recites as follows:

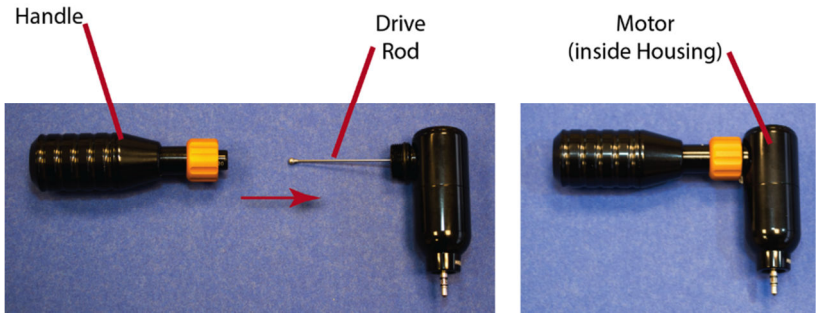
> 1. An ink application device for tattooing or for making permanent make-up, comprising:
>
> a basic module having a handle and an integrated needle drive; and

[7] Notably, in T-Tech's Opposition to Complainants' Motion for Summary Determination, T-Tech makes no apparent challenge to Complainants' showing that the T-Tech EZ Needle Cartridge infringe when used with the Cheyenne® Hawk Tattoo Machine, focusing its response exclusively on the "EZ Grip" configuration. (Document No. 506591 at 2-4.)

> a disposable module including an outer housing substantially surrounding a needle which is supported at one end of the disposable module by a needle nozzle and which is supported at another end of the disposable module by a portion that can contact the integrated needle drive, the needle being movable relative to the outer housing, and an ink receiving portion disposed around the needle, and
>
> means for allowing simultaneous removal of the entire disposable module from the basic module.

The T-Tech EZ Needle Cartridge as used with the Cheyenne® Hawk tattoo machine collectively form a "ink application device" that is used for tattooing or for making permanent make-up. (CX-48 at Q76.)

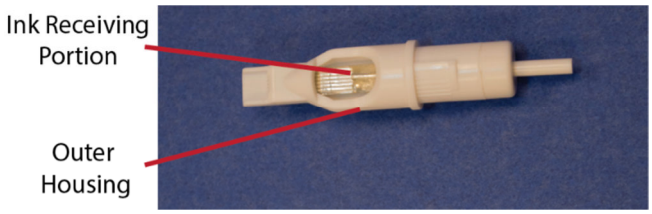
With respect to the "basic module" element, the grip of the Cheyenne® Hawk is a "handle," and the drive rod (or conrod) in connection with the motor disposed inside the housing of the drive unit provides an "integrated needle drive" because the needle drive is incorporated into the basic module. (CX-48 at Q77.)



CDX-13-001

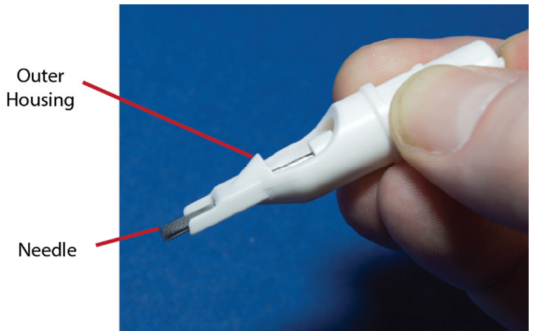
Dr. Trumper's testimony demonstrates how the T-Tech EZ Needle Cartridge meets all the requirements of the claimed "disposable module." The T-Tech EZ Needle Cartridge includes an "outer housing" that substantially surrounds a needle. The needle is supported at one end by a needle nozzle. The needle is supported at the other end by a portion that can contact the integrated needle drive, *i.e.*, the plastic shaft of the needle

contacts the drive rod of the Cheyenne® Hawk when the EZ Needle Cartridge is inserted into the handle or grip. (CX-48 at Q78.)



CDX-11-001

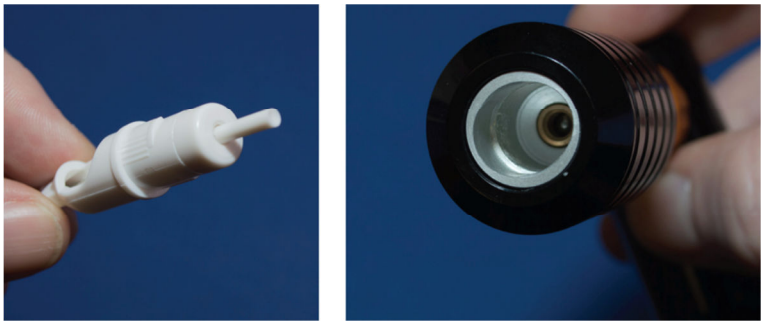
The needle in the T-Tech EZ Needle Cartridge is movable relative to the outer housing, as shown below with the needle tip extended from the nozzle of the needle cartridge when the needle shaft is pressed. (CX-48 at Q79.)



CDX-11-004

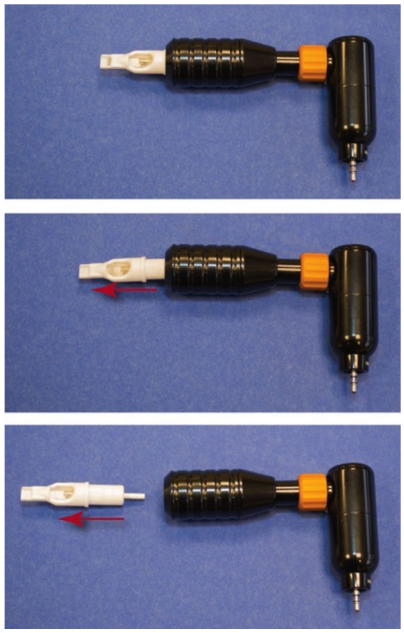
The T-Tech EZ Needle Cartridge further includes an ink receiving portion disposed around the needle, as shown at the opening in the outer housing. (CX-48 at Q80.)

Dr. Trumper's testimony further demonstrates that the "means for allowing simultaneous removal of the entire disposable module from the basic module" limitation is present. As Dr. Trumper explains, the structure of the housing of the EZ Needle Cartridge is designed to be inserted within a corresponding opening of the handle of the Cheyenne® Hawk Tattoo machine. (CX-48 at Q81.)



CX-29-006 and CX-30-003

The T-Tech EZ Needle Cartridge, as used with the Cheyenne® Hawk tattoo machine, performs the function of "allowing the simultaneous removal of the entire disposable module from the basic module" because the entire disposable module (EZ Needle cartridge) can be removed from the Cheyenne® Hawk tattoo machine in a single step. (CX-48 at Q81.)



CDX-13-002

As to the structure identified for the "means for allowing simultaneous removal" term, Dr. Trumper testimony demonstrates that the Cheyenne® Hawk and EZ Needle Cartridge include corresponding structures that are consistent with the configuration

shown in Figures 1 and 2 of the '530 Patent. This allows for the disposable module to be removably attached to the handle of the basic module. (CX-48 at Q82.)

The T-Tech EZ Needle Cartridge and Cheyenne® Hawk thus include all the elements of claim 1. (CX-48 at Q76 to Q82.)

b) Claim 2

Claim 2 depends from claim 1 and requires "the ink receiving portion has a volume sufficient for one application of ink." The ink receiving portion of the EZ Needle Cartridge provides a chamber with a volume sufficient for an application of ink. Dr. Trumper's testimony will thus establish that the T-Tech EZ Needle Cartridge and Cheyenne® Hawk thus include all the elements of claim 2. (CX-48 at Q83.)

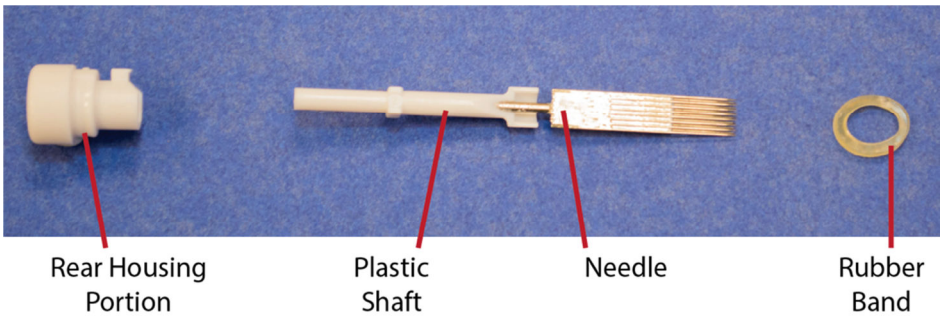
c) Claim 3

Claim 3 depends from claim 1 and requires "wherein the needle is disposed at least partially in said ink receiving portion so that during operation of the device, needle movement transports ink through the needle nozzle." The T-Tech EZ Needle Cartridge includes a needle partially disposed in the ink receiving portion. During operation, the needle is driven to reciprocate in and out of the housing, which provides movement that transports ink through the needle nozzle. Ink on the needle tip is then transported below the skin surface during a tattoo procedure. Dr. Trumper's testimony will thus establish that the T-Tech EZ Needle Cartridge and Cheyenne® Hawk thus include all the elements of claim 3. (CX-48 at Q84.)

d) Claim 7

Claim 7 depends from claim 1 and requires "the portion that can contact the integrated needle drive is the needle shaft." As Dr. Trumper will explain, the needle of the T-Tech EZ Needle Cartridge includes a plastic shaft portion that is fixedly attached to

the metal portion of the needle, which contains the needle point (or points). When inserted into the handle of the Cheyenne® Hawk, the end of the plastic shaft of the needle contacts the end of the drive bar, which provides the reciprocating movement to the needle shaft into order to drive the needle. (CX-48 at Q85.)



CDX-11-003

The T-Tech EZ Needle Cartridge and Cheyenne® Hawk thus include all the elements of claim 7. (CX-48 at Q85.)

e) Claim 8

Claim 8 depends from claim 7 and further requires that "the needle shaft is cylindrical." The plastic shaft of the needle in the T-Tech EZ Needle Cartridge is cylindrical, as Dr. Trumper demonstrates. The T-Tech EZ Needle Cartridge and Cheyenne® Hawk thus include all the elements of claim 8. (CX-48 at Q86.)

f) Claim 19

Claim 19 is a method claim that defines a "method of using an ink application device" having features substantially the same as the ink application device of claim 1. (CX-48 at Q87.) Specifically, claim 19 recites:

> 19. A method of using an ink application device for tattooing or for making permanent make-up, comprising the steps of:
>
> providing a basic module having a handle and an integrated needle drive;

> providing a disposable module including an outer housing substantially surrounding a needle which is supported at one end of the disposable module by a needle nozzle and which is supported at another end of the disposable module by a portion that can contact the integrated needle drive, an ink receiving portion disposed around the needle,
>
> applying ink to a surface; and
>
> simultaneously removing the entire disposable module from the basic module directly following an application of ink using the ink application device.

For the same reasons Dr. Trumper provided with respect to claim 1, his testimony will establish that the Cheyenne® Hawk tattoo machine is a basic module having a handle and integrated needle drive. Similarly, the T-Tech EZ Needle Cartridge is a disposable module having the features of the outer housing substantially surrounding a needle, the needle being supported at one end by a needle nozzle and at another end by a portion contacting the integrated needle drive, and the ink receiving portion disposed around the needle. Thus, the T-Tech EZ Needle Cartridge, when used with the Cheyenne® Hawk tattoo machine, meet both steps of providing a basic module and providing a disposable module, as claimed. (CX-48 at Q88 to Q90.)

When used in an ink application procedure, the EZ Needle Cartridge, in connection with the Cheyenne® Hawk, will apply ink to a surface (*i.e.*, a person's skin). (CX-48 at Q91.)

The final limitation of "simultaneously removing the entire disposable module from the basic module directly following an application of ink using the ink application device" is also met by the use of the EZ Needle Cartridge and Cheyenne® Hawk for the same rationale discussed above with respect to claim 1. The structure of the EZ Needle Cartridge is designed to be inserted within the opening in the front of the handle of the

Cheyenne® Hawk. Following an ink application procedure, the entire cartridge (disposable module) is necessarily removed from the handle in a single step. (CX-48 at Q92.)

The T-Tech EZ Needle Cartridges are specifically designed to be disposable, as indicated by the packaging of the cartridge describing it as a "single use" product. (CX-48 at Q92 to Q93.) Thus when the EZ Needle Cartridges are used with the Cheyenne® Hawk tattoo machine for an ink application procedure, all elements of claim 19 are necessarily met. (CX-48 at Q93.)

CX-29-001

g) Claim 20

Claim 20 depends from claim 19 and requires "replacing another disposable module on the basic module to allow another application of ink." The T-Tech EZ Needle Cartridges are designed and marketed as a "single use" product. This necessarily means that the cartridge, after being used to perform an ink application procedure with the Cheyenne® Hawk, is intended to be removed from the handle and disposed of. In order to perform another ink application procedure, a new T-Tech EZ Needle Cartridge inserted into the handle (*i.e.*, replacing another disposable module on the basic module). Thus, when operated as intended (and as T-Tech's packaging instructs), the T-Tech EZ Needle Cartridge and Cheyenne® Hawk meet the requirement of claim 20. (CX-48 at Q94.)

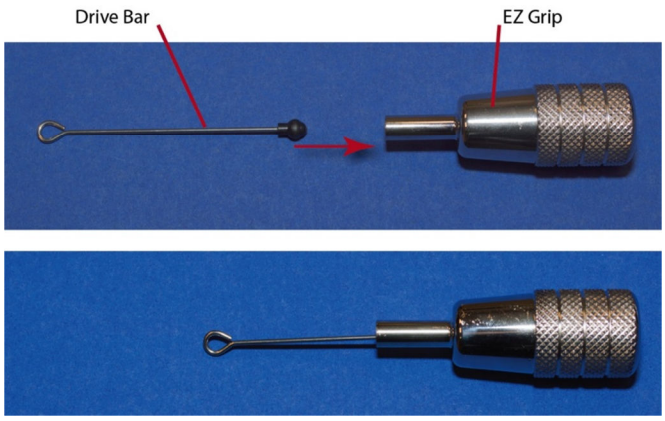
2. Infringement Analysis for T-Tech EZ Needle Cartridges and EZ Grip with Conventional Tattoo Machines

T-Tech's EZ Grip and Drive Bar are designed to allow the T-Tech EZ Needle Cartridge to be used with a "conventional" tattoo machine. (CX-42 at RFA Nos. 8 and 12-14; CX-49C at Q82; CX-13-89; CX-48 at Q96.) Dr. Trumper's expert testimony demonstrates that when the T-Tech EZ Needle Cartridge is used with T-Tech EZ Grip on a conventional tattoo machine, it infringes all the asserted claims. (CX-48 at Q96 to Q128; CDX-8.)

a) Claim 1

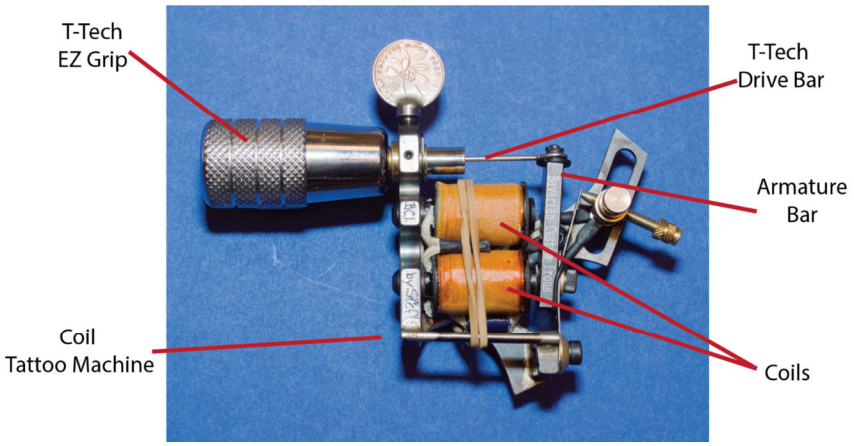
As Dr. Trumper explains, when the EZ Grip and Drive Bar are installed on the conventional tattoo machine and the EZ Needle Cartridge is inserted into the EZ Grip, it provides an ink application device for tattooing or applying permanent makeup, which satisfies the preamble of claim 1. (CX-48 at Q120.)

When connected to a conventional tattoo machine, the T-Tech EZ Grip and associated T-Tech drive bar include all the elements of the claimed "basic module." The T-Tech Drive Bar is inserted into the EZ Grip such that a first end of the drive bar will contact the shaft of the needle cartridge when installed into the EZ Grip. The other end of the T-Tech drive bar is shaped in an eyelet and is attached to the armature bar (or other drive mechanism, *e.g.*, a conventional rotary drive) of the conventional tattoo machine. (CX-48 at Q121.)



CDX-4-001

The T-Tech EZ Grip and Drive Bar are attached to the conventional tattoo machine. In this configuration, the EZ Grip provides the "handle" of the basic module. Further, the T-Tech Drive Bar in connection with magnetic coils act as an "integrated needle drive," as the needle drive is incorporated into the basic module when the grip, drive bar, and conventional tattoo machine are assembled. (CX-48 at Q121.)



CDX-4-006

Dr. Trumper thus opines that the T-Tech EZ Grip and Drive Bar, when installed onto the conventional tattoo machine, literally meets the claim requirement of an "integrated needle drive" as the Court has construed this term. (CX-48 at Q121.)

Even if the EZ Grip and Drive Bar, as installed on the conventional tattoo machine, did not literally provide a "needle drive incorporated into the basic module," the

configuration shown above would provide the substantial equivalent of the "integrated needle drive."

The EZ Grip and Drive Bar, as installed on the conventional tattoo machine performs substantially the same function in substantially the same way to yield substantially the same result, which establishes equivalence under the doctrine of equivalents. *See Valmont Indus.*, 983 F.2d at 1043. The fact that the EZ Grip and Drive Bar are separable components from the conventional tattoo machine has no effect on the function that it performs. Thus, to the extent that this configuration is considered different from the needle drive of the Cheyenne® Hawk, for example, with the drive rod attached to the motor in the housing, the differences are inconsequential as to the operation of "driving" the needle. As with the Cheyenne® Hawk, the EZ Grip, Drive Bar, and conventional tattoo machine operate to "drive" a needle of an attached needle cartridge by providing reciprocating movement to the needle cartridge shaft. This function is also performed in the same way, *i.e.*, a device (whether it be the electric motor or the electromagnetic coils and armature bar) produces motion that is transferred by a linkage (*i.e.*, the drive rod or EZ Drive Bar) to drive a needle cartridge inserted into the handle. Further, the same result is achieved—driving of the needle in a needle cartridge for an ink application procedure.

Additionally, there are no insubstantial differences between the claim element and the corresponding element of the accused device, thus demonstrating equivalence of the "integrated needle drive" element under the alternative test of the doctrine of equivalents. *See Honeywell Int'l*, 370 F.3d at 1139. As to the configuration of the T-Tech EZ Grip, Drive Bar, and conventional tattoo machine shown above, the differences between this

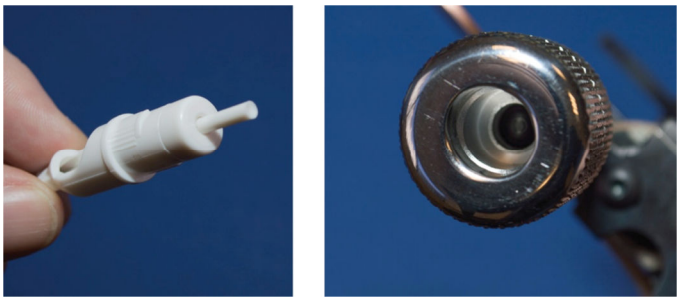
configuration and one in which a drive rod is attached to the motor in the housing such as in the Cheyenne® Hawk are insubstantial from the standpoint of how the needle is driven. As explained above, in both instances a device (whether it be the electric motor or the electromagnetic coils and armature bar) produces motion that is transferred by a linkage (*i.e.*, the drive rod or EZ Drive Bar) to drive a needle cartridge inserted into the handle. Further, the reciprocating motion of the needle within the needle cartridge is effectively the same in either drive configuration. Also, in either case the user is attaching a "disposable module" to a "basic module" that has the reusable (*i.e.*, non-disposable) components. The fact that the user may have assembled some of those components in the case of the "conventional" tattoo machine used with the EZ Grip and Drive Bar is inconsequential from the standpoint of how the device operates.

Thus, even if the T-Tech EZ Grip and Drive Bar, as installed on the conventional tattoo machine, were found not to literally meet the "integrated needle drive" limitation, it is the substantial equivalent of this element and since all other elements would be literally present, there would still be infringement under the doctrine of equivalents. (CX-48 at Q122 to Q123.)

As discussed above with respect to the T-Tech EZ Needle Cartridge and the Cheyenne® Hawk configuration, the T-Tech EZ Needle Cartridge meets all the requirements of the "disposable module" of claim 1. The same rationale thus applies in the configuration where the EZ Needle Cartridge is used with the EZ Grip. (CX-48 at Q124.)

With respect to the "means for allowing simultaneous removal of the entire disposable module from the basic module," Dr. Trumper's testimony establishes that this

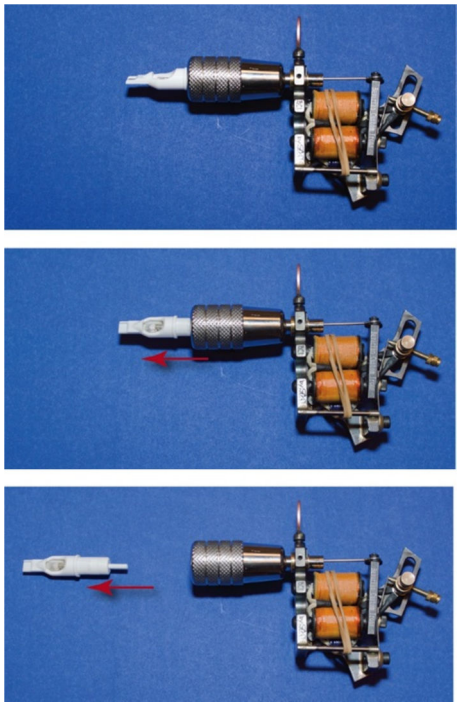
limitation is also met by the EZ Grip configuration. The structure of the housing of the EZ Needle Cartridge is designed to be inserted within a corresponding opening of the handle of the EZ Grip.



CX-29-006 and CX-34-008

This structural arrangement is consistent with the configuration shown in Figures 1 and 2 of the '530 Patent, which allows for the needle cartridge (disposable module) to be removably attached to the handle of the basic module.

By virtue of these structures, the EZ Needle Cartridge is removable from the handle of the EZ Grip in a single step. As shown below, the entire cartridge is withdrawn from the handle (EZ Grip) and removed as a single piece, in the same fashion as the EZ Needle cartridge is removed from the Cheyenne® Hawk tattoo machine.



COMP0002389-91 (annotated)

The T-Tech EZ Needle Cartridge, as used with the EZ Grip and Drive Bar on a conventional tattoo machine, provides for "simultaneous removal of the entire disposable module from the basic module." Further, the "means for simultaneous removal of the entire disposable module from the basic module" is satisfied by this combination of components because the simultaneous removal function is performed and the structure of "a rear housing part 1 of the disposable module that is connected to, and detachable from, the basic module, as shown in Figures 1 and 2 of the '530 patent" is present. Thus, as Dr. Trumper's testimony establishes, the T-Tech EZ Needle Cartridge and EZ Grip, as used with a conventional tattoo machine, include all the elements of claim 1. (CX-48 at Q125.)

b) Claims 2-3 and 7-8

Dependent claims 2-3 and 7-8 define features of the disposable module, which have been addressed above with respect to the T-Tech EZ Needle Cartridge and

Cheyenne® Hawk Tattoo Machine configuration. The analysis for these claims is substantially identical for the T-Tech EZ Needle Cartridge used with the T-Tech EZ Grip and Drive Bar and conventional tattoo machine, as discussed in Dr. Trumper's testimony. (CX-48 at Q126.)

c) Claims 19 and 20

For reasons similar to those discussed above with respect to claim 1, the T-Tech EZ Grip and Drive Bar, when installed on a conventional tattoo machine, literally meets the claim feature of "providing a basic module having a handle and an integrated needle drive." Alternatively, even if this configuration were found to not meet the "integrated needle drive" limitation, the T-Tech EZ Grip and Drive Bar configuration, as installed on a conventional tattoo machine would be the substantial equivalent of this element, for the rationale provided at the discussion of claim 1 above.

As the T-Tech EZ Grip and Drive Bar configuration would at least meet all other elements of claim 19, for similar reasons to those discussed above for claim 1, this configuration would infringe under the doctrine of equivalents even if the "integrated needle drive" feature was determined to not be literally present. (CX-48 at Q127.)

As Dr. Trumper also testifies, the feature of claim 20 is met by the T-Tech EZ Grip and Drive Bar configuration. (CX-48 at Q128.)

3. Evidence of Acts of Direct Infringement Involving the T-Tech Accused Products in the United States

Dr. Trumper's analysis expressing his expert opinion that the T-Tech Accused Products infringe when used with the Cheyenne® Hawk tattoo machine or with conventional tattoo machines in connection with the EZ Grip is strong evidence that direct infringement has occurred. *See Certain Foam Masking Tape*, 337-TA-528, Order

No. 41, 2005 WL 1597282 at *7 (finding direct infringement based on expert testimony that one using the product in its intended manner would be infringing). Further evidence establishes that acts of direct infringement involving the T-Tech accused products have occurred in the United States and that this infringement is ongoing.

For instance, Mr. Dado Dzigal is MT.Derm's Manager of the Cheyenne Tattoo Equipment Business Unit for North America, and his testimony establishes that he has personally observed these infringing acts in connection with his employment at MT. Derm. (CX-46C.) Mr. Dizgal testifies that he frequently attends tattoo conventions in the United States on behalf of MT. Derm. (CX-46C at Q8 to Q9.) On June 14-16, 2011, Mr. Dzigal observed tattoo artists appearing at the Miami Tattoo Lapaloosa convention using T-Tech's EZ Needle cartridges for tattooing. Further, Mr. Dzigal has also observed the accused T-Tech EZ Needle cartridges being used by tattoo artists to perform tattooing procedures on customers at other conventions in the United States, including the Ink n Iron on June 7-9, 2012, Long Island Tattoo Convention on July 27-29, 2012, and Paradise Tattoo Gathering on September 12-14, 2012. (CX-46C at Q10 to Q15.) As Mr. Dzigal further explains, it is uncommon not to see at least one tattoo artist using the T-Tech EZ Needle cartridges at these conventions. (CX-46C at Q15.) This direct evidence of the T-Tech Accused EZ Needle Cartridges being used with Cheyenne® Hawk Tattoo machines, as observed first hand by Mr. Dzigal, demonstrates that direct infringement has occurred.[8] *See Broadcom*, 543 F.3d at 700 (direct infringement may be proven by direct

[8] CX-17, which includes T-Tech's posting on an internet message board regarding the accused products, also provides further evidence that direct infringement in the United States has occurred. A number of the posters on that message board that describe their experience with the T-Tech accused products identify locations in the United States.

evidence or circumstantial evidence that the accused device necessarily infringes the patent in suit.)

Apart from this direct evidence, significant circumstantial evidence of direct infringement involving the use of the T-Tech Accused Products also exists. For instance, T-Tech does not deny that it has sold the T-Tech Accused Products to customers, which it openly describes as "tattoo artists", who are located in the United States. (CX-42 at RFA Nos. 60-66) T-Tech's website further claims that:

> EZ disposable tattoo needle cartridges, tips and EZ quick attaching grips are user-friendly and designed for saving time. These tools allow tattoo artists to set up needles and switch needle configuration very quickly during the tattooing process.

(CX-13-061.)

T-Tech also readily admits that its Accused Needle Cartridges are designed for ink application. (CX-42 at RFA No. 27.) Further, although T-Tech states that it does not provide any documentation to purchasers of the Accused Products, it claims that its website "clearly" shows how to use its products. (CX-40 at Response Nos. 1 and 2.) The website in fact clearly shows the EZ Needle Cartridges installed in the Cheyenne® Hawk tattoo machine. (CX-13-089; CX-49C at Q80 to Q82.) Further, the T-Tech website plainly describes the use of the EZ Grip product with the EZ Needle Cartridges, instructing its customers to form an infringing ink application device. (CX-13-068.)

T-TECH EZ GRIPS and EZ CARTRIDGES SET UP

Place a rubber nipple grommet on the tattoo machine, and place the eyelet of the needle drive bar over the rubber nipple grommet. Plug the other end of the needle drive bar into the stem of the grip. Install the grip to the machine. Attach the needle cartridge to the bayonet socket of the grip. Rubber bands are not required for the needle drive bar. Additional rubber bands may cause needle drive bars to wear out faster than normal lifetime.

CX-13-068

The T-Tech EZ Needle Cartridge can only be used with the Cheyenne® Hawk tattoo machine or with the EZ Grip in a conventional tattoo machine, and both these configurations infringe the asserted claims.[9] (CX-48 at Q54 to Q128.) Thus, in light of the admitted sales of the Accused Products into the United States, the lack of any non-infringing use, and T-Tech instructions to its customers to use the products in an infringing manner, the circumstantial evidence confirms the direct infringement of the asserted claims in the United States. *See Broadcom*, 543 F.3d at 700; *Certain Foam Masking Tape*, Inv. No. 337-TA-528, Order No. 41, 2005 WL 1597282 at *7 (finding

[9] Although T-Tech has alleged that its EZ Grip product can be used with a conventional tattoo needle (*i.e.*, without using an EZ Needle Cartridge), this is irrelevant to the question of whether any non-infringing use exists for the EZ Needle cartridges. Further, as discussed below, T-Tech clearly encourages and promotes the use of the EZ Grip in an infringing manner (*i.e.*, with the EZ Needle cartridge) amounting to inducement. Moreover, there is no evidence that establishes any non-infringing use of the EZ Grip in any configuration without the EZ Needle cartridge would be substantial.

direct infringement). This result is particularly appropriate where, as here, T-Tech has refused to provide any discovery as to the identity of its customers in the United States, implausibly stating that it had no records of its transactions or communications with the customers. (CX-39 at Response Nos. 8 and 9.)

4. Indirect Infringement of the T-Tech EZ Needle Cartridges and EZ Grip Products

T-Tech's admitted knowledge of the '530 Patent and MT. Derm's patented needle cartridge design, its decision to copy that design all aspects material to the asserted claims, and its activities in marketing and selling its Accused Products establish T-Tech indirectly infringes the asserted claims by inducing infringement and by contributing to infringement.

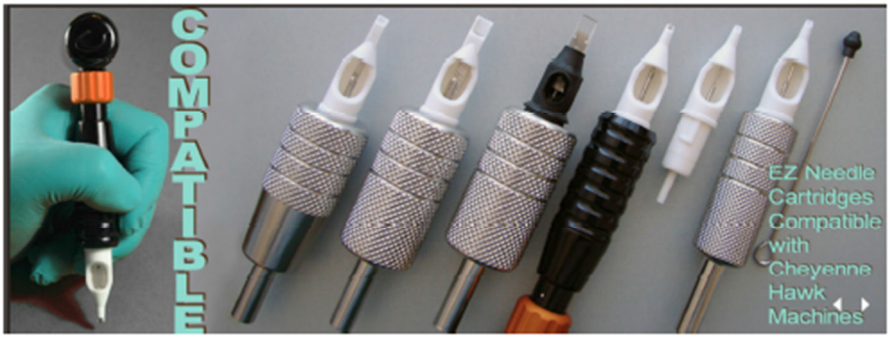
a) Induced Infringement

With respect to inducement, T-Tech has admitted that it had knowledge of the '530 Patent and MT.Derm's patented needle cartridges at the time that it began developing the EZ Needle Cartridge. (CX-39 at Response Nos. 4 and 8; CX-40 at Response No. 14.) Specifically, T-Tech's owner Long Xiao first became aware in 2008 of Complainants' Cheyenne® Hawk tattoo machine and other Ink Application Devices developed by MT.Derm, and became aware that the MT. Derm products were patented at this time. (CX-39 at Response Nos. 4 and 8.) Mr. Xiao further knew that in the tattoo industry ***only*** MT. Derm made needle cartridges, and this kind of needle cartridges only can be used on their "special tattoo machines." (CX-39 at Response No. 4.) Mr. Xiao further admits to "analyzing, studying, and investigating" the '530 Patent and MT. Derm's related patents, as well as MT. Derm's ink application devices. (CX-40 at Response Nos. 15 and 16.)

Equipped with this knowledge, T-Tech proceeded to design its EZ needle cartridges to be "compatible with the Cheyenne Hawk machines." (CX-39 at Response No. 2.) This "compatible" design allows T-Tech's EZ Needle Cartridges allows to be attached to MT.Derm's Cheyenne® HAWK machines. (CX-49C at Q79-81; CX-13-089; Doc. Id. 482356, Request of T-Tech Tattoo Device, Inc., dated June 5, 2012, at p.1; CX-48 at Q137.) T-Tech further admits that it designed the EZ needle cartridge and EZ Grip to have the same type of "bayonet coupling" and to be the same size as Cheyenne® Hawk tattoo machines and Cheyenne® hawk needle cartridges. (Document No. 485315, T-Tech's Answer to Complaint at 1.) T-Tech also admits that it designed the EZ Needle cartridge, EZ Grip and EZ Needle driver for conventional tattoo machines, which it sells to tattoo artists. (Document No. 482356, Request of T-Tech Tattoo Device at p.5.)

With respect to its marketing and sales of the accused products, T-Tech admits that its website, ttechtattoo.com, "clearly shows" how to use the T-Tech Accused EZ Needle Cartridges and EZ Grip. (CX-40 at Response Nos. 1 and 2.) T-Tech further describes its EZ Needle Cartridges and EZ Grip products as "easy to use." (CX-40 at Response No. 2.)

The evidence thus establishes that T-Tech's EZ Needle Cartridges were designed with full knowledge of the asserted '530 Patent and specifically marketed for use with MT.Derm's Cheyenne® Hawk Machine and other conventional ink application devices in an infringing manner. This is exemplified by the following advertisements T-Tech employs on its website:



CX-13-089

CX-13-090

The reasonable inference from T-Tech's admitted knowledge of the patent, copying of the patented technology, and its specific actions to encourage the use of the Accused Products in an infringing manner demonstrates that T-Tech intended to induce its customers to infringe the '530 Patent. *See Certain Inkjet Ink Cartridges with Printheads and Components Thereof*, ITC Inv. No. 337-TA-723, 2011 WL 3489151 at *47-49 (June 10, 2011) (finding intent to induce infringement based on undisputed evidence that respondent studied complainant's patents to copy the technology disclosed therein); *Smith & Nephew, Inc. v. Arthrex, Inc.*, 2013 WL 163823, *4 (Fed. Cir. Jan. 16, 2013) (upholding finding of inducement and contributory infringement post-*Global-Tech* based on infringers indisputable knowledge of the patent prior to infringement, copying of the patented method, and lack of comparison of its products to the asserted patent.) This conclusion is further supported by Dr. Trumper's analysis. (CX-48 at Q133-Q137.)

Evidence of labeling, advertising, or other sales methods, including instructions or directions as to the infringing use, such as T-Tech's explicit advertisements here, have been frequently relied upon to establish liability for inducing infringement. *See National Instruments Corp. v. MathWorks, Inc.*, No. 03-1540, 03-1553, 2004 WL 2030128, at *3 (Fed. Cir. 2004) (evidence of alleged infringer's own instructions and training seminars during which the infringer coached customers to do exercises covered by the patent claims was sufficient for a jury to find induced infringement); *Biotec Biologische Naturverpackungen GmbH v. Biocorp., Inc.*, 249 F.3d 1341, 1351 (Fed. Cir. 2001) (accused infringer was found to infringe by inducement when it instructed customers to process an imported product in a fashion to cause it to meet the limitation required by the claim; no direct evidence of direct infringement was presented by plaintiff); *Fromberg, Inc. v. Thornhill*, 315 F.2d 407, 412-13 (5th Cir. 1963) (demonstrations by sales staff of infringing uses supported liability for inducement); *Cugley v. Bundy Incubator Co.*, 93 F.2d 932 (6th Cir. 1937) (defendant sold an incubator "capable of being used" to infringe the patented process and "openly and repeatedly taught the . . . method in the catalogues issued to its customers . . ."); *Haworth Inc. v. Herman Miller Inc.*, 37 U.S.P.Q.2d 1080, 1090 (W.D. Mich. 1994) (evidence that defendant "demonstrate[d] and recommend[ed] infringing configurations" of its product could support inducement liability); *Sims v. Mack Trucks, Inc.*, 459 F. Supp. 1198, 1215 (E.D. Pa. 1978) (finding inducement where the use "depicted by the defendant in its promotional film and brochures infringes the . . . patent"), *overruled on other grounds*, 608 F.2d 87 (3rd Cir. 1979).

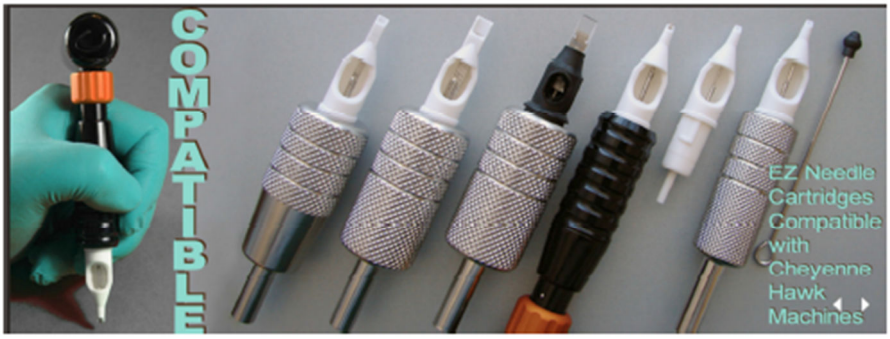
Further, T-Tech has presented no evidence that it obtained any opinion of counsel regarding any defense to infringement of the '530 Patent. This is further circumstantial

evidence supporting an inference of T-Tech's intent to induce infringement. *See Broadcom Corp.*, 543 F.3d at 700 (Fed. Cir. 2008) (lack of opinion of counsel relevant to showing intent to induce infringement); *Weiland Sliding Doors & Windows, Inc. v. Panda Windows & Doors, LLC*, 2012 WL 202664 at *5 (S.D. Cal. Jan. 23, 2012) (citing *Broadcom* for the proposition that failure to obtain opinion of counsel may suggest intent to infringe "or at the very least that Defendants were willfully blind to whether their products were infringing [the asserted] patents.")

b) Contributory Infringement

With respect to contributory infringement, the T-Tech EZ Needle Cartridges are specifically made for use in ink application devices and ink application methods that are covered by the asserted claims of the '530 Patent. Further, the T-Tech EZ Needle Cartridges are not staple articles of commerce suitable for substantial non-infringing uses. As Dr. Trumper's analysis confirms, there is no substantial non-infringing use for the T-Tech EZ Needle Cartridges. (CX-48 at Q138.) Indeed, it is undisputed that the Accused EZ Needle Cartridges are only used either with the Cheyenne® Hawk tattoo machine or with the EZ Grip on a conventional machine, and, as the evidence shows, both these uses infringe the asserted claims.

T-Tech's website clearly advertises T-Tech's EZ Needle Cartridge assembled for use with a Cheyenne® Hawk Machine. (CX-13-089.)



CX-13-089

As T-Tech's website illustrates, the T-Tech EZ Needle Cartridge can be used in the Cheyenne® Hawk Machine, or alternatively can be plugged into the T-Tech EZ Grip for use in conventional ink application devices. T-Tech even shows MT.Derm's needle cartridge plugged into the T-Tech EZ Grip for use with conventional ink application devices. (CX-49C at Q81 to Q82.) As stated on T-Tech's website: "EZ Grips are compatible with all coil tattoo machines and conventional rotary tattoo machines." (CX-13-061.) Put simply, the only purpose of T-Tech's EZ Needle Cartridges is to take the place of MT.Derm's patented cartridges. (CX-48 at Q138.) Indeed, T-Tech has admitted that it designed its EZ Needle Cartridges to provide a low cost alternative to MT.Derm's patented cartridges. (CX-17-004 to -005).

Contributory infringement requires showing: (1) an act of direct infringement in violation of Section 337; (2) the accused device has no substantial non-infringing uses; and (3) the accused infringer imported, sold for importation, or sold after importation within the United States, the accused components that contributed to another's direct infringement. *Spansion,* 629 F.3d at 1353.

Here, the evidence will establish that the EZ Needle cartridge directly infringes, whether used with the Cheyenne® Hawk tattoo machine or with the EZ Grip on a conventional tattoo machine. (*See* Direct Infringement discussion above.) Further, there

is no evidence that the T-Tech EZ Needle Cartridge has any non-infringing use, let alone any non-infringing use that is substantial. *See Vita-Mix Corp.*, 581 F.3d at 1327 (a non-infringing use that is "unusual, far-fetched, illusory, impractical, occasional, aberrant, or experimental" is not substantial). Finally, T-Tech has admitted that it sold the Accused Products in the United States (CX-42 at RFA Nos. 60-66), and direct and circumstantial evidence confirms that these products have been used by customers of T-Tech in an infringing manner.

The evidence further shows that T-Tech had the requisite knowledge of the patent and that its acts were infringing. *See Golden Blount*, 365 F.3d at 1061 (contributory infringement requires alleged infringer "knew that the combination for which its components were especially made was both patented and infringing.") T-Tech's knowledge of the '530 Patent prior to this Investigation is admitted. Further, the fact that the Accused Products are specifically designed to be used in a patented combination demonstrates knowledge of infringement. *See Metro–Goldwyn–Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 932 (2005) ("One who makes and sells articles which are only adapted to be used in a patented combination will be presumed to intend the natural consequences of his acts; he will be presumed to intend that they shall be used in the combination of the patent." (internal quotation marks omitted)). T-Tech's website, which touts the compatibility of its EZ Needle cartridges with the Cheyenne® Hawk tattoo machine, is further evidence of its intent to infringe. *Ricoh Co., Ltd. v. Quanta Computer, Inc.*, 550 F.3d 1324, 1343 (Fed. Cir. 2008) ("*Grokster* recognized that providing instruction on how to engage in an infringing use 'show[s] an affirmative intent that the product be used to infringe.'" (quoting *Grokster*, 545 U.S. at 936.))

With respect to T-Tech's EZ Grip product, even if the EZ Grip alone could be used in a non-infringing fashion with conventional tattoo needles (*i.e.*, without the EZ Needle cartridges) T-Tech has provided no evidence that such a use would be a substantial non-infringing use. T-Tech expressly refused to provide Complainants with any information regarding T-Tech's customers, including any documents concerning sales of the Accused Products or communications with customers, implausibly claiming that no such documents exist. (*See, e.g.*, CX-39 at Response Nos. 5 and 7; CX-40 at Response Nos. 9-13.) T-Tech was ultimately sanctioned for its failure to cooperate in discovery. Had T-Tech provided discovery on its customers, Complainants could have pursued discovery from customers of its EZ Grip product concerning the nature of its use. Given its failure to do so, it should not now be permitted to claim that its EZ Grip has a substantial non-infringing use, particularly since its website prominently advertises and promotes the EZ Grip for use with the EZ Needle cartridges in an infringing manner. (*See, e.g.*, CX-13-061, -062, -064, -066, -068, -084, -087, -088, and -090.) A finding of contributory infringement as to the EZ Grip alone is thus also appropriate.

Regardless, even if the EZ Grip, taken apart from the Accused EZ Needle cartridges, were to be considered as having a substantial non-infringing use (which the evidence does not support) (*see* CX-48 at Q139), this would be irrelevant to the question of whether the EZ Needle cartridges contributorily infringe since the only uses of the EZ Needle cartridges are either with the Cheyenne® Hawk or with the EZ Grip and conventional tattoo machine, which are both infringing. Moreover, liability for inducement would still exist as to the EZ Grip products based on the showing above.

The evidence thus demonstrates that T-Tech also infringes indirectly by contributing to infringement, and Dr. Trumper's testimony further supports this conclusion. (CX-48 at Q138-Q139.)

C. Domestic Industry - "Technical Prong"

In order to satisfy the technical prong the complainant must show that it practices the patents-in-suit in the United States. *Crocs, Inc. v. International Trace Comm'n*, 598 F.3d 1294, 1306-1307 (Fed. Cir. 2010). The test for determining whether the technical prong is met through the practice of the patent "is essentially the same as that for infringement, *i.e.*, a comparison of domestic products to the asserted claims." *Alloc v. Int'l Trade Com'n*, 342 F.3d 1361, 1375 (Fed. Cir. 2003). Commission precedent only requires that there be one claim of the asserted patent for which there is a domestic industry, not a domestic industry for each patent claim asserted. *Certain Inkjet Ink Supplies and Components Thereof*, ITC Inv. No. 337-TA-730, Order No. 14, 2011 WL 3813118 at *14 (Aug. 3, 2011); *Certain Microsphere Adhesives*, ITC Inv. No. 337-TA-336, Comm. Op. at 16 (Jan. 16, 1996), *aff'd sub nom.* To prevail, the patentee must establish by a preponderance of the evidence that the domestic product practices one or more claims of the patent either literally or under the doctrine of equivalents. *See Certain Abrasive Products Made Using a Process for Making Powder Preforms, and Products Containing Same*, ITC Inv. No. 337-TA-449, Order No. 25, 2001 WL 1110484 at *2 (Sept. 20, 2001).

As to the technical prong requirement, Complainants' will present the expert testimony of Dr. Trumper, which will provide an element-by-element comparison of Complainants Domestic Industry Products to the claim 1 of the '530 Patent. (CX-48 at Q141 to Q170; CDX-9; CDX-10.) Dr. Trumper's analysis, which stands unrebutted, will

demonstrate that both the MT. Derm Cheyenne® Hawk tattoo machine and Cheyenne® Hawk needle cartridges and the Nouveau Contour PMU devices and Nouveau Contour needle cartridges practice at least claim 1 of the '530 Patent. *See Alloc*, 342 F.3d at 1375 (technical prong is demonstrated by comparison of domestic products to one or more claims of the asserted patent).

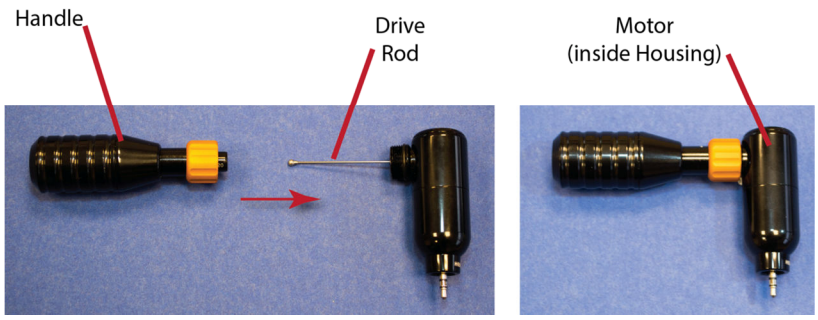
Moreover, T-Tech's Opposition to Complainants' motion for summary determination made no challenge as to the showing that the technical prong was satisfied by either the Cheyenne® Hawk Tattoo Machines and Needle Cartridges or the Nouveau Contour PMU Devices and Needle Cartridges. (Document No. 506591.)

1. Cheyenne® Hawk Tattoo Machine and the Cheyenne® Hawk Needle Cartridge

As Dr. Trumper's testimony demonstrates, each element of claim 1 is met by the Cheyenne® Hawk tattoo machine and the Cheyenne® Hawk needle cartridge. Collectively, these elements form an "ink application device." (CX-48 at Q152.)

a) The "basic module"

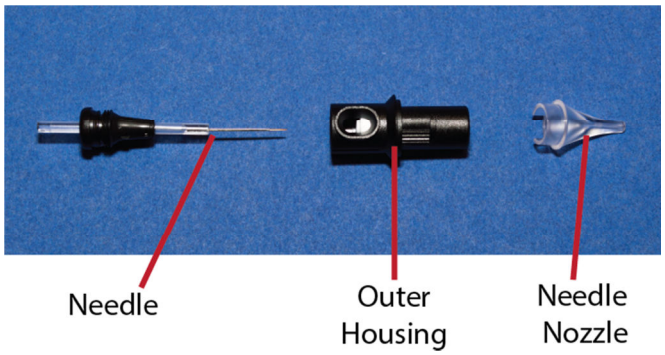
Dr. Trumper's testimony further establishes that the Cheyenne® Hawk tattoo machine includes all the elements of the claimed "basic module." As shown below, the grip of the Cheyenne® Hawk is a "handle," and the drive rod (or "conrod") in connection with the motor disposed inside the housing of the drive unit. (CX-48 at Q153.)



CDX-3-007

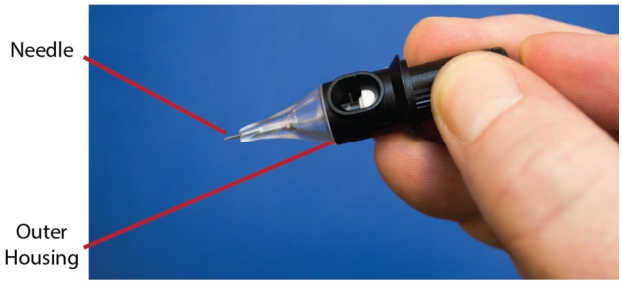
b) The "disposable module"

Dr. Trumper also testifies that the Cheyenne® Hawk needle cartridge meets all the requirements of the claimed "disposable module." As explained, the Cheyenne® Hawk needle cartridge includes an "outer housing" that substantially surrounds a needle. The needle is supported at one end by a needle nozzle. (CX-48 at Q154.)



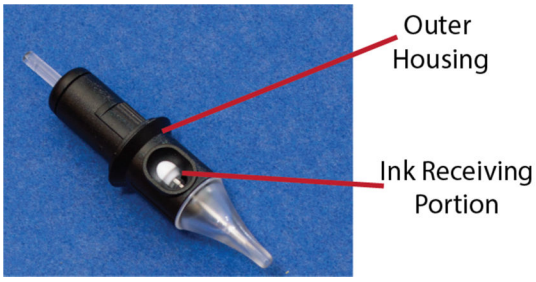
CDX-3-002

The needle is supported at the other end by a portion that can contact the integrated needle drive, *i.e.*, the plastic shaft of the needle contacts the drive rod of the Cheyenne® Hawk tattoo machine when the Cheyenne® Hawk needle cartridge is inserted into the handle or grip. Further, the needle in the Cheyenne® Hawk needle cartridge is movable relative to the outer housing. (CX-48 at Q154.)



CDX-3-004

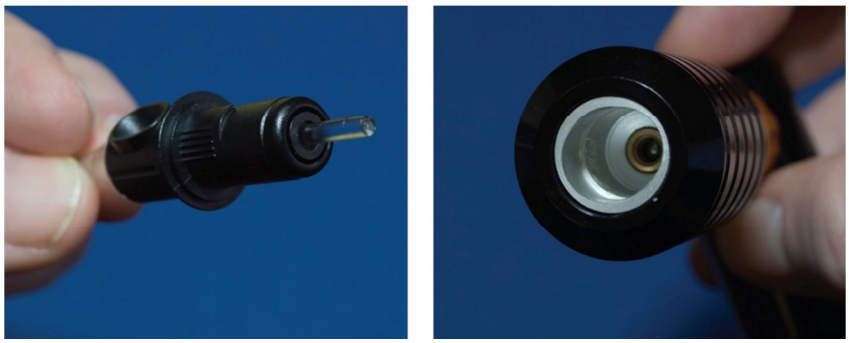
The disposable module further includes an ink receiving portion disposed around the needle, as shown in the opening in the outer housing. (CX-48 at Q154.)



CDX-3-001

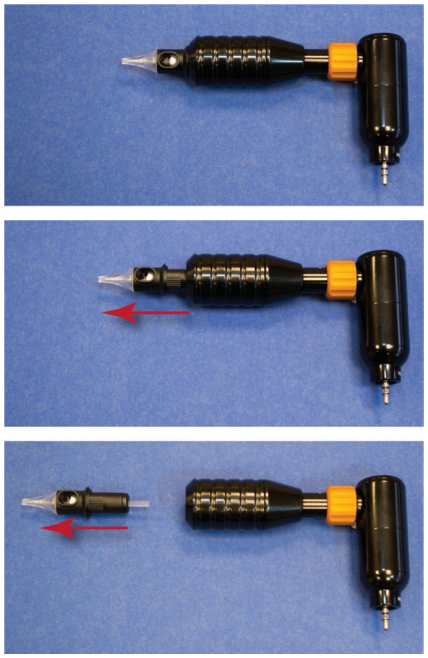
c) "means for allowing simultaneous removal of the entire disposable module from the basic module"

With respect to the final element of claim 1, Dr. Trumper explains how this element is present in the Cheyenne Hawk. For instance, the structure of the housing of the Cheyenne® Hawk needle cartridge is designed to be inserted within a corresponding opening of the handle of the Cheyenne® Hawk tattoo machine, as shown below. (CX-48 at Q155.)



CX-35-012 and CX-35-011

This structural arrangement is consistent with the configuration shown in Figures 1 and 2 of the '530 Patent, which allows for the needle cartridge (disposable module) to be removably attached to the handle of the basic module. By virtue of these structures, the Cheyenne® Hawk needle cartridge is removable from the handle of the Cheyenne® Hawk tattoo machine in a single step. As shown below, the entire cartridge is withdrawn from the handle and removed as a single piece. (CX-48 at Q155.)



CDX-3-006

Thus, as Dr. Trumper concludes, the Cheyenne® Hawk tattoo machine and needle cartridges practice at least claim 1 of the '530 Patent. (CX-48 at Q156.)

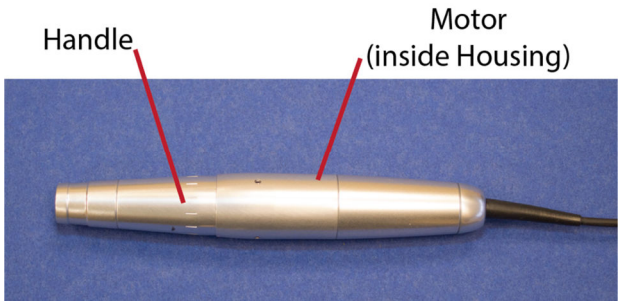
2. Nouveau Contour PMU Devices and Nouveau Contour Needle Cartridges

Dr. Trumper's analysis also confirms that each element of claim 1 is present in the Nouveau Contour PMU devices and the Nouveau Contour needle cartridges, which collectively provide an "ink application device." (CX-48 at Q157 to Q170.) As Dr. Trumper explains, the Nouveau Contour PMU Device and Needle Cartridges satisfy the preamble of claim 1. (CX-48 at Q 166.)

a) The "basic module"

The Nouveau Contour PMU device includes all the elements of "basic module" of claim 1. As Dr. Trumper testifies, the Nouveau Contour Digital PMU device includes a motor disposed within the housing, with the front portion of the housing acting as a

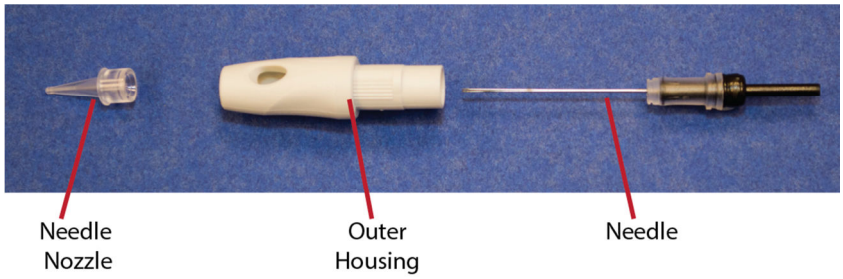
handle or grip. Thus, the Nouveau Contour PMU Device provides the basic module of claim 1 with the handle and integrated needle drive. (CX-48 at Q167.)



CDX-1-005

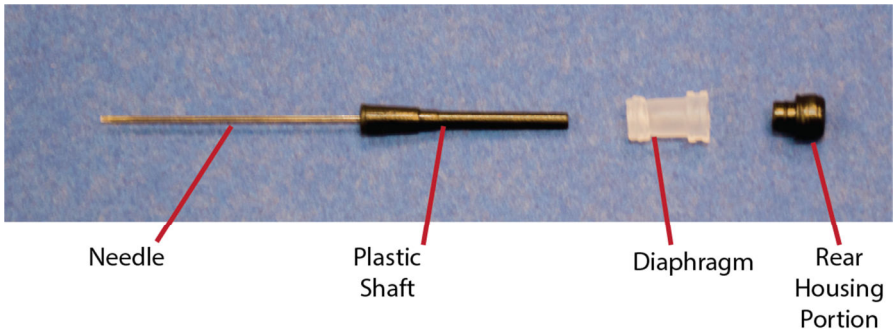
b) The "disposable module"

Dr. Trumper's testimony demonstrates that the Nouveau Contour needle cartridge meets all the requirements of the claimed "disposable module." As explained, the Nouveau Contour needle cartridge includes an "outer housing" that substantially surrounds a needle. The needle is supported at one end by a needle nozzle. (CX-48 at Q168.)



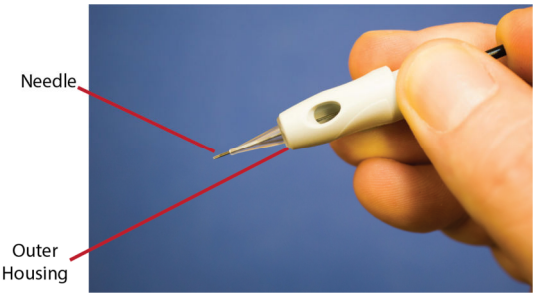
CDX-1-002

The needle is supported at the other end by a portion that can contact the integrated needle drive, *i.e.*, the plastic shaft of the needle contacts the drive rod of the Nouveau Contour PMU device when the Nouveau Contour needle cartridge is inserted into the handle or grip. (CX-48 at Q168.)



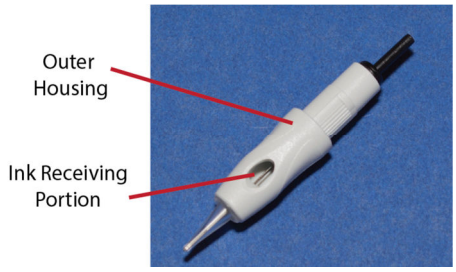
CDX-1-003

Further, the needle in the Nouveau Contour needle cartridge is movable relative to the outer housing. (CX-48 at Q168.)



CDX-1-004

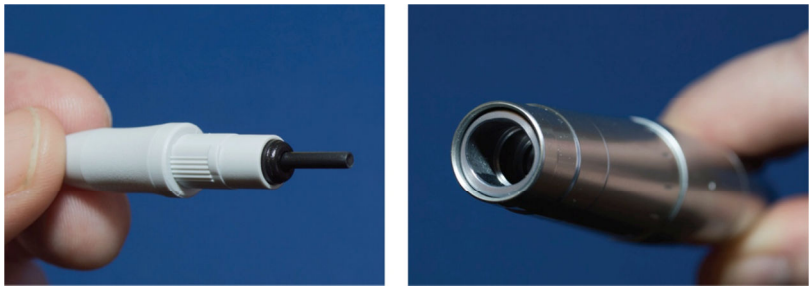
The Nouveau Contour needle cartridge further includes an ink receiving portion disposed around the needle, as shown at the opening in the outer housing. (CX-48 at Q168.)



CDX-1-001

c) "means for allowing simultaneous removal of the entire disposable module from the basic module"

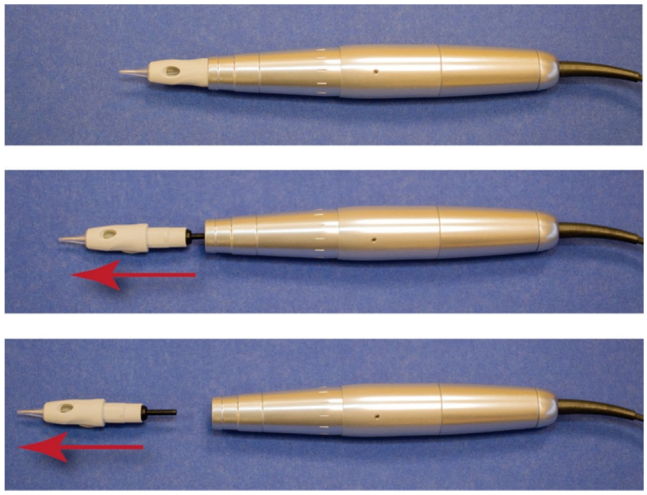
Dr. Trumper's testimony also demonstrates that the final limitation of claim 1 is satisfied by the Nouveau Contour PMU Device and Needle Cartridges. The structure of the housing of the Nouveau Contour needle cartridge is designed to be inserted within a corresponding opening of the handle of the Nouveau Contour PMU device, as shown below. (CX-48 at Q169.)



CX-36-010 and CX-36-011

This structural arrangement is consistent with the configuration shown in Figures 1 and 2 of the '530 Patent, which allows for the needle cartridge (disposable module) to be removably attached to the handle of the basic module. (CX-48 at Q169.)

By virtue of these structures, the Nouveau Contour needle cartridge is removable from the handle of the Nouveau Contour PMU device in a single step. As Dr. Trumper demonstrated, the entire cartridge is withdrawn from the handle and removed as a single piece. (CX-48 at Q169.)



CDX-1-007

Thus, Dr. Trumper's testimony establishes that the Nouveau Contour PMU devices and needle cartridges, as well as the Cheyenne® Hawk Tattoo Machine and Needle Cartridges, practice at least claim 1 of the '530 Patent. (CX-48 at Q170.)

D. Validity

A patent is presumed valid under 35 U.S.C. § 282. Therefore, "[t]he burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity." *See Certain Devices for Connecting Computers Via Telephone Lines*, ITC Inv. No. 337-TA-360, Initial Determination at 2 (May 24, 1994).

In Order No. 27, the Chief Judge determined that T-Tech had failed to plead the affirmative defense of invalidity and the defense was therefore waived. As such, there is no issue as to the validity of the '530 Patent properly raised in this Investigation.

E. Unenforceability

As with validity, T-Tech failed to plead any affirmative defense based on any claim that the '530 Patent is unenforceable. By failing to plead this defense, T-Tech has waived any challenge to the enforceability of the '530 Patent.

F. Other Defenses

Beyond contesting infringement and Complainants' satisfaction of the economic prong (which Complainants in both instance consider lacking in merit in view of the evidence on these issues discussed herein), Complainants are unaware of any other defenses properly raised by T-Tech.

IV. DOMESTIC INDUSTRY - ECONOMIC PRONG

In order to prove a violation under Section 337, Complainants must prove "an industry in the United States, relating to the articles protected by the patent, . . . exists or is in the process of being established." *Certain Microsphere Adhesives, Process for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes,* ITC Inv. No. 337-TA-366, Commission Opinion at 8, USITC Pub. No. 2949 (Jan. 1996) (quoting 19 U.S.C. §1337(a)(2)); *Certain Plastic Encapsulated Integrated Circuits,* ITC Inv. No. 337-TA-315, Commission Opinion at 16, USITC Pub. 2574 (Nov. 1992) (*Plastic Encapsulated Circuits*). Section 337 defines a domestic industry as follows:

> (a) (3) an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, or mask work or design concerned - -
>
> (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.
>
> 19 U.S.C. § 1337(a)(3).

Under Commission precedent, the domestic industry requirement consists of both an "economic prong" and a "technical prong." *See Certain Two-Handle Centerset*

Faucets and Escutcheons, and Components Thereof, ITC Inv. No. 337-TA-422, Initial Determination (Summary Judgment), Order No. 11 at 2 (Nov. 16, 1999) (*Centerset Faucets*); *Certain Laser Bar Code Scanners and Scan Engines, Components Thereof and Products Containing Same*, ITC Inv. No. 337-TA-551, Initial Determination (Summary Judgment), Order No. 25 at 3 (July 17, 2006) (aff'd by Comm'n). The economic prong is directed to the existence and quantity of activities in the United States defined by any of subsections (A)-(C) above. *See Certain Integrated Circuit Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, ITC Inv. No. 337-TA-337, Unreviewed Initial Determination (Summary Judgment) at *1-2, 1992 ITC LEXIS 484 (July 22, 1992) (granting motion for summary determination on the "economic prong" of the domestic industry requirement).

Here, the evidence demonstrates that Complainant MT. Derm is a worldwide leader in the innovation, design, development and manufacture of state of the art devices for the permanent makeup (PMU), medical and tattoo industries. (CX-49C at Q4; CX-44.) Although the devices used in each market are essentially the same and both are covered by the '530 patent, the tattoo and PMU markets are unique. (CX-49C at Q16.)

MT.Derm's products are sold primarily in Western Europe, the United States, Asia, Eastern Europe and the Middle East. MT.Derm's PMU and tattoo devices are of the highest quality, and are developed and manufactured in facilities certified in accordance with DIN EN ISO 9001:2000 and DIN EN ISO 13485:2003 standards. MT.Derm has invested significant time, financial resources, and effort in the research and development of permanent make up and tattooing technology, including the cartridge system for tattooing and permanent makeup applications at issue in this Investigation.

(CX-44-021 to -022; CX-49C at Q19 to Q20 and Q32 to Q33.) MT.Derm puts significant profits back into development of new technologies and improving existing ones. (CX-49C at Q4.) To protect its investment, MT.Derm has filed for and obtained numerous patents, including the '530 Patent. (CX-49C at Q5 to Q11.)

In the U.S., MT.Derm commercializes products for the tattoo market under the Cheyenne® brand name. Products under the Cheyenne® brand name include the HAWK tattoo machines, and associated needle cartridges. (CX-44-014 to -015; CX-10.) Each Cheyenne® tattoo machine can accommodate up to 25 different needle cartridge configurations. The Cheyenne® HAWK tattoo machine, in combination with the needle cartridges, are covered by the '530 Patent. (CX-49C at Q14; CX48 at Q141.) In the tattoo applications market, MT.Derm provides educational support for customers and users of its devices in the tattooing industry, and provides information to customers in the U.S. allowing customers to safely exploit the '530 Patent at issue. (CX-49C at Q23).

In [redacted], MT.Derm sold [redacted] worth of PMU and tattoo devices and related equipment to its U.S. distributors (retail value [redacted]). In fact, since [redacted] MT.Derm has sold over [redacted] ink application devices in about [redacted] countries worldwide, including at least [redacted] units in the United States. MT.Derm offers a full range of equipment and consumable attachments at the forefront of industry technology necessary for cosmetic ink application and tattooing, and has sold over [redacted] cartridges worldwide since [redacted] at least [redacted] of which were sold to customers in the United States. (CX-49C at Q48 to Q53; CX-21C.)

Complainant Nouveau Cosmetique is located in Orlando, Florida, and is a joint venture between principals of MT.Derm and NouveauContour BV (located in the

Netherlands). (CX-47C at Q7; CX-49C at Q12.) Nouveau Cosmetique is the exclusive U.S. Licensee of the '530 Patent in the field of PMU, and the distributor of MT.Derm's PMU equipment line in that field. (CX-7C; CX47C at Q10; CX-49C at Q12 to Q13.) Nouveau Cosmetique sells MT.Derm products under the NouveauContour Digital 1000, NouveauContour Intelligent, and NouveauContour Simplicity private labels. (CX-45; CX47C at Q11; CX-49C at Q14.) Every PMU machine distributed by Nouveau Cosmetique is covered by the '530 Patent. (CX-47C at Q12; CX-48 at Q140 to Q142; CX-49C at Q14)

In addition to sales of the patented articles, Florida-based Nouveau Cosmetique provides PMU related services to customers throughout the United States that include customer and product support as well as repair services for the products. (CX-47C at Q15 to Q18.) Nouveau Cosmetique also owns and operates the Nouveau Contour Academy, which is a training academy for PMU professionals. (CX-26; CX-47C at Q35 to Q40.)

Complainants rely on their significant employment of labor or capital, or alternatively on their investment in plant and equipment, or alternatively on substantial investment in the exploitation of the '530 Patent, including training, repair, customer and product support. As demonstrated below, and as set forth in the testimony of Joern Kluge (CX-49C), Robert Waters (CX-47C), and Dado Dzigal (CX-46C), Complainants' investments and activities are more than sufficient to satisfy the economic prong of the domestic industry requirement of Section 337.

The domestic industry requirement is not decided by the application of a rigid formula; rather, the determination is made by an examination of the facts in each

investigation, the article of commerce, and the realities of the marketplace. *Certain Feathered Fur Coats and Pelts, and Process for the Manufacture Thereof*, ITC Inv. No. 337-TA-260, Initial Determination at 14, USITC Pub. No. 2085 (May 1988), Unreviewed Initial Determination, Commission Notice (Nov. 10, 1987) (*Feathered Fur Coats*); *Certain Slide Fastener Stringers and Machines and Components Thereof*, ITC Inv. No. 337-TA-85, Commission Opinion at 21, USITC Pub. No. 1141 (April 1981); *Certain Variable Speed Wind Turbines and Components Thereof,* ITC Inv. No. 337-TA-376, Initial Determination at 70, USITC Pub. No. 3003 (May 30, 1996) (adopted by Comm'n) (*Wind Turbines*).

A Complainant may satisfy the economic prong of the domestic industry requirement by showing any one of the following: (1) significant investment in plant and equipment; (2) significant employment of labor or capital; or (3) substantial investment in the patent's exploitation, including engineering, research and development, or licensing. 19 U.S.C. §1337(a)(3). *Centerset Faucets* at 4-5; *Wind Turbines* at 69; *Certain Recombinant Erythropoietin*, ITC Inv. No. 337-TA-281, Initial Determination at 96-97, USITC Pub. 2186, 1989 ITC LEXIS 57 (April 1989). The evidence demonstrates that Complainants satisfy the economic prong of the domestic industry requirement under each of the alternative measures defined by 19 U.S.C. §1337(a)(3).

A. Complainants' Significant Investment in Plant and Equipment Satisfies the Economic Prong of the Domestic Industry Requirement

Nouveau Cosmetique has a [redacted] sq. foot facility in Orlando, Florida, used exclusively for customer and product support, sales, and training for purchasers and users of Nouveau Cosmetique's products. (CX-47C at Q20.) Nouveau Cosmetique acquired

its Orlando facility in [redacted] and in [redacted] total lease expenses totaled [redacted]. (CX-47C at Q21 to Q22; CX-25C.) Total lease payments from [redacted] totaled [redacted], not including sales tax. (CX-47C at Q22; CX-25C.) Approximately [redacted] of the facility is dedicated to the Nouveau Contour Training Academy (described below), which exists solely to provide training on the safe use of the patented articles to Nouveau Cosmetique licensees. (CX-47C at Q23.) Overall, approximately [redacted] of the facility space is directed to non-sales activities related to the '530 Patent, including, *e.g.*, the Training Academy, product support, customer support and education, etc. (CX-47C at Q23.) This corresponds to a lease expense of about [redacted], apportioned solely to non-sales activities associated with the '530 Patent. (CX-47C at Q24.)

Nouveau Cosmetique's capital investment in its Orlando facility was [redacted]. This includes an approximate [redacted] investment in the equipment used for education, training, and customer support relating to the patented articles. Equipment included treatment furniture (tables, etc.), lights, stools, supplies, TV monitors, computers, etc., all required to comply with health code standards for education. (CX-47C at Q25 to Q27; CX-22C.) Neither the language of the statute nor Commission precedent limits the investment in plant and equipment to only manufacturing related facilities, and indeed the Commission has accepted evidence of investments in a wide range of plant facilities and equipment. *See, e.g. In the Matter of Certain Acesulfame Potassium and Blends and Products Containing Same*, Inv. No. 337-TA-403, 1999 ITC LEXIS 130 (March 1999) (research laboratories); *In the Matter of* Cert*ain Adjustable Keyboard Support Systems and Components Thereof,* Inv. No. 337-TA-670, 2011 ITC LEXIS 2765 (Nov. 2011)

(facilities for quality control testing, design, and engineering of articles).

B. Complainants' Significant Employment of Labor or Capital Satisfies the Economic Prong of the Domestic Industry Requirement

Complainants' employment of U.S. labor or capital in supporting customers who purchase and use the patented tattoo and PMU devices and accessories includes customer training, certification, quality control, etc., and is sufficient to meet the significant employment of labor standard of §1337(a)(3)(B).[10]

Complainant Nouveau Cosmetique is the exclusive licensee of the '530 Patent in the United States for PMU applications. (CX-7C; CX-47C at Q12 to Q13.) As such, its employment of labor or capital is considered in evaluating the domestic industry in the '530 Patent. *Certain Variable Speed Wind Turbines and Components Thereof,* ITC Inv. No. 337-TA-376, Commission Determination (Feb. 2, 1997) ("We have consistently held that the domestic industry inquiry under section 337 is not limited to the activities of the patent owner, but also involves the activities of any licensees."); *See also, Certain Static Random Access Memories*, Inv. No. 337-TA-341, Order No. 5. ("The owner of a patent is not the only possible complainant. A licensed domestic producer of an article that is protected by a U.S. patent may be the complainant.").

In 2012, Nouveau Cosmetique had [redacted] full time employees at its Orlando, Florida facility whose full time responsibilities are the sales, customer support and training of customers of the MT.Derm products sold under the NouveauContour Digital 1000, NouveauContour Intelligent, and NouveauContour Simplicity private labels. (In 2013,

[10] [redacted] of Nouveau Cosmetique sales and services relate to its Nouveau Contour line of products, which are all articles encompassed within the scope of the '530 Patent. [redacted] relates to anesthetics, which are not covered by the '530 Patent. (CX-47C at Q16 to Q18.) Thus, [redacted] of the non-sales related investments of Nouveau Cosmetique are made in relation to the asserted '530 Patent, and are included for purposes of domestic industry.

Nouveau is projected to have [redacted] full time employees). (CX-47C at Q29.)

Of the [redacted] employees, [redacted] dedicated to sales full time. The remaining [redacted] employees each contribute a significant portion of their time to customer support, product training and administration. (CX-47C at Q30.) In 2011, the total Nouveau Cosmetique labor costs associated with the sales, customer education, product, support and training related to the patented products was [redacted], which is approximately [redacted] of the [redacted] cost of running the Orlando office and [redacted] of gross sales. (CX-22C; CX-47C at Q31.) For 2012, total labor costs associated with the sales, customer support and training of the patented products was [redacted], which is approximately [redacted] of the [redacted] cost of running the Orlando office and [redacted] of gross sales. (CX-20C; CX-47C at Q32 TO Q33.)

In addition to Nouveau Cosmetique as exclusive licensee for PMU applications, MT.Derm has [redacted] employee in the U.S., Mr. Dado Dzigal, with a home office in Louisville, Kentucky. Mr. Dzigal's full time responsibilities include the customer support and training of customers relating to the patented Cheyenne tattoo devices and related equipment used in the tattoo industry. (CX-46C at Q2; CX-49C at Q55 to Q56.) He is also responsible for order processing, customer service related to equipment (machines, grips and cartridges) manufactured by MT.Derm GmbH. He also handles the processing of warranties, product repair and replacement, and customer education. (CX-46C at Q3 to Q7; CX-49C at Q56.) Approximately [redacted] of his time is spent on product sales and marketing, and [redacted] of his time is spent on customer education, product support, warranty issues, training on MT. Derm products and repair/returns of MT. Derm equipment. (CX-46C at Q17.) The cost of Mr. Dzigal as MT.Derm personnel is

[redacted] per year, which includes salary, benefits and related expenses. (CX-49C at Q57 to Q58.)).

As stated above, Nouveau Cosmetique's initial investment in its Orlando facility was [redacted], which included approximately [redacted] of capital. (CX-47C at Q25 to Q27; CX-22C.) As a further example of capital investments, in 2009, Nouveau Cosmetique purchased Harmonix Corp. for [redacted], a company located in Florida and engaged in the distribution of certain ink application equipment and related devices. The acquisition was made to facilitate exploitation of the '530 Patent, and to increase Nouveau Cosmetique's ability to supply and service the domestic market. Presently, Harmonix is a subsidiary of Nouveau Cosmetique. (CX-47C at Q48 to Q50.)

C. Complainants' Substantial Investment in the Exploitation of the '530 Patent Capital Satisfies the Economic Prong of the Domestic Industry Requirement

Education and training on the proper use of Nouveau Cosmetique's PMU devices, all of which are covered by the '530 Patent, is essential for the safe and effective treatment of patients receiving PMU procedures. In fact, all states require cosmetologists performing PMU procedures to be certified in a licensed, accredited facility. Trainers receiving certification from Nouveau Cosmetique's Florida-based training academy can perform PMU procedures in virtually any state.[11] (CX-47C at Q34.)

Thus, for the patented articles to be used safely, and in order to comply with regulations requiring certification of individuals performing procedures with the devices, training is necessary. Absent a certification after training, no state permits a PMU procedure to be performed on a patient. Training and certification is therefore a required

[11] In Colorado, traders must receive a certification from an accredited facility in Colorado. (CX-47C at Q34.)

adjunct to the use of the patented PMU devices. In fact, complainant Nouveau does not sell any of the patented articles to customers or users who have not received certification. (CX-47C at Q34.)

In order to facilitate the proper and safe use of its patented devices, Nouveau Cosmetique's investment in its business includes the Nouveau Contour Academy, which is a training academy for permanent makeup professionals, owned and operated by Nouveau Cosmetique. The Nouveau Contour Academy is a fully accredited, state registered school that provides courses in the proper use of the MT.Derm PMU devices. (CX-26C; CX-47C at Q36). The annual cost of running the Orlando office of Nouveau Cosmetique is approximately [redacted], which includes the expense of running the Training Academy, which was [redacted] in 2012. (CX-20C; CX-47C at Q37.) Thus, in 2012, the cost of running the training academy was [redacted] of the cost of running the Orlando facility. (CX-47C at Q37.)

Complainants' investments in customer support and training activities may be used to establish the existence of a domestic industry under § 1337(a)(3)(C). *See Certain Switches and Products Containing Same*, Inv. No. 337-TA-589, Initial Determination at 74 (Nov. 7, 2007) (unreviewed in relevant part) (finding the economic prong satisfied by a "substantial investment" under section 337(a)(3)(C) relating to, *inter alia*, "customer **training** and support, the drafting of manuals, a limited amount of testing, minor repairs to returned products, and a small amount of design work" for a complainant whose product was manufactured abroad). In *Certain Liquid Crystal Display Devices*, Inv. No. 337-TA-741, Commission Opinion at (July 6, 2012), the Commission acknowledged that "the existence of other types of 'exploitation' of the asserted patent such as research,

development, or engineering; the existence of license-related ancillary activities such as ensuring compliance with license agreements *and providing training or technical support to its licensees*" would be considered as supporting a domestic industry under 19 U.S.C. § 1337(a)(3)(C); In *Certain Connecting Devices ("Quick-Clamps") for Use with Modular Compressed Air Conditioning Units*, Inv. No. 337-TA-587, Initial Determination at 63-64 (Feb. 13, 2008) (unreviewed) the Court found the economic prong satisfied by a "substantial investment" under section 337(a)(3)(C) relating to "customer support . . ., quality inspection, qualifying vendors, retooling manufacturing equipment, and quality control" for a complainant whose product was manufactured abroad.

Specific costs associated with running the Academy include employee and contract labor, hotel/student expenses, licensing, medical waste, supplies, depreciation, amortization, computer expenses, etc. In 2011, [redacted] students were trained at the Academy, and in 2012, [redacted] students were trained at the Academy. (CX-47C at Q37 to Q38).

The Nouveau Contour Academy is the only Permanent Make-up Academy in North America offering training from a Nouveau Contour Master Trainer, who is fully accredited from Nouveau Contour USA and Nouveau Contour Europe. The Master trainer is a [redacted] employee of Nouveau Cosmetique who spends all of her time in training and teaching. The Nouveau Contour Academy is a fully accredited educational facility that is licensed by the Commission for Independent Education, Florida Dept. of Education (License No. 4028). (CX-26; CX-47C at Q35 to Q36.)

Part 1 of The Nouveau Contour Academy Fundamental training class includes at least 35 hours of Pre-manual Self-study and 4 hours of Bloodborne Pathogens Certification. Part 2 of the Foundation course includes at least 65 hours of practical

"hands-on" model procedures including all basic permanent make-up techniques. This course is offered 12 times per year and typically, 2-5 students enroll in each course. (CX-47C at Q40.)

The advanced class, which is intended for those practicing professionals who want to advance their skill level and technique in discrete areas, features 8 hours or 16 hours of course instruction. Depending on the course offered, advanced classes are offered 40 times per year. The Instructor is a full time employee of Nouveau Cosmetique. (CX-47C at Q40.)

More than [redacted] of Nouveau Cosmetique's labor cost is associated with non-sales activities, e.g., the Training Academy and product support associated with its products and services. The remaining labor costs are related to sales. Since the introduction of its products in 2000, Nouveau Cosmetique has invested [redacted] in labor costs associated with the sales, service and support of its PMU devices. (CX-47C at Q44.)

The annual non-sales related labor costs of running the Orlando facility are [redacted], and the annual labor costs of running the Training Academy were [redacted] in 2012. (CX-20C; CX-47C at Q44.)

In order for Nouveau Cosmetique to continue to provide the most updated services and current techniques on the uses of the PMU devices, handsets and cartridges to Academy students and clients, MT.Derm (Berlin) sends personnel to Nouveau Cosmetique (U.S.) and vice versa several times per year. The development of new techniques by educators and the product training associated features of the MT.Derm PMU devices are all in further exploitation of the '530 patent. The cost of routinely exchanging personnel between the companies is approximately [redacted] per year. (CX-

47C at Q45 to Q46.)

In addition to its direct sales and training classes for the patented PMU devices, Nouveau Cosmetique works with a number of distribution partners in the U.S. for whom it provides support for the sales of its Nouveau Contour equipment. (CX-47C at Q51.) For example, the Beau Institute, located at 2000 Academy Drive, Suite 400, Mt. Laurel, New Jersey, 08054, specializes in Permanent Makeup Procedures, Training, and Supplies sales. The Beau Institute has [redacted] full-time employees and features the use of Nouveau Contour equipment embodying the '530 Patent, including the Digital Intelligent, the Digital 1000, and the Nouveau Contour needles specifically designed for use with this equipment. The Beau Institute offers permanent make-up training on this equipment at beginner and advanced levels, and in 2012, The Beau Institute trained [redacted] students on Nouveau Contour equipment. (CX-47C at Q52.)

Although these [redacted] trainers are employed by a distribution partner, they work exclusively with licensed Nouveau Contour devices, and so the labor expense associated with the employment of these individuals (used to train others on the proper use of the patented articles) should contribute toward the domestic industry under §1337(a)(3)(C). (CX-47C at Q51.)

Boca Ta-2, located at 940 N.W. 2nd Avenue in Williston, Florida, 32696, is a training academy that employs [redacted] full time professionals and offers beginning and advanced classes in the proper use of PMU equipment and techniques. The academy and the website features the use of Nouveau Contour's Digital Intelligent, Digital 1000, and Simplicity PMU devices, which all embody the '530 Patent owned by MT.Derm and licensed exclusively to Nouveau Cosmetique in the U.S. for PMU applications. The

academy offers a Fundamentals training course on the NouveauContour Simplicity machines for $4300 (including machine kit) and a beginner's training program on the NouveauContour Intelligent PMU machine for $5900. The Boca Ta-2 Academy is Licensed by the Florida Commission for Independent Education, License # 3866 (http://www.bocata2.com/training/training_fundamentals.htm), and its Director is nationally certified with the American Academy of Micropigmentation, CMI, and DAAM. In 2012, The Boca Ta-2 Academy trained [redacted] students exclusively on Nouveau Contour equipment. (CX-47C at Q53.)

Premier Products is a company located at 2500 E. Randolph Mill Rd., Ste. 137, Arlington, TX 76011-6302, that employs [redacted] full time individuals that both sell permanent pigment products and offer training on the proper use and techniques for PMU equipment as well as tattoo equipment. The company features Nouveau Contour (MT.Derm) devices and related equipment that embodies the '530 patent. In 2012, Premier Products trained [redacted] students exclusively on Nouveau Contour equipment. (CX-47C at Q54.)

Kolorsource is a micropigmentation company located in Hawaii that employs [redacted] full time professionals engaged in the sales and training on equipment and products used in the permanent make up industry. Kolorsource specifically features Nouveau Contour products on its website, and an instructional video by the Company's founder on the use of the NouveauContour Simplicity device, covered by the '530 patent. In 2012, Kolorsource trained [redacted] students exclusively on Nouveau Contour equipment. (CX-47C at Q55.)

The ACAS Academy in Boca Raton, Florida is a permanent makeup school featuring beginner and advanced classes in makeup, micropigmentation, cosmetic

enhancement and tattoo removal. ACAS is licensed by the Florida Department of Education, Commission for Independent Education #3954, and is a recognized Medical Professional of the (IBMS) International Board of Medicine and Surgery. The ACAS Academy features Nouveau Contour equipment and in 2012, ACAS Academy trained [redacted] students exclusively on Nouveau Contour equipment. (CX-47C at Q56.)

The NaturaLook Institute in La Jolla, California is certified by the Society of Permanent Cosmetic Professionals (SPCP) and American Academy of Micropigmentation (AAM) and offers beginners and advanced classes in permanent makeup and micropigmentation. In 2012, NaturaLook trained [redacted] students exclusively on Nouveau Contour equipment. (CX-47C at Q57.)

Thus in 2012, training by Nouveau Cosmetique distribution partners was provided to [redacted] students exclusively using Nouveau Contour equipment. All of the training, instruction and value added services provided by, *e.g.*, The Beau Institute, Boca Ta-2, Premier Pigments, ACAS Academy, NaturaLook and Kolorsource on the NouveauContour Digital Intelligent, Digital 1000, and Simplicity PMU devices represent further investment in labor and capital in the PMU industry defined by the '530 Patent, because each employs trainers and provides instruction on the correct use and specific procedures for the patented NouveauContour machines and related equipment. Although Complainants do not bear the labor costs of the trainers, cosmetologists, etc., employed by The Beau Institute, Boca Ta-2, Premier Pigments, ACAS Academy, NaturaLook and Kolorsource, the instruction, support and training provided by these companies furthers the exploitation of the '530 Patent by promoting the safe use of Complainants' patented articles, as well as the development of new techniques and products in the PMU market.

(CX-47C at Q58.)

Also included as part of Nouveau Cosmetique's investment is product repair and support. At the Orlando facility, repairs are received, administered and returned from the Nouveau Cosmetique office in Orlando. Nouveau then sends all of its repairs to a third party contractor in Boca Raton, Florida. Nouveau Cosmetique spent approximately [redacted] in product repair costs to its third-party contractor in 2012 to repair its patented machines. (CX-47C at Q47; CX-20C.)

In addition to the Academy, Nouveau Cosmetique offers a hotline for providing support on the use of its products. The hotline is run by Nouveau Cosmetique from its Florida location, and all support issues received through the hotline are handled by Nouveau Cosmetique staff directly. Nouveau Cosmetique also offers repair service on all of its products, and it manages the importation, inventory, and marketing and sales of all of its products. Repairs to Nouveau Cosmetique products are performed in the U.S. by third-party repair organizations, under contract from Nouveau Cosmetique. (CX-47C at Q59.)

In addition, MT.Derm is currently working under an agreement with [redacted] directed at the joint development of new removable tattoo colors that will be used in conjunction the patented tattoo application devices and related equipment. [redacted] are U.S. based companies and the joint R&D effort with MT.Derm is undertaken in further exploitation of the '530 patent. During the research and product development work under the agreement, MT.Derm invested [redacted] in cash plus R&D support for staff and regular participation in U.S. meetings. In addition, MT.Derm managed a sub-division of

[redacted] in Germany. (CX-49C at Q59.)

Additionally MT.Derm exhibits (directly and indirectly) at beauty exhibitions, medical conferences and tattoo conventions throughout the U.S. MT.Derm attends more than 10 such events per year. MT.Derm supports all products with respects to repairs, exchange, or credits, etc., and provides hotlines to support both its distribution partners and their customers on the correct use of MT.Derm's products. All of these activities are undertaken in further exploitation of the '530 Patent. (CX-49C at Q63).

Complainants submit that the above figures qualify as significant investment in plant, equipment, labor and capital relating to the training, product support, and repair relating Nouveau Cosmetique's permanent makeup equipment line. Even though Nouveau Cosmetique is a relatively small company, its operations are exclusively dedicated to the patented articles and their safe use, and its labor costs are approximately [redacted] of its operational expenses on an annual basis. Its capital expenses associated with the acquisition of Harmonix Corp. are also exclusively related to the '530 Patent. *See Feathered Fur Coats* at 16-19; *Certain Telephonic Digital-Added Main Line Systems, Components Thereof and Products Containing Same,* ITC Inv. No. 337-TA-400, Unreviewed Initial Determination, Order No. 6 at 3-5 (Nov. 6, 1997) (granting motion for summary determination on domestic industry where complainant establishes significant investment in labor and capital). Complainants' investments in customer training, product support/product repair, hotline support, customer education, follow-up service, etc., are substantial, and sufficient to establish the existence of a domestic industry under Section 337(a)(3)(C) that is independent of, and addition to, any domestic industry that is established under Section 337(a)(3)(A)-(B), based on Complainants' significant

employment of plant, equipment, labor or capital. *Display Controllers* at *10; *Memory Controllers* at 1-4.

V. REMEDY AND BONDING

Subsequent to an initial determination on the question of violation of Section 337, the administrative law judge must issue a recommended determination concerning the appropriate remedy in the event that the Commission finds a violation of Section 337, and the amount of bond to be posted during Presidential review of the Commission action. *See* 19 C.F.R. § 210.42(a); *Certain Static Random Access Memories and Products Containing Same*, ITC Inv. No. 337-TA-792, Initial Determination, 2012 WL 6635029 at *29 (Oct. 25, 2012).[12]

A. A Limited Exclusion Order Should be Entered as to T-Tech

"The Commission has broad discretion in selecting the form, scope, and extent of a particular remedy." *Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 18 (July 1997). Should a violation of Section 337 be found with respect to T-Tech, Complainants submit that the appropriate remedy is a limited exclusion order directed at accused products imported by or on behalf of T-Tech. Complaints seek a permanent limited exclusion order pursuant to Section 337(d) of the Tariff Act of 1930, as amended, excluding from entry into the United States the T-Tech Accused Products.

[12] On July 13, 2012, Complainants previously provided a Written Submission on Remedy, Public Interest, and Bonding with Respect to the Defaulting Respondents Yiwu Beyond Tattoo Equipments Co., Ltd. and Guangzhou Pengcheng Cosmetology Firm. (Document No. 485370.) In that submission, Complainants requested a Permanent Limited Exclusion Order as to the defaulted respondents. As to bonding, Complainants requested that the defaulting respondents be prevented from importing infringing products during the Presidential review period, or, alternatively, the Commission should impose a bond of 100% of the entered value of the infringing articles.

Further, the Commission "has long recognized that an exclusion order directed at specific models adjudicated to be infringing does not protect the patent owner's rights by preventing importation of all infringing merchandise, and is subject to circumvention; it fails to achieve the intended effect of exclusion orders of preventing future violations with respect to the type of products involved in the investigation." *Certain Hardware Logic Emulation Systems and Components Thereof*, Inv. No. 337-TA -383, USITC Pub. 3089, Comm'n Op. on Remedy, the Public Interest and Bonding, 1998 ITC LEXIS 138 at *22-23 (Mar. 1998) (*citing Certain Nonwoven Gas Filter Elements*, Inv. No. 337 TA 275, USITC Pub. 2129, Comm'n Op. at 7-8, (Sept. 1988)); *Certain Cellular Radio Telephones and Subassemblies and Component Parts Thereof*, Inv. No. 337-TA-297, USITC Pub. 2361, Comm'n Op. at 5-6, (Feb. 1991). Additionally, limiting the scope of an exclusion order to the specific models of accused devices found to infringe a patent owner's patents "merely invites an unscrupulous respondent to change the model numbers to circumvent the order." *Certain Hardware Logic*, Inv. No. 337-TA-383, USITC Pub. 3089, Comm'n Op. on Remedy, the Public Interest, and Bonding, 1998 ITC LEXIS 138 at *8 (quoting the ALJ's RD on remedy, c*iting Certain Cellular Radio Telephones and Subassemblies and Component Parts Thereof*, Inv. No. 337-TA-297, USITC Pub. 2361, Comm'n Op. on Remedy, the Public Interest, and Bonding at 5 (Aug. 1989)). Accordingly, Complainants seek a permanent limited exclusion order pursuant to Section 337(d), excluding the unlicensed entry into the United States of ink application devices and components thereof that infringe certain claims of U.S. Patent No. 6,505,530, and that are made by or for and/or sold by T-Tech or any of its affiliated companies, parents, subsidiaries, agents, or other related business entities, or its successors or assigns.

In this case, exclusion of the infringing ink application devices and components thereof will have no negative or deleterious effect on public health and welfare in the United States, on competitive conditions in the United States economy, on the production of like or directly competitive articles in the United States, or on United States consumers. As described below:

(a) There are no public health, safety, or welfare concerns in the United States relating to the potential exclusion order against the infringing products or relating to proposed cease and desist orders against Respondents.

(b) Complainants' products are widely available in the United States.

(c) Complainants and/or their licensees are able to meet all current and conceivable demand in the relevant industry.

Complainants submit that such public interest factors are served by excluding T-Tech's infringing ink application devices and components thereof from entry into the United States and from prohibiting certain activities by T-Tech with respect to these products in violation of Complainants' rights in the Asserted Patents.

No Adverse Effect On Public Health, Safety, or Welfare in the United States-

The issuance of an exclusion order or cease and desist order in this matter would not adversely affect the public health, safety, or welfare in the United States. In fact, the opposite is true- an exclusion order would improve the public health, safety and welfare.

Specifically, during the ink application process, one or more needles deliver colored ink into the dermis, which is the second layer of skin. When a customer's skin is pierced by the needle of an ink application device, blood or blood serum may issue from the treated portion of the skin. Because certain infectious deceases, including HIV and

hepatitis, can be transmitted by bodily fluids, there is a substantial concern for the health and safety of the customer, as well as the user/artist. (CX-49C at Q85 to Q89; CX-11).

Complainants' needle cartridges are designed and developed to prevent the spread of disease by incorporating certain protections into the product. Specifically, each MT.Derm manufactured cartridge includes a resilient diaphragm, which prevents the contamination of ink application devices. In addition, each needle cartridge manufactured by MT.Derm and used by Nouveau Cosmetique meets strict health and safety standards, and is certified by DIN EN ISO 9001 and 13485. And, each MT.Derm needle cartridge undergoes an extensive final inspection before being released to the public. Technicians that use these products must also follow strict hygiene and sterilization procedures that conform to OSHA and CDC (Centers for Disease Control) guidelines. These protections eliminate or greatly reduce the risk of contamination, and thereby protect the health of consumers across the United States. (CX-49C at Q22 and Q85.)

The EZ Needle Cartridges sold by T-Tech, on the other hand, do not offer such protection and may not meet any hygienic standards. These devices are made in China, and while T-Tech may advertise the products as being safe, there is no guarantee that this is the case. In addition, the T-Tech EZ Needle cartridges do not have an internal diaphragm to prevent the backflow of wound liquids into the ink-application device. As such, the ink-application device may become contaminated and would pose a severe health risk if used on subsequent customers. Thus, a purchaser who is confused into believing that the Defaulting Respondents' infringing products offer the same protection

as those manufactured by MT.Derm or sold by Nouveau Cosmetique, but simply cost less money, may infect his or her customers without even realizing it. (CX-49C at Q86.)

No Negative Effect On Competitive Conditions- The proposed limited exclusion order would not negatively affect the competitive conditions in the United States. The competitive policy of the United States favors the protection of domestic intellectual property rights. *See Certain Two-Handle Centerset Faucets and Escutcheons, and Components Thereof* Inv. No. 337-TA-422, USITC Pub. No. 3332, Comm'n Op. at 9 (July 2000). Complainants have made and continue to make substantial investments in the design and development of new products covered by the asserted patents, as well as the exploitation of their patents through licensing and enforcement activities. (CX-49C at Q4, Q12, Q14, Q22.) Without the requested limited exclusion order, Complainants' investment will be left unprotected.

MT.Derm has enforced, and will continue to enforce, its intellectual property rights in the '553 and '530 patents using all available means. (CX-49C at Q64 to Q73.) The issuance of a permanent limited exclusion order in this matter would have the beneficial effect of protecting Complainants' valuable intellectual property rights, and thus fostering innovation.

Complainants Have The Capacity To Replace The Volume Of Articles To Be Excluded- The United States market for ink application devices and components thereof can be fully supplied by Complainants or by other non-infringing alternatives (CX-49C at Q91), and therefore exclusion of the T-Tech products will not harm the production of like or directly competitive articles in the United States. In fact, Complainant MT.Derm has approximately a [redacted] market share in the United States of PMU and tattoo

needles/devices market. By contrast, the infringing products have [redacted] of the PMU and tattoo needles/devices market. (CX-49C at Q90). If the "market" is defined as a market for disposable needle cartridges for use with MT.Derm devices, the infringing products have [redacted] share of the U.S. market. (CX-49C at Q90). Complainants have the capacity to supply the volume of articles subject to the potential remedial orders in a commercially reasonable time in the United States. (QX-49C at Q91.)

Impact Of Requested Relief On Consumers- The requested relief would likely have little to no impact on consumers. MT.Derm makes and sells products covered by the '530 Patents, including the Cheyenne Hawk and Nouveau Contour PMU Devices. Complainants have the capacity to supply the United States market with any needle cartridges and components expected to be excluded under the proposed Exclusion Order. (CX-47C at Q91.)

Moreover, Complainants are prepared to work with U.S. Customs and Border Protection ("Customs") to address any potential disruption in needle cartridge and component supplies. Thus, U.S. consumers will still be able to purchase competitively priced needle cartridges as well as other products that lack the infringing features. For at least these reasons, the requested remedial orders in this matter will not significantly impact U.S. consumers.

Moreover, T-Tech has indicated that it has "no contention" as to the appropriate remedy that should be imposed in the event a violation of Section 337 is found. (CX-41 at Response No. 15.) This further supports the entry of the requested Limited Exclusion Order.

B. No Cease and Desist Order is Sought

T-Tech has represented that it does not maintain any inventory of the accused products in the United States. (CX-39 at Response No. 6.) Based on this representation, Complainants are not seeking a cease and desist order to be entered as to T-Tech.

C. A 100% Bond Should Be Imposed

Section 337 provides that the bond during the Presidential review period should be set at an amount "sufficient to protect the complainant from any injury." 19 U.S.C. § 1337(j)(3). The Commission may compute the bond based on one of the following methods: (i) determining the difference in sale prices between the accused imported products and Complainants' domestic products; or (ii) determining a reasonable royalty rate based on royalties charged in licenses of the patents in suit. *See, e.g., Certain Electrical Connectors and Products Containing Same*, Inv. No. 337-TA-374, USITC Pub. No. 2981, Comm'n Op. at 20-21 (July 1996) (imposing a 20% bond based on evidence that respondents' connectors typically sold for 15-20 percent below complainant's product); *Certain Acid-Washed Denim Garments and Accessories*, Inv. No. 337-TA-324, USITC Pub. No. 2576, Comm'n Op. at 27-28 (Nov. 1992) (imposing a 3.75% bond based on royalty rates charged to several licensees of the patents in suit).

However, where direct price comparisons between the parties' respective products are not clear, the Commission frequently establishes a bond rate of 100% of the entered value for the infringing product. *See, e.g., Certain Microsphere Adhesives, Process for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, ITC Inv. No. 337-TA-366, USITC Pub. No. 2949, Comm'n Op. at 25 (Jan. 1996) (citing cases). The lack of reliable price comparisons is particularly acute here given T-Tech refusal to provide documentary evidence of sales and customer communications in

response to Complainants' discovery requests claiming such documents did not exist, resulting in sanctions being imposed by the Administrative Law Judge in Order No. 24. Since direct price comparisons cannot be determined, and T-Tech's refusal to cooperate in discovery has produced this result, Complainants submit that a bond be set at one hundred percent (100%) of the entered value of the imported ink application devices and components thereof excluding the value of the goods contained therein, during the Presidential review period. Such a bond will be sufficient to protect Complainants from injury.

Furthermore, T-Tech has again stated that it has "no contention" as to the amount of bond that should be imposed during the Presidential Review Period. (CX-41 at Response No. 16). This too supports the imposition of the requested 100% bond amount.

VI. CONCLUSION

As discussed herein, the evidence will demonstrate a violation of Section 337 with respect to the T-Tech Accused Products, that a limited exclusion order should be entered, and a 100% bond imposed during the Presidential Review period.

Dated: April 12, 2013

Complainants by their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2013, copies of the foregoing **COMPLAINANTS' PRETRIAL BRIEF (PUBLIC VERSION)** were served upon the following parties as indicated:

The Honorable Lisa R. Barton Acting Secretary U.S. International Trade Commission 500 E. Street S.W. Room 112 Washington, D.C. 20436	(☐) Via hand delivery (☐) Via FedEx (☐) Via facsimile (☐) Via first class mail (☒) Via EDIS
The Honorable Charles E. Bullock Chief Administrative Law Judge U.S. International Trade Commission 500 E. Street, S.W., Room 317 Washington, D.C. 20436 ***(two hard copies)***	(☐) Via hand delivery (☒) Via FedEx (☐) Via facsimile (☐) Via first class mail (☐) Via EDIS (☒) Via Email (Irina.Kushner@usitc.gov)
Matthew N. Bathon, Esq. Commission Investigative Attorney Office of Unfair Import Investigation U.S. International Trade Commission 500 E. Street, S.W. Washington, D.C. 20436 *Matthew.Bathon@usitc.gov*	(☐) Via hand delivery (☒) Via FedEx (☐) Via facsimile (☐) Via first class mail (☐) Via EDIS (☒) Via Email (.pdf copy)
T-Tech Tattoo Device Inc. 33 Kiriakou St. Scarborough, Ontario, CANADA, M1P 5G8	(☐) Via hand delivery (☒) Via FedEx (☐) Via facsimile (☐) Via first class mail (☐) Via EDIS

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