September 2, 2014

The Honorable Lisa R. Barton
Secretary to the Commission
U.S. International Trade Commission
500 E Street SW
Washington, DC 20436

Submitted electronically via Electronic Document Information System (EDIS)

RE: Certain Laser Abraded Denim Garments, Docket No. 3027

Dear Ms. Barton:

On the behalf of our combined membership, which represents the apparel and retail industries, and their suppliers, we are writing in response to the request for comments on public interest issues raised by the complaint entitled "Certain Laser Abraded Denim Garments" under Docket No. 3027.

The U.S. International Trade Commission (ITC or Commission) has requested comments on whether the relief requested in the complaint in this investigation would, if granted, adversely affect the public health and welfare, the competitive conditions in our economy, the production of like or directly competitive articles, and our consumers in the United States. We believe it would, and we therefore request that the ITC not launch the investigation based upon the complaint as filed.

First, while we are strong supporters of properly registered and enforced IPR, we understand there are significant questions about the asserted patents and licenses as well as the methods being used to protect them. The crux of Complainants' case is that all laser abrasion process technology violates one or more of their patents. The Complainant specifically targets the laser abrasion technology of Jeanologia/GFT and Easy Laser. Rather than going after these parties directly regarding alleged patent infringement, Complainants have chosen to go after Respondents, importers of distressed and worn jeans. The 337 infringement analysis requires substantial detailed information regarding the production processes used for the manufacture of the accused denim garments. That information is exclusively in the hands of Jeanologia/GFT and Easy Laser and the foreign apparel producers—not Respondents who are merely purchasers of finished apparel products and therefore are not directly responsible for any of the violations being claimed. Great care should be taken before the Commission undertakes an investigation that could have far-reaching and negative impacts on our industries and the U.S. economy.

We further note that on August 15, 2014, the Complainants in this case served each of the listed Respondents in a related patent infringement case.[1] The fundamental issue in that case will be validity of the same patents listed in this case. In order for the ITC to proceed, articles must infringe upon a valid and enforceable patent. To proceed with a 337 case prior to a formal determination of the validity of the underlying patents would be premature.

Second, an adverse ITC decision would have major negative ramifications for a serious public health issue and undermine the positive progress that the retail and apparel industries have made over the last decade through various social responsibility efforts. Our members are working to eliminate the practice of using sandblasting for post-production finishes from our supply chains due to the concerns raised by apparel production workers of significant health risks if the sandblasting is not performed with adequate protective gear using safe work practices in a proper environment. A broad import restriction may significantly restrict the use of alternative technology, which would chill efforts to remove harmful sandblasting techniques and encourage a return to the use of sandblasting, creating a serious risk to the health of workers. An import restriction, especially if the underlying IPR are of suspect validity and scope, may improperly limit the use of all laser-based finishing technology, which would chill efforts to remove harmful sandblasting techniques altogether. Such a result would have an unacceptable impact on the health and safety of garment workers throughout the world.

Third, a general exclusion order that would necessarily cover the entire class of worn distressed denim product would have a tremendous detrimental impact on the U.S. apparel and retail industries, the workers in those industries, consumers and the U.S. economy. The general exclusion order proposed could amount to an import restriction on an entire class of products (jeans with worn/distressed finish) and would impact a large number of companies beyond those that are the subject of the proposed investigation. A significant percentage of the denim products sold in the U.S. today involve some sort of post-production distressing technique to achieve a distressed or worn look. This look can be achieved through a wide range of processes, including those involving lasers as well as other abrasion techniques. Importantly, it is exceedingly difficult to determine which method was used to achieve a distressed look through mere visual inspection. Moreover, we are not aware of an industry test method that could be used to accurately identify the particular process used to create the distressed effect on a specific product. Customs and Border Protection (CBP) would have no definable way to determine how a particular product achieved the distressed look or to enforce an import restriction based on the specific distressing process and thus could lead to overbroad enforcement. Therefore, an import restriction that is intended to target certain processes would have the risk of being an import restriction on the "look" itself, impacting a wide range of products beyond the scope of the requested investigation that do not undergo the targeted, laser-based processes because of the difficulty in determining which process was actually used to create the distressed look. Thus, the requested exclusion order would necessarily disrupt the importation of an entire class of garments that are provided post-production distressed characteristics by means other than the targeted lasers technology, laser technology not covered under the 337 petition, sandblasting or hand-sanding techniques in which workers abrade the garments using sandpaper or other abrasive materials.

[1] See Verified Complaint p 31.

Fourth, because the Complainants currently own patents for a specific type of laser abrading technology (i.e., one particular type of machine that can be used to accomplish abrading) and do not produce abraded denim garments, they do not produce like or directly competitive articles that could replace the subject articles, if the latter were to be excluded as a result of the proposed investigation. Millions of denim garments, many with distressed and worn finishes, are sold annually in the U.S. Although the Complainants claim that they are in the process of setting up a domestic industry,[2] the Complainants do not currently have nor could they readily obtain the capacity needed to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time. As a result, the impact of the requested remedy would deprive U.S. consumers of the ability to choose multiple garment finishes and appearances in the apparel they buy, have a substantial negative effect in the U.S. market for denim garments, and create economic hardship for U.S. companies and their employees.

Fifth, one of the patents asserted in the complaint will expire prior to the anticipated target date if this action is instituted. This raises a serious concern that complainants' true goal is to extract payment from the industry rather than an exclusion order, which would be mooted by the expiration of this patent. U.S. Patent No. 5,990,444 ("the '444 Patent") will expire in less than 14 months, on October 30, 2015. The Commission grants only prospective relief, and once a patent in suit expires, the investigation must be terminated as moot as to that patent. *See Mobile Devices, Associated Software, and Components Thereof*, 337-TA-744, Notice of Termination, April 30, 2014 (terminating the investigation as no remedy may issue for the expired patent.); *Audiovisual Components and Products*, 337-TA-837, Commission Determination to Grant Motion to Partially Terminate, March 4, 2014 (terminating the investigation as to the expired patent "because the Commission grants prospective relief only, when the '867 patent expired, the investigation concerning the '867 patent became moot."). As Commission precedent indicates that summary determination may not be available prior to the patent's expiration, the Commission should decline to institute an investigation as to this patent in order to avoid the needless waste of substantial Commission and industry resources.

It is for these reasons that we urge the ITC not to initiate the investigation. We believe the proposed relief would have a detrimental impact on workers' health, our industries' economic welfare, and the cost on consumers of the affected products.

Should the Commission decide to initiate the investigation, we request that it delegate the authority to make factual findings regarding the public interest to the Administrative Law Judge (ALJ) in the investigation. Such delegation would ensure that the Commission receives a full record regarding the public interest that allows it to carry out its statutory duty to protect workers, consumers, U.S. companies, and the U.S. economy.

[2] See Complaint pp 32-35

Thank you for your consideration in this matter. Please don't hesitate to contact one of us if you have any questions or would like additional information.

Sincerely,

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