

*In the Matter of*

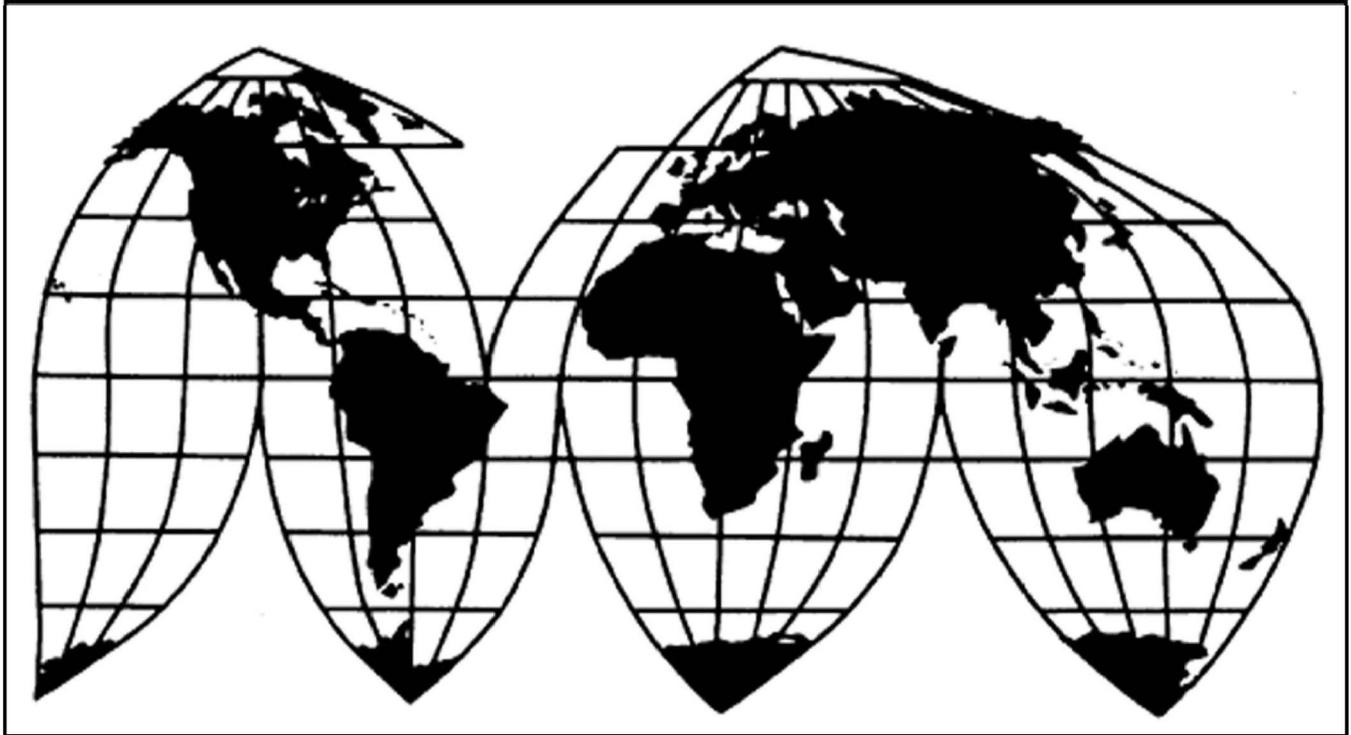
**CERTAIN FOLDABLE REUSABLE  
DRINKING STRAWS AND COMPONENTS  
AND ACCESSORIES THEREOF**

Investigation No. 337-TA-1183

**Publication 5306**

**March 2022**

**U.S. International Trade Commission**



Washington, DC 20436

# **U.S. International Trade Commission**

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Washington, DC 20436**

# **U.S. International Trade Commission**

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*In the Matter of*

## **CERTAIN FOLDABLE REUSABLE DRINKING STRAWS AND COMPONENTS AND ACCESSORIES THEREOF**

Investigation No. 337-TA-1183



**UNITED STATES INTERNATIONAL TRADE COMMISSION**  
**Washington, D.C.**

**In the Matter of**

**CERTAIN FOLDABLE REUSABLE  
DRINKING STRAWS AND COMPONENTS  
AND ACCESSORIES THEREOF**

**Investigation No. 337-TA-1183**

**ISSUANCE OF A GENERAL EXCLUSION ORDER;  
TERMINATION OF THE INVESTIGATION**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to issue a general exclusion order (“GEO”) prohibiting the unlicensed importation of foldable reusable drinking straws and components and accessories thereof that infringe one or more of claims 1-12 and 14-17 of U.S. Patent No. 10,123,641 (“the ’641 patent”). The investigation is terminated in its entirety.

**FOR FURTHER INFORMATION CONTACT:** Cathy Chen, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, D.C. 20436, telephone 202-205-2392. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email [EDIS3Help@usitc.gov](mailto:EDIS3Help@usitc.gov). General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on November 13, 2019, based on a complaint filed on behalf of The Final Co. LLC (“Final” or “Complainant”) of Santa Fe, New Mexico. 84 FR 61639 (Nov. 13, 2019). The complaint, as amended, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (“section 337”), in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain foldable reusable drinking straws and components and accessories thereof by reason of infringement of claims 1-12, 14-17, and 20 of the ’641 patent. *Id.* The complaint further alleged that a domestic industry exists. *Id.* The Commission’s notice of investigation named seventeen respondents: Huizhou Sinri Technology Company Limited of Guangdong, China; Hebei Serun Import and Export Trade Co., Ltd. of Hebei, China; Dongguan Stirling Metal Products Co., Ltd. of Guangdong, China; Ningbo Wwpartner Plastic Manufacture Co., Ltd. of Zhejiang, China;

Shenzhen Yuanzhen Technology Co., Ltd. of Shenzhen, China; Jiangmen Boyan Houseware Co., Ltd. of Guangdong, China; Shanghai Rbin Industry And Trade Co., Ltd. of Shanghai, China; Jiangmen Shengke Hardware Products Co., Ltd. of Guangdong, China; Funan Anze Trading Co., Ltd. of Anhui, China; Hangzhou Keteng Trade Co., Ltd. of Zhejiang, China; Hunan Jiudi Shiye Import And Export Trading Co., Ltd. of Hunan, China (“Hunan Jiudi”); Shenzhen Yaya Gifts Co., Ltd. of Guangdong, China; Ningbo Weixu International Trade Co., Ltd. of Zhejiang, China (“Ningbo Weixu”); Ningbo Beland Commodity Co., Ltd. of Zhejiang, China; Xiamen One X Piece Imp. & Exp. Co., Ltd. of Fujian, China; Hunan Champion Top Technology Co., Ltd. of Hunan, China; and Yiwu Lizhi Trading Firm of Zhejiang, China. *Id.* at 61639-40. The Office of Unfair Import Investigations (“OUII”) is also named as a party in this investigation. *Id.* at 61640.

The Commission terminated respondents Ningbo Weixu and Hunan Jiudi from the investigation based on Complainant’s partial withdrawal of the complaint. *See* Order No. 7 (Feb. 13, 2019), *unreviewed by* Comm’n Notice (Mar. 9, 2020).

On March 16, 2020, the Commission found the remaining fifteen respondents (collectively, the “Defaulted Respondents”) in default. Order No. 8 (Mar. 3, 2020), *unreviewed by* Comm’n Notice (Mar. 16, 2020).

On April 7, 2020, Complainant filed a motion for summary determination of a violation of section 337 by the Defaulted Respondents. On May 5, 2020, Complainant filed a motion for leave to supplement the motion for summary determination, and the ALJ granted leave on May 8, 2020. On May 27, 2020, OUII filed its response in support of Complainant’s motion.

On July 17, 2020, the ALJ issued Order No. 13, an ID granting in part the motion for summary determination. *See* Order No. 13 (July 17, 2020). The ALJ found that Complainant established importation of the accused products and infringement of claims 1-12 and 14-17 of the ’641 patent by Defaulted Respondents and that Complainant satisfied the technical prong of the domestic industry requirement. However, the ALJ did not grant the motion with respect to Complainant’s satisfaction of the economic prong of the domestic industry requirement or infringement of claim 20, so the ALJ did not find a violation of section 337 by the Defaulted Respondents. The Commission determined not to review Order No. 13. *See* Notice (Aug. 18, 2020).

Also, on July 17, 2020, the ALJ issued Order No. 14, which required the parties to choose from several options on how to proceed. *See* Order No. 14, at 1-2 (July 17, 2020). On July 31, 2020, Complainant and OUII filed a joint response to Order No. 14. The joint response stated that Complainant would file a motion to amend the complaint to terminate its assertion of claim 20 of the ’641 patent, and an additional motion for summary determination on the remaining issues.

On August 7, 2020, Complainant filed a motion for partial summary determination regarding the economic prong of the domestic industry requirement, a remedy in the form of a general exclusion order, and a bond during the period of Presidential review in the amount of one

hundred percent (100%) of the entered value. On August 14, 2020, Complainant moved to replace Exhibit 11C within its motion for summary determination, which was granted by the ALJ. *See* Order No. 16 (Aug. 20, 2020). On August 24, 2020, OUII filed its response in support of Complainant's motion.

On August 17, 2020, Complainant moved to terminate the investigation with respect to asserted claim 20 by reason of withdrawal of the complaint allegations. On August 26, 2020, the ALJ granted the motion to withdraw claim 20. *See* Order No. 17 (Aug. 26, 2020), *unreviewed by* Comm'n Notice (Sep. 15, 2020).

On September 22, 2020, the ALJ issued Order No. 18, an ID granting Complainant's motion for partial summary determination that a domestic industry exists with respect to Complainant's research and development investments under section 337(a)(3)(C) and finding a violation of section 337 with respect to claims 1-12 and 14-17 of the '641 patent by the Defaulted Respondents. The ID also denied Complainant's motion for summary determination under section 337(a)(3)(B). No petitions for review of the ID were filed.

The ALJ concurrently issued a Recommended Determination ("RD") on the issues of remedy and bonding. The RD recommended the issuance of a GEO and setting the bond during the period of Presidential review in the amount of one hundred percent (100%) of the entered value. The Commission solicited comments from the public on public interest issues raised by the recommended relief. 85 FR 67010 (Oct. 21, 2020). No submissions were filed in response to the Commission Notice.

On November 5, 2020, the Commission determined not to review Order No. 18, thereby adopting the ID's finding of a violation of section 337 in connection with claims 1-12 and 14-17 of the '641 patent. 85 FR 71942-43 (Nov. 12, 2020). (The Order's denial of summary determination as to section 337(a)(3)(B) was not an initial determination subject to Commission review and hence was not adopted by the Commission). The Commission also requested the parties, interested government agencies, and other interested parties to file submissions on the issues of remedy, the public interest, and bonding during the period of Presidential review. *Id.* at 71944. On November 19 and November 23, 2020, OUII and Complainant, respectively, filed submissions on the issues of remedy, the public interest, and bonding as requested by the Commission. *See id.* at 71943-44. On November 30, 2020, OUII and Complainant each filed reply submissions. No other submissions were received in response to the Notice.

The Commission has determined that the appropriate remedy in this investigation is a GEO prohibiting the unlicensed importation of foldable reusable drinking straws and components and accessories thereof that infringe one or more of claims 1-12 and 14-17 of the '641 patent. The foldable reusable drinking straws and components and accessories thereof that are subject to the GEO are as follows: individual foldable reusable drinking straws and components thereof, cases used to store the foldable reusable drinking straws, and tools used for cleaning the foldable reusable drinking straws. The Commission has also determined that the public interest factors enumerated in section 337(g)(1), 19 U.S.C. 1337(g)(1), do not preclude issuance of the exclusion order. Finally, the Commission has determined that the bond during

the period of Presidential review pursuant to 19 U.S.C. 1337(j) shall be in the amount of one hundred percent (100%) of the entered value of the imported articles subject to the GEO. The Commission's order was delivered to the President and to the United States Trade Representative on the day of its issuance. The investigation is hereby terminated.

The Commission vote for this determination took place on January 28, 2021.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR Part 210).

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', with a stylized flourish at the end.

Lisa R. Barton  
Secretary to the Commission

Issued: January 28, 2021

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served via EDIS upon the Commission Investigative Attorney, **Paul Gennari, Esq.**, and the following parties as indicated, on **January 28, 2021**.



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
500 E Street, SW, Room 112  
Washington, DC 20436

**On Behalf of Complainant The Final Co. LLC:**

Benjamin T. Horton, Esq.  
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Email: bhorton@marshallip.com

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**Respondents:**

Huizhou Sinri Technology Company Limited  
3<sup>rd</sup> Floor, Plant A, Yiyuan Sci-Tech Industry Park, Cangkeng  
Section, Tianduan Village, Xikeng, Huihuan, Zhongkai High-  
Tech Zone, Huizhou, Guangdong, China 516006

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Hebei Serun Import and Export Trade Co., Ltd.  
Shenhou Shenqi Tingyuan, High and New Technology Industrial  
Development Zone, Luquan, Shijiazhuang, Hebei,  
China, 050200

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3-201, xinhe Ind. Zone, Xiaobian, Chang'an Town  
Dongguan, Guangdong,  
China 523853

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**CERTAIN FOLDABLE REUSABLE DRINKING STRAWS  
AND COMPONENTS THEREOF**

**Inv. No. 337-TA-1183**

Certificate of Service – Page 2

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Apt. 501-48, No. 50, Lane 578, South Tiantong Road,  
Yinzhou District, Ningbo,  
Zhejiang, China 315199

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China 236300

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Pingshan Street, Pingshan New Dist.,  
Shenzhen, Guangdong, China 518118

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Ningbo Beland Commodity Co., Ltd.  
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China, 315040

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China 322000

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**UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, DC**

**In the Matter of**

**CERTAIN FOLDABLE REUSABLE  
DRINKING STRAWS AND COMPONENTS  
AND ACCESSORIES THEREOF**

**Investigation No. 337-TA-1183**

**GENERAL EXCLUSION ORDER**

The United States International Trade Commission (“Commission”) has determined that there is a violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), in the unlawful importation, sale for importation, or sale within the United States after importation of certain foldable reusable drinking straws and components and accessories thereof that infringe one or more of claims 1-12 and 14-17 of U.S. Patent No. 10,123,641 (“the ’641 patent”).

Having reviewed the record of this investigation, including the written submissions of the parties, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined that a general exclusion from entry for consumption is necessary to prevent circumvention of an exclusion order limited to products of named persons or because there is a pattern of violation of section 337 and it is difficult to identify the source of infringing products. Accordingly, the Commission has determined to issue a general exclusion order prohibiting the unlicensed importation of certain foldable reusable drinking straws and components and accessories thereof.

The Commission has also determined that the public interest factors enumerated in 19 U.S.C. § 1337(g) do not preclude the issuance of the general exclusion order, and that the bond

during the Presidential review period shall be in the amount of one hundred percent (100%) of the entered value of the articles in question.

Accordingly, the Commission **ORDERS** that:

1. Foldable reusable drinking straws and components and accessories thereof (as defined in paragraph 2) that infringe one or more of claims 1-12 and 14-17 of the '641 patent are excluded from entry for consumption into the United States, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, for the remaining term of the patent, except under license of, or with the permission of, the patent owner or as provided by law.
2. The foldable reusable drinking straws and components and accessories thereof that are subject to this Order (*i.e.*, "covered articles") are as follows: individual foldable reusable drinking straws and components thereof, cases used to store the foldable reusable drinking straws, and tools used for cleaning the foldable reusable drinking straws.
3. Notwithstanding paragraph 1 of this Order, covered articles are entitled to entry for consumption into the United States, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption under bond in the amount of one hundred percent (100%) of the entered value of the products, pursuant to subsection (j) of section 337 (19 U.S.C. § 1337(j)) and the Presidential Memorandum for the United States Trade Representative of July 21, 2005 (*70 Fed. Reg.* 43,251), from the day after this Order is received by the United States Trade Representative until such time as the United States Trade Representative notifies the Commission that this Order is approved or disapproved but, in any event, not

- later than sixty (60) days after the date of receipt of this Order. All entries of covered articles made pursuant to this paragraph are to be reported to U.S. Customs and Border Protection (“CBP”), in advance of the date of the entry, pursuant to procedures CBP establishes.
4. At the discretion of CBP and pursuant to procedures that it establishes, persons seeking to import articles that are potentially subject to this Order may be required to certify that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the products being imported are not excluded from entry under paragraph 1 of this Order. At its discretion, CBP may require persons who have provided the certification described in this paragraph to furnish such records or analyses as are necessary to substantiate the certification.
  5. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to covered articles that are imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.
  6. The Commission may modify this Order in accordance with the procedures described in section 210.76 of the Commission’s Rules of Practice and Procedure (19 C.F.R. § 210.76).
  7. The Secretary shall serve copies of this Order upon each party of record in this investigation that has retained counsel or otherwise provided a point of contact for electronic service and upon CBP. While temporary remote operating procedures are in place in response to COVID-19, the Office of the Secretary is not able to serve

parties that have not retained counsel or otherwise provided a point of contact for electronic service. Accordingly, pursuant to Commission Rules 201.16(a) and 210.7(a)(1) (19 CFR §§ 201.16(a), 210.7(a)(1)), the Commission orders that the Complainant complete service of this Order for any party without a method of electronic service noted on the attached Certificate of Service and shall file proof of service on the Electronic Document Information System (EDIS).

8. Notice of this Order shall be published in the *Federal Register*.

By order of the Commission

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', with a stylized flourish at the end.

Lisa R. Barton  
Secretary to the Commission

Issued: January 28, 2021

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **GENREAL EXCLUSION ORDER** has been served via EDIS upon the Commission Investigative Attorney, **Paul Gennari, Esq.**, and the following parties as indicated, on **January 28, 2021**.



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
500 E Street, SW, Room 112  
Washington, DC 20436

**On Behalf of Complainant The Final Co. LLC:**

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**PUBLIC VERSION**

**UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C.**

**In the Matter of**

**CERTAIN FOLDABLE REUSABLE  
DRINKING STRAWS AND COMPONENTS  
AND ACCESSORIES THEREOF**

**Investigation No. 337-TA-1183**

**COMMISSION OPINION**

This investigation is before the Commission for a final determination on remedy, the public interest, and bonding. On November 5, 2020, the Commission determined not to review an initial determination (“ID”) (Order No. 18), issued by the administrative law judge (“ALJ”), granting complainant’s motion for partial summary determination for the existence of a domestic industry and finding a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (“section 337”) in connection with claims 1-12 and 14-17 of U.S. Patent No. 10,123,641 (“the ’641 patent”) by respondents in default. 85 Fed. Reg. 71942-43 (Nov. 12, 2020). Complainant’s claims of importation, infringement, and technical prong of the domestic industry requirement were established in an earlier unreviewed initial determination. *Id.* at 71943 (citing Order No. 13 (July 17, 2020); Comm’n Notice (Aug. 18, 2020)). Accordingly, the Commission adopted the ALJ’s finding of a violation of section 337 and requested written submissions from the parties in the investigation, interested government agencies, and other interested parties on the issues of remedy, the public interest, and bonding. *Id.* at 71943-44.

Upon consideration of the submissions received, the Commission has determined that the appropriate form of relief is a general exclusion order (“GEO”) prohibiting the unlicensed importation of foldable reusable drinking straws and components and accessories thereof that

## PUBLIC VERSION

infringe one or more of claims 1-12 and 14-17 of the '641 patent. The foldable reusable drinking straws and components and accessories thereof that are subject to the GEO are as follows: individual foldable reusable drinking straws and components thereof, cases used to store the foldable reusable drinking straws, and tools used for cleaning the foldable reusable drinking straws. The Commission has also determined that the public interest factors enumerated in section 337(g)(1), 19 U.S.C. § 1337(g)(1), do not preclude issuance of the exclusion order. Finally, the Commission has determined that the bond during the period of Presidential review pursuant to 19 U.S.C. § 1337(j) shall be in the amount of one hundred percent (100%) of the entered value of the imported articles subject to the GEO.

### I. BACKGROUND

The Commission instituted this investigation on November 13, 2019, based on a complaint filed on behalf of The Final Co. LLC (“Final” or “Complainant”) of Santa Fe, New Mexico. 84 Fed. Reg. 61639 (Nov. 13, 2019). The complaint, as amended, alleged violations of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain foldable reusable drinking straws and components and accessories thereof by reason of infringement of claims 1-12, 14-17, and 20 of the '641 patent. *Id.* The complaint further alleged that a domestic industry exists. *Id.* The Commission’s notice of investigation named seventeen respondents: Huizhou Sinri Technology Company Limited of Guangdong, China; Hebei Serun Import and Export Trade Co., Ltd. of Hebei, China; Dongguan Stirling Metal Products Co., Ltd. of Guangdong, China; Ningbo Wwpartner Plastic Manufacture Co., Ltd. of Zhejiang, China; Shenzhen Yuanzhen Technology Co., Ltd. of Shenzhen, China; Jiangmen Boyan Houseware Co., Ltd. of Guangdong, China; Shanghai Rbin Industry And Trade Co., Ltd. of Shanghai, China; Jiangmen Shengke Hardware

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Products Co., Ltd. of Guangdong, China; Funan Anze Trading Co., Ltd. of Anhui, China; Hangzhou Keteng Trade Co., Ltd. of Zhejiang, China; Hunan Jiudi Shiye Import And Export Trading Co., Ltd. of Hunan, China (“Hunan Jiudi”); Shenzhen Yaya Gifts Co., Ltd. of Guangdong, China; Ningbo Weixu International Trade Co., Ltd. of Zhejiang, China (“Ningbo Weixu”); Ningbo Beland Commodity Co., Ltd. of Zhejiang, China; Xiamen One X Piece Imp. & Exp. Co., Ltd. of Fujian, China; Hunan Champion Top Technology Co., Ltd. of Hunan, China; and Yiwu Lizhi Trading Firm of Zhejiang, China. *Id.* at 61639-40. The Office of Unfair Import Investigations (“OUII”) was also named as a party in this investigation. *Id.* at 61640.

The Commission terminated respondents Ningbo Weixu and Hunan Jiudi from the investigation based on Complainant’s partial withdrawal of the complaint. Order No. 7 (Feb. 13, 2019), *unreviewed by* Comm’n Notice (Mar. 9, 2020).

On March 16, 2020, the Commission found the remaining fifteen respondents (collectively, the “Defaulted Respondents”) in default. Order No. 8 (Mar. 3, 2020), *unreviewed by* Comm’n Notice (Mar. 16, 2020).

On April 7, 2020, Complainant filed a motion for summary determination of a violation of section 337 by the Defaulted Respondents. On May 5, 2020, Complainant filed a motion for leave to supplement the motion for summary determination, and the ALJ granted leave on May 8, 2020. On May 27, 2020, OUII filed its response in support of Complainant’s motion.

On July 17, 2020, the ALJ issued Order No. 13, an ID granting in part the motion for summary determination. *See* Order No. 13 (July 17, 2020). Order No. 13 found that Complainant established importation of the accused products and infringement of claims 1-12 and 14-17 of the ’641 patent by the Defaulted Respondents and that Complainant satisfied the technical prong of the domestic industry requirement. *Id.* at 49. Order No. 13 also denied the

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motion for summary determination as to the economic prong of the domestic industry requirement and infringement of claim 20. *Id.* Therefore, Order No. 13 did not result in a determination of violation of section 337 by the Defaulted Respondents. As stated above, the Commission determined not to review the ID reflected in Order No. 13. *See* Comm'n Notice (Aug. 18, 2020).<sup>1</sup>

Also, on July 17, 2020, the ALJ issued Order No. 14, which required the parties to choose from several options on how to proceed in light of the still pending issues (economic prong of the domestic industry requirement and issues related to asserted claim 20). *See* Order No. 14, at 1-2 (July 17, 2020). On July 31, 2020, Complainant and OUII filed a joint response to Order No. 14. *See* Complainant Final and Commission Investigative Staff's Joint Response to Order No. 14 Regarding Continuing Proceedings, EDIS Doc ID 716129 (July 31, 2020). The joint response stated that Complainant would file a motion to amend the complaint to terminate its assertion of claim 20 of the '641 patent, and an additional motion for summary determination on the economic prong of the domestic industry requirement. *Id.* at 1-2.

On August 7, 2020, Complainant filed a motion for partial summary determination that the economic prong of the domestic industry requirement was met, a request for a remedy in the form of a general exclusion order, and a bond during the period of Presidential review in the amount of one hundred percent (100%) of the entered value.<sup>2</sup> On August 14, 2020,

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<sup>1</sup> The ruling of Order No. 13 denying the motion for summary determination on infringement of claim 20 and the economic prong of the domestic industry requirement was not an initial determination subject to Commission review. *See* 19 C.F.R. § 210.42.

<sup>2</sup> Complainant Final's Motion for Partial Summary Determination for the Existence of a Domestic Industry, for a General Exclusion Order, and for a Recommended Determination on Remedy and Bonding (Aug. 7, 2020) ("Mot."); Complainant Final's Memorandum of Points and Authorities in Support of Its Motion for Partial Summary Determination for the Existence of a Domestic Industry, for a General Exclusion Order, and for a Recommended Determination on

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Complainant moved to replace Exhibit 11C within its motion for summary determination, which was granted by the ALJ.<sup>3</sup> See Order No. 16 (Aug. 20, 2020). On August 24, 2020, OUII filed its response in support of Complainant's motion.

On August 17, 2020, Complainant moved to terminate the investigation with respect to asserted claim 20 by reason of withdrawal of the complaint allegations; the ALJ granted the motion on August 26, 2020. See Order No. 17 (Aug. 26, 2020), *unreviewed by Comm'n Notice* (Sept. 15, 2020).

On September 22, 2020, the ALJ issued Order No. 18, an ID granting Complainant's motion for partial summary determination that a domestic industry exists with respect to Complainant's research and development investments under section 337(a)(3)(C) and finding a violation of section 337 with respect to claims 1-12 and 14-17 of the '641 patent by the Defaulted Respondents. Order No. 18 also denied Complainant's motion for summary determination that a domestic industry exists under section 337(a)(3)(B). No petitions for review of the ID were filed. The Commission determined not to review the ID reflected in Order No. 18. 85 Fed. Reg. 71942-44. The denial of summary determination in Order No. 18 as to section 337(a)(3)(B) was not an initial determination subject to Commission review and hence was not adopted by the Commission and was not a part of the Commission's determination.

The ALJ concurrently issued a Recommended Determination ("RD") on the issues of remedy and bonding. The RD recommended issuance of a GEO and setting the bond during the period of Presidential review in the amount of one hundred percent (100%) of the entered value.

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Remedy and Bonding (Aug. 7, 2020) ("Mot. Mem.").

<sup>3</sup> Exhibit 11C is the supplemental declaration of Ms. Cohen, the CEO and Managing Director of Complainant Final.

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The Commission solicited comments from the public on public interest issues raised by the recommended relief. 85 Fed. Reg. 67010 (Oct. 21, 2020). No submissions were filed in response to the Commission Notice.

As stated above, on November 5, 2020, the Commission determined not to review the ID reflected in Order No. 18, thereby adopting the ID's finding of a violation of section 337 in connection with claims 1-12 and 14-17 of the '641 patent. 85 Fed. Reg. 71942-43 (Nov. 12, 2020). The Commission also requested the parties, interested government agencies, and other interested parties to file submissions on the issues of remedy, the public interest, and bonding during the period of Presidential review. *Id.* at 71944. On November 19 and November 23, 2020, OUII and Complainant, respectively, filed submissions on the issues of remedy, the public interest, and bonding as requested by the Commission.<sup>4</sup> On November 30, 2020, OUII and Complainant each filed reply submissions.<sup>5</sup> Complainant did not submit a proposed GEO or CDOs in its remedy submissions as requested in the Notice. No other submissions were received in response to the Notice.

## II. DISCUSSION

The Commission's authority to issue a GEO when no respondents appear to contest the investigation is found in section 337(g)(2), which provides that a GEO may be issued when:

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<sup>4</sup> See Complainant's Submission on Remedy, the Public Interest, and Bonding, EDIS Doc ID 726190 (Nov. 23, 2020) ("Comp. Sub."); Submission of the Office of Unfair Import Investigations on Remedy, the Public Interest, and Bonding, EDIS Doc ID 725806 (Nov. 19, 2020) ("OUII Sub.").

<sup>5</sup> See Complainant's Reply on Remedy, the Public Interest, and Bonding, EDIS Doc ID 726727 (Nov. 30, 2020) ("Comp. Reply"); Reply of the Office of Unfair Import Investigations on Remedy, the Public Interest, and Bonding, EDIS Doc ID 726590 (Nov. 30, 2020) ("OUII Reply").

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(A) no person appears to contest an investigation concerning a violation of the provisions of this section,

(B) such a violation is established by substantial, reliable, and probative evidence, and

(C) the requirements of subsection (d)(2) of this section are met.

19 U.S.C. § 1337(g)(2). Subsection (d)(2) provides that the Commission may, in appropriate circumstances, issue a GEO that applies to all infringing products, regardless of their manufacture, when:

(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or,

(B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19 U.S.C. § 1337(d)(2); *see Certain Pumping Bras*, Inv. No. 337-TA-988, Comm'n Op. at 10-11 (Apr. 7, 2017) (issuing a GEO pursuant to 19 U.S.C. §§ 1337(d)(2) and 1337(g)(2)).

As explained below, the Commission finds that the statutory requirements for a general exclusion from entry of infringing articles under section 337(g)(2), 19 U.S.C. § 1337(g)(2), are met in this investigation. The Commission notes that no person appeared to contest a violation of section 337, and such a violation has been established by substantial, reliable, and probative evidence. Moreover, based on the evidence in the record, the Commission finds that: (1) there is a pattern of violation of section 337 and a difficulty identifying the source of infringing products; and (2) a GEO is necessary to prevent circumvention of an exclusion order limited to products of named persons. The Commission also finds that the public interest factors enumerated in section 337(g)(1), 19 U.S.C. § 1337(g)(1), do not warrant denying relief. Accordingly, the Commission determines that the appropriate remedy in this investigation is a GEO prohibiting the unlicensed importation of foldable reusable drinking straws and

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components and accessories thereof that infringe one or more of claims 1-12 and 14-17 of the '641 patent.

### A. General Exclusion Order

#### 1. Pattern of Violation and Difficulty Identifying the Source of Infringing Products

The evidence presented by Complainant Final and cited in the RD establishes a pattern of unauthorized use amongst the fifteen Defaulted Respondents in this investigation. *See* ID at 18 (citing Order No. 13 at 8-13; Complaint, Exs. 11-20, 22, 24-27). The evidence shows that the Defaulted Respondents' accused products are nearly indistinguishable in design and the packaging associated with those products is identical and incorporate Final's own product imagery without authorization. *Id.* (citing Mot. Mem. at 41-43 (citing Mot., Ex. 11C (Suppl. Decl. Cohen) at ¶ 24; Complaint, Exs. 11-20, 22, 24-27)); *see also* Comp. Sub. at 19-22 (photographs comparing representative Final product with Respondents' accused products). In addition, the Commission finds there are likely many other instances of unauthorized use based on evidence showing that Final made thousands of take-down requests of various online marketplaces. *See* ID at 19 (citing Mot., Ex. 11C at ¶ 22 (citing Ex. F at -854)).

The evidence presented by Complainant Final and cited in the RD also establishes that it is difficult to identify the source of infringing products due to "the natural anonymity of online marketplaces and the simplicity and portability of the tooling equipment needed to create these products." *See id.* (citing Mot. Mem. at 33-38 (citing Complaint, Ex. 29 (Decl. Cohen) at ¶¶ 14-16)). For instance, the RD noted that two of the originally named respondents, now terminated, were unable to be located for service of the complaint. *Id.*; *see* Order No. 7. The RD cited evidence of "duplicative and confusing" postings of the same accused product, from the same respondent, taken from an online marketplace on a single day. ID at 19 (citing Mot. Mem. at

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28-29 (citing Complaint, Exs. 11-13, 15, 18, 21, 23, 25-27); Mot., Exs. 11C & F). The RD also cited evidence showing that the shipping or supplier address for many of the products imported into the United States and received by Final's counsel are "intentionally or unintentionally illegible, confusing, contradictory, and [are] often incomplete return addresses and, in some instances, no return addresses at all . . . ." *Id.* (citing Mot. Mem. at 31-32 (citing Complaint, Ex. 28 (Decl. Gordon); Mot., Ex. 11C at ¶¶ 22-24)); *see also* Comp. Sub. at 10-12 (table showing exemplary return addresses of Respondents' accused products).

Based on the evidence in the record, the Commission finds that there is a pattern of violation of section 337 and a difficulty identifying the source of infringing products.

### **2. High Likelihood of Circumvention**

The evidence cited in the RD with respect to the existence of a pattern of violation and a difficulty of identifying the source also establishes that a GEO is necessary to prevent circumvention of an order limited to the products of the named Respondents. *See* ID at 19-20. For instance, the evidence shows that the small size and portability of the products covered by the asserted patent makes circumvention of specific types of enforcement, such as a limited exclusion order, easy and inexpensive. *See* Comp. Sub. at 12-17 (citing Complaint, Ex. 29). In addition, "the ability of foreign distributors to sell directly to United States customers via the Internet makes it possible for myriad fly-by-night entities to import infringing products into the United States." *Id.* at 17; *see id.* at 18-19. Indeed, in investigations with similar facts, the Commission has found the threat of circumvention sufficient to issue a GEO. *See, e.g., Certain LED Lighting Devices and Components Thereof*, Inv. No. 337-TA-1107, Comm'n Op. at 6-7 (Sept. 11, 2019); *Certain Cases for Portable Elec. Devices*, 337-TA-867/861, Comm. Op. at 9-10 (Jul. 10, 2014); *Certain Toner Cartridges and Components Thereof*, Inv. No. 337-TA-918,

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Comm'n Op. at 6-8 (Oct. 1, 2015); *Certain Toner Cartridges and Components Thereof*, Inv. No. 337-TA-740, Comm'n Op. at 6 (Nov. 19, 2012).

Based on the evidence discussed above, the Commission finds that the requirements of section 337(g)(2) have been met. Accordingly, the Commission determines that the appropriate remedy in this investigation is a GEO prohibiting the unlicensed importation of foldable reusable drinking straws and components and accessories thereof that infringe one or more of claims 1-12 and 14-17 of the '641 patent.

### **B. Cease and Desist Orders**

In addition to a GEO, Complainant Final requests the entry of cease and desist orders (“CDOs”) against the Defaulted Respondents in a single sentence in the conclusion of its initial submission on remedy. *See* Comp. Sub. at 28. Final, however, provides no explanation or rationale for the issuance of CDOs and did not submit proposed CDOs (or a proposed GEO) in its submissions on remedy. Moreover, Final’s briefs before the ALJ did not discuss CDOs. As such, the RD and OUII’s submissions on remedy did not address whether to issue CDOs in this investigation.

Given the nature of Final’s belated request and the lack of arguments and evidence supporting the issuance of CDOs in this investigation, the Commission has determined to deny Final’s request for CDOs against the Defaulted Respondents, which are all foreign respondents. Final’s request for CDOs is analyzed under section 337(g)(1). *See Certain Arrowheads with Deploying Blades and Components Thereof and Packaging Therefor*, Inv. No. 337-TA-977, Comm'n Op. at 15-23 (Apr. 28, 2017). “In determining whether to issue a cease and desist order in default cases, under Section 337(g), the Commission has examined similar facts to determine appropriate relief in any investigation in which a violation is found, namely whether

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defaulting respondents maintain commercially significant inventories in the United States or have significant domestic operations that could undercut the remedy provided by an exclusion order.” *Id.* at 17. With respect to foreign defaulted respondents, the Commission has declined to presume the presence of domestic inventories or other business operations in the United States that would support the issuance of a CDO. *Id.* at 18. The Commission finds the record evidence does not support the issuance of CDOs against the foreign defaulted respondents in this investigation.<sup>6</sup>

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<sup>6</sup> Commissioner Karpel and Commissioner Schmidlein would issue CDOs directed to the Defaulted Respondents. They consider section 337(g)(1) to be the appropriate authority for the issuance of CDOs as to these Defaulted Respondents because the criteria for issuance of CDOs under subsection 337(g)(1)(A)-(E) are met as to these respondents. Each of these respondents was named in the complaint and each was served with the complaint and notice of investigation. Order No. 8 (Mar. 3, 2020), *unreviewed by Comm’n Notice* (Mar. 16, 2020). The ALJ issued a show cause order ordering these respondents to show cause why they should not be held in default for failing to respond to the complaint and notice of investigation. *See id.* None of these respondents filed responses to the show cause orders. *Id.* These findings satisfy subsections 337(g)(1)(A)-(D). Final requested CDOs limited to each of these defaulting respondents in its initial submission on remedy, bonding, and the public interest thus satisfying subsection 337(g)(1)(E). Given that subsections 337(g)(1)(A)-(E) are satisfied, the statute directs the Commission to issue the requested CDOs, subject to consideration of the public interest. The public interest factors as detailed in Section II.B *infra* do not support a finding that CDOs directed to the Defaulted Respondents in this investigation would be contrary to the public interest. Accordingly, Commissioner Karpel and Commissioner Schmidlein would issue CDOs against the Defaulted Respondents under section 337(g)(1).

Commissioner Karpel and Commissioner Schmidlein find that Final’s request for CDOs against the Defaulted Respondents in its initial remedy submission accords with the Commission’s notice, 85 Fed. Reg. 71942-44 (Nov. 12, 2020), and its CDO request is consistent with the remedies requested in its Complaint. *See* DN 3415, Complaint ¶ 75(e) (EDIS Doc. ID 690716). Final’s failure to reiterate its CDO request before the ALJ, though regrettable, is not fatal to its remedial request under section 337(g)(1). Moreover, neither section 337(g)(1) nor Commission Rule 210.50 require Final’s CDO request directed to Defaulted Respondents to be accompanied by an “explanation or rationale for the issuance of CDOs” or submission of proposed CDOs in conjunction with its CDO request. They note that the Commission’s notice on remedy, public interest, and bonding requested parties to include proposed remedial orders in their initial submissions (85 Fed. Reg. at 71944), and that the purpose of this is to aid the Commission’s consideration of an appropriate remedy for the violation found. While not fatal to Final’s request, it is regrettable that Final did not submit proposed CDOs so as to aid the Commission’s consideration and preparation of the remedial orders directed to the Defaulted

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### C. The Public Interest

Before issuing any remedial order, the Commission must “consider[] the effect of such exclusion or order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers.” 19 U.S.C. § 1337(g)(1).

The record in this investigation contains no evidence that a GEO would adversely affect the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers. *See* OUII Sub. at 11. There is no information in the record to suggest that the products at issue implicate any public health, safety, or welfare concern. Nor does the record contain information that competitive conditions in the United States or U.S. production of like or directly competitive articles would be adversely impacted. Final asserts that a plethora of non-infringing drinking straws, both reusable and single-use, are available in the United States. *See* Comp. Sub. at 24. Final also asserts that consumers would have access to competitive products if Respondents’ infringing products are excluded from the United States because it has the capacity to increase production of its products and non-infringing products will continue to be available from third parties. *Id.* at 25. Final further argues that the availability of its products and other commercial alternatives to the accused products will not negatively impact U.S. consumers. *Id.* at 25-26. Accordingly, based on the record of this investigation, the Commission determines that the public interest does not preclude the issuance of a GEO.

### D. Bonding

During the 60-day period of Presidential review under 19 U.S.C. § 1337(j), “articles

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Respondents here.

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directed to be excluded from entry under subsection (d) . . . shall . . . be entitled to entry under bond prescribed by the Secretary in an amount determined by the Commission to be sufficient to protect the complainant from any injury.” 19 U.S.C. § 1337(j)(3).

The RD recommends that the bond amount be set at one hundred percent (100%) of the entered value of the accused products during the period of Presidential review in the event a violation of section 337 is found. RD at 21-22. OUII agrees that the bond should be set at one hundred percent (100%) due to Final’s inability to obtain either pricing or reasonable royalty information since no Respondents appeared in this investigation. OUII Sub. at 10-11.

Given the circumstances of this investigation, the Commission determines to set the bond at one hundred percent (100%) of the entered value of the infringing products during the period of Presidential review. As noted in the RD, the Defaulted Respondents chose not to participate in this investigation and provided no discovery relating to pricing or royalty information. *See* RD at 21. The Commission finds a bond rate of one hundred percent (100%) is also appropriate given the factual considerations which led to the recommendation of a GEO and the Commission’s precedent to set the bond at one hundred percent (100%) for defaulting respondents who provide no information during discovery. *See id.* at 21-22 (citing *Certain Mobile Device Holders and Components Thereof*, Inv. No. 337-TA-1028, Comm’n Op. at 29-30 (Mar. 22, 2018)); *see also Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm’n Op. at 19 (June 26, 2015) (setting the bond at one hundred percent where “the record [] shows that a large number of infringing loom kits are sold on the Internet at different prices,” “the defaulting respondents in th[e] investigation provided no discovery, including discovery about pricing,” and “[t]he record [] lacks a reliable comparison of the price of the domestic industry products to the price of the infringing products”).

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**III. CONCLUSION**

For the reasons detailed above, the Commission (1) determines to issue a GEO prohibiting the unlicensed importation of foldable reusable drinking straws and components and accessories thereof that infringe one or more of claims 1-12 and 14-17 of the '641 patent; (2) finds that the public interest will not be adversely affected by the issuance of the GEO; and (3) sets the bond during the period of Presidential review in the amount of one hundred percent (100%) of the entered value of articles subject to the order.

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton'.

Lisa R. Barton  
Secretary to the Commission

Issued: February 10, 2021

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **COMMISSION OPINION** has been served via EDIS upon the Commission Investigative Attorney, **Paul Gennari, Esq.**, and the following parties as indicated, on **February 10, 2021**.



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
500 E Street, SW, Room 112  
Washington, DC 20436

**On Behalf of Complainant The Final Co. LLC:**

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- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: Email Notification of Availability to Download

**Respondents:**

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3<sup>rd</sup> Floor, Plant A, Yiyuan Sci-Tech Industry Park, Cangkeng  
Section, Tianduan Village, Xikeng, Huihuan, Zhongkai High-  
Tech Zone, Huizhou, Guangdong, China 516006

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: Service to Be Completed by Complainant

Hebei Serun Import and Export Trade Co., Ltd.  
Shenhou Shenqi Tingyuan, High and New Technology Industrial  
Development Zone, Luquan, Shijiazhuang, Hebei,  
China, 050200

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: Service to Be Completed by Complainant

Dongguan Stirling Metal Products Co., Ltd.  
3-201, xinhe Ind. Zone, Xiaobian, Chang'an Town  
Dongguan, Guangdong,  
China 523853

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: Service to Be Completed by Complainant

**CERTAIN FOLDABLE REUSABLE DRINKING STRAWS  
AND COMPONENTS THEREOF**

**Inv. No. 337-TA-1183**

Certificate of Service – Page 2

Ningbo Wwpartner PPlastic Manufacture Co., Ltd.  
Apt. 501-48, No. 50, Lane 578, South Tiantong Road,  
Yinzhou District, Ningbo,  
Zhejiang, China 315199

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: Service to Be Completed by Complainant

Shenzhen Yuanzhen Technology Co., Ltd.  
805,Block B, Fuquan Building, Qingquan Road,  
Longhua District, Shenzhen, China 518000

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: Service to Be Completed by Complainant

Jiangmen Boyan Houseware Co., Ltd.  
No. 18-1-107, Zhongxin South Road,  
Huicheng, Xinhui Dist., Jiangmen,  
Guangdong, China 529100

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: Service to Be Completed by Complainant

Shanghai Rbin Industry and Trade Co., Ltd.  
Room D4003, Bldg. 1, No. 888, Huaxu Road,  
Qingpu Dist., Shanghai,  
China 201702

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: Service to Be Completed by Complainant

Jiangmen Shengke Hardware Products Co., Ltd.  
Cunqian House, Wubian Land, Heping Group, Xinjian Village,  
Siqian Town, Xinhui District, Guangdong, China 529000

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: Service to Be Completed by Complainant

Funan Anze Trading Co., Ltd.  
No. 104-16, Jiaoyang Road, Lucheng Town,  
Funan County, Fuyang, Anhui,  
China 236300

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: Service to Be Completed by Complainant

Hangzhou Keteng Trade Co., Ltd.  
C533, Floor 5, Bldg. 3-C, No. 8, Xiyuan 9<sup>th</sup> Road,  
Xihu Dist., Hangzhou, Zhejiang,  
China 310030

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: Service to Be

**CERTAIN FOLDABLE REUSABLE DRINKING STRAWS  
AND COMPONENTS THEREOF**

**Inv. No. 337-TA-1183**

Certificate of Service – Page 3

Completed by Complainant

Shenzhen Yaya Gifts Co., Ltd.  
No. 2, Lane 3, eas of Henglingtang,  
Pingshan Street, Pingshan New Dist.,  
Shenzhen, Guangdong, China 518118

Via Hand Delivery  
 Via Express Delivery  
 Via First Class Mail  
 Other: Service to Be  
Completed by Complainant

Ningbo Beland Commodity Co., Ltd.  
14-6, No. 51, Bldg. 12, Xintiandi East Zone  
Yinzhou Dist., Ningbo, Zhejiang,  
China, 315040

Via Hand Delivery  
 Via Express Delivery  
 Via First Class Mail  
 Other: Service to Be  
Completed by Complainant

Xiamen One X Piece Imp. & Exp. Co., Ltd.  
601, Bldg. 73, Jimei Zhongxin Garden,  
Xiamen, Fujian,  
China 36100

Via Hand Delivery  
 Via Express Delivery  
 Via First Class Mail  
 Other: Service to Be  
Completed by Complainant

Hunan Champion Top Technology Co., Ltd.  
No. 600, Wanfu North Road, Yuhua area,  
Changsha city, Hunan  
China 410000

Via Hand Delivery  
 Via Express Delivery  
 Via First Class Mail  
 Other: Service to Be  
Completed by Complainant

Yiwu Lizhi Trading Firm  
Unit 3, Building 42, Xiawang New Village  
Third District, Jiangdong Street, Yiwu, Jinhua, Zhejiang,  
China 322000

Via Hand Delivery  
 Via Express Delivery  
 Via First Class Mail  
 Other: Service to Be  
Completed by Complainant

**UNITED STATES INTERNATIONAL TRADE COMMISSION**  
**Washington, D.C.**

**In the Matter of**

**CERTAIN FOLDABLE REUSABLE  
DRINKING STRAWS AND COMPONENTS  
AND ACCESSORIES THEREOF**

**Investigation No. 337-TA-1183**

**NOTICE OF A COMMISSION DETERMINATION NOT TO REVIEW AN INITIAL  
DETERMINATION GRANTING A MOTION FOR PARTIAL SUMMARY  
DETERMINATION AND FINDING A VIOLATION OF SECTION 337; REQUEST FOR  
WRITTEN SUBMISSIONS ON REMEDY, THE PUBLIC INTEREST, AND BONDING**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (“ID”) (Order No. 18) of the presiding administrative law judge (“ALJ”) granting complainant’s motion for partial summary determination and finding a violation of section 337. The Commission requests written submissions from the parties, interested government agencies, and interested persons on the issues of remedy, the public interest, and bonding, under the schedule set forth below.

**FOR FURTHER INFORMATION CONTACT:** Cathy Chen, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, D.C. 20436, telephone 202-205-2392. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email [EDIS3Help@usitc.gov](mailto:EDIS3Help@usitc.gov). General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on November 13, 2019, based on a complaint filed on behalf of The Final Co. LLC (“Final” or “Complainant”) of Santa Fe, New Mexico. 84 FR 61639 (Nov. 13, 2019). The complaint, as amended, alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (“section 337”), in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain foldable reusable drinking straws and components and accessories thereof by reason of infringement of claims 1-12, 14-17, and 20 of U.S. Patent No. 10,123,641 (“the ’641 patent”). *Id.* The complaint further alleges that a domestic industry exists. *Id.* The Commission’s notice of investigation names

seventeen respondents, specifically, Huizhou Sinri Technology Company Limited of Guangdong, China; Hebei Serun Import and Export Trade Co., Ltd. of Hebei, China; Dongguan Stirling Metal Products Co., Ltd. of Guangdong, China; Ningbo Wwpartner Plastic Manufacture Co., Ltd. of Zhejiang, China; Shenzhen Yuanzhen Technology Co., Ltd. of Shenzhen, China; Jiangmen Boyan Houseware Co., Ltd. of Guangdong, China; Shanghai Rbin Industry And Trade Co., Ltd. of Shanghai, China; Jiangmen Shengke Hardware Products Co., Ltd. of Guangdong, China; Funan Anze Trading Co., Ltd. of Anhui, China; Hangzhou Keteng Trade Co., Ltd. of Zhejiang, China; Hunan Jiudi Shiye Import And Export Trading Co., Ltd. of Hunan, China (“Hunan Jiudi”); Shenzhen Yaya Gifts Co., Ltd. of Guangdong, China; Ningbo Weixu International Trade Co., Ltd. of Zhejiang, China (“Ningbo Weixu”); Ningbo Beland Commodity Co., Ltd. of Zhejiang, China; Xiamen One X Piece Imp. & Exp. Co., Ltd. of Fujian, China; Hunan Champion Top Technology Co., Ltd. of Hunan, China; and Yiwu Lizhi Trading Firm of Zhejiang, China. *Id.* at 61639-40. The Office of Unfair Import Investigations (“OUII”) is also named as a party in this investigation. *Id.* at 61640.

The Commission previously terminated respondents Ningbo Weixu and Hunan Jiudi from the investigation based on Complainant’s partial withdrawal of the complaint. *See* Order No. 7 (Feb. 13, 2019), *unreviewed* by Comm’n Notice (Mar. 9, 2020).

On March 16, 2020, the Commission found the remaining fifteen respondents (collectively, the “Defaulted Respondents”) in default. Order No. 8 (March 3, 2020), *unreviewed* by Notice (March 16, 2020).

On April 7, 2020, Complainant filed a motion for summary determination of a violation of section 337 by the Defaulted Respondents. On May 5, 2020, Complainant filed a motion for leave to supplement the MSD, and the ALJ granted leave on May 8, 2020. On May 27, 2020, OUII filed its response in support of Complainant’s motion.

On July 17, 2020, the ALJ issued Order No. 13, an ID granting in part the motion for summary determination. *See* Order No. 13 (July 17, 2020). The ALJ found that Complainant established importation of the accused products and infringement of claims 1-12 and 14-17 of the ’641 patent by Defaulted Respondents and that Complainant satisfied the technical prong of the domestic industry requirement. The ALJ also found, however, that Complainant did not satisfy the economic prong of the domestic industry requirement, and so the ALJ did not find a violation of section 337 by the Defaulted Respondents. The Commission determined not to review Order No. 13. *See* Notice (Aug. 18, 2020).

Also, on July 17, 2020, the ALJ issued Order No. 14, which required the parties to choose from several options on how to proceed. *See* Order No. 14, at 1-2 (July 17, 2020). On July 31, 2020, Complainant and OUII filed a joint response to Order No. 14. The joint response stated that Complainant would file an additional motion for summary determination on the remaining issues raised in the subject ID as well as a motion to amend the complaint to drop its assertion of claim 20 of the ’641 patent.

On August 7, 2020, Complainant filed a motion for partial summary determination of the economic prong of the domestic industry requirement, a remedy in the form of a general exclusion order, and a bond of 100% during the Presidential review period. On August 14, 2020, Complainant moved to replace Exhibit 11C within its motion for summary determination, which was granted by the ALJ. *See* Order No. 16 (Aug. 20, 2020). On August 24, 2020, OUII filed its response in support of Complainant's motion.

On August 17, 2020, Complainant moved to terminate the investigation with respect to asserted claim 20 by reason of withdrawal of the complaint allegations. On August 26, 2020, the ALJ granted the motion to withdraw claim 20. *See* Order No. 17 (Aug. 26, 2020), *unreviewed by* Notice (Sep. 15, 2020).

On September 22, 2020, the ALJ issued the subject ID granting Complainant's motion for partial summary determination that a domestic industry exists with respect to Complainant's research and development investments under section 337(a)(3)(C) and finding a violation of section 337 with respect to claims 1-12 and 14-17 of the '641 patent by the Defaulted Respondents. Order No. 18 also denied Complainant's motion for summary determination under section 337(a)(3)(B). The ALJ's denial of summary determination in Order No. 18 as to section 337(a)(3)(B) is not an initial determination subject to Commission review and hence is not adopted by the Commission and is not a part of the Commission's determination. No petitions for review of the subject ID were filed.

The ALJ concurrently issued a Recommended Determination ("RD") on the issues of remedy and bonding. The RD recommends the issuance of a general exclusion order and setting the bond during the period of Presidential review in the amount of one hundred percent (100%) of the entered value.

Having reviewed the record of the investigation, including the subject ID and the parties' submissions to the ALJ, the Commission has determined not to review the subject ID. Accordingly, the Commission adopts the ID's finding that a violation of section 337 has occurred in connection with claims 1-12 and 14-17 of the '641 patent.

In connection with the final disposition of this investigation, the statute authorizes issuance of, *inter alia*, (1) an exclusion order that could result in the exclusion of the subject articles from entry into the United States; and/or (2) cease and desist orders that could result in the respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843, Comm'n Op. at 7-10 (Dec. 1994).

The statute requires the Commission to consider the effects of that remedy upon the public interest. The public interest factors the Commission will consider include the effect that an exclusion order would have on: (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve, disapprove, or take no action on the Commission's determination. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

**WRITTEN SUBMISSIONS:** Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding.

In their initial submissions, Complainant is also requested to identify the remedy sought and Complainant and OUII are requested to submit proposed remedial orders for the Commission's consideration. Complainant is further requested to state the date that the Asserted Patent expires, to provide the HTSUS subheadings under which the accused products are imported and to supply the identification information for all known importers of the products at issue in this investigation. The initial written submissions and proposed remedial orders must be filed no later than close of business on **Monday, November 23, 2020**. Reply submissions must be filed no later than the close of business on **Monday, November 30, 2020**. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (March 19, 2020). Submissions should refer to the investigation number (Inv. No. 337-TA-**1183**) in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, [https://www.usitc.gov/documents/handbook\\_on\\_filing\\_procedures.pdf](https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf)). Persons with questions regarding filing should contact the Secretary, (202) 205-2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. All information, including

confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

The Commission vote for this determination took place on November 5, 2020.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR Part 210).

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', written in a cursive style.

Lisa R. Barton  
Secretary to the Commission

Issued: November 5, 2020

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served via EDIS upon the Commission Investigative Attorney, **Paul Gennari, Esq.**, and the following parties as indicated, on 11/5/2020.



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
500 E Street, SW, Room 112  
Washington, DC 20436

**On Behalf of Complainant The Final Co. LLC:**

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of Availability to Download

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**Washington, D.C.**

**In the Matter of**

**CERTAIN FOLDABLE REUSABLE  
DRINKING STRAWS AND  
COMPONENTS AND ACCESSORIES  
THEREOF**

**Inv. No. 337-TA-1183**

**ORDER NO. 18: INITIAL DETERMINATION GRANTING COMPLAINANT  
FINAL'S MOTION FOR PARTIAL SUMMARY  
DETERMINATION FOR THE EXISTENCE OF A DOMESTIC  
INDUSTRY AND VIOLATION, AND RECOMMENDED  
DETERMINATION ON REMEDY AND BOND**

(September 22, 2020)



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## I. PROCEDURAL BACKGROUND

Complainant The Final Co. LLC (“Final” or “Complainant”) filed the complaint underlying this Investigation on October 9, 2019, and amended the complaint on October 29, 2019. The amended complaint alleged numerous respondents import or sell in connection with an importation certain products that infringe one or more claims of U.S. Patent No. 10,123,641 (“the 641 patent”). Those respondents included: Huizhou Sinri Technology Company Limited of China; Hebei Serun Import and Export Trade Co., Ltd. of China; Dongguan Stirling Metal Products Co., Ltd. of China; Ningbo Wwpartner Plastic Manufacture Co., Ltd. of China; Shenzhen Yuanzhen Technology Co., Ltd. of China; Jiangmen Boyan Houseware Co., Ltd. of China; Shanghai Rbin Industry And Trade Co., Ltd. of China; Jiangmen Shengke Hardware Products Co., Ltd. of China; Funan Anze Trading Co., Ltd. of China; Hangzhou Keteng Trade Co., Ltd. of China; Hunan Jiudi Shiye Import And Export Trading Co., Ltd. of China; Shenzhen Yaya Gifts Co., Ltd. of China; Ningbo Weixu International Trade Co., Ltd. of China; Ningbo Beland Commodity Co., Ltd. of China; Xiamen One X Piece Imp. & Exp. Co., Ltd. of China; Hunan Champion Top Technology Co., Ltd. of China; and Yiwu Lizhi Trading Firm of China.

By publication of a notice in the *Federal Register* on November 13, 2019, the U.S. International Trade Commission ordered that:

Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of products identified in paragraph (2) by reason of infringement of one or more of claims 1-12, 14-17, and 20 of the '641 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337[.]

[REDACTED]

84 Fed. Reg. 61639 (Nov. 13, 2019). On December 3, 2019, I set a target date of March 12, 2021 for completion of this investigation. Order No. 3. Also on December 3, 2019, I set the evidentiary hearing for August 17-21, 2020. Order No. 4.

On January 8, 2020, Final moved for a show cause order as to certain respondents as to why they should not be found in default for failure to respond to the complaint and notice of investigation. A supplement to the motion was filed on February 10, 2020 with three additional respondents. I granted the motion on February 13, 2020 and ordered these respondents to show cause by February 24, 2020. Order No. 6. This deadline passed without any responses, and on March 3, 2020, I found the following respondents in default: Huizhou Sinri Tech Comp Ltd. (“Huizhou Sinri”), Ningbo Wwpartner Plastic Manufacturing (“Ningbo Plastic”), Shenzhen Yuanzhen Tech Co. Ltd. (“Shenzhen Yuanzhen”), Jiangmen Boyan Houseware Co. Ltd. (“Jiangmen Houseware”), Shanghai Rbin Industry And Trade Co. Ltd. (“Shanghai Rbin”), Jiangmen Shengke Hardware Prod. (“Jiangmen Hardware”), Hangzhou Keteng Trade Co., Ltd. (“Hangzhou Trade”), Shenzhen Yaya Gifts Co., Ltd. (“Yaya Gifts”), Ningbo Beland Commodity Co. (“Ningbo Beland”), Xiamen One X Piece Imp. Exp. (“Xiamen One Piece”), Hunan Champion Top Tech. (“Hunan Champion”), Yiwu Lizhi Trading Firm (“Yiwu Trading”), Dongguan Stirling Metal Products Co., Ltd. (“Dongguan Stirling”), Hebei Serun Import and Export Trade Co., Ltd. (“Hebei Serun”), and Funan Anze Trading Co., Ltd. (“Funan Trading”) (collectively, the “Defaulted Respondents”). Order No. 8.

In parallel with the motions to show cause, on February 10, 2020, Final moved to withdraw the complaint against a second group of respondents upon whom the complaint was unable to be served. On February 13, 2020, I granted the motion via initial determination, terminating the investigation as to these respondents. Order No. 7. These respondents included Ninbo Weixu

[REDACTED]

International Trade Co., Ltd. and Hunan Jiudi Shiye Import and Export Trading Co., Ltd. (collectively, the “Terminated Respondents”). *Id.*

Between the Defaulted Respondents and the Terminated Respondents, no other respondents remain in this investigation. Thus, on February 18, 2020, Final moved to suspend the procedural schedule and for leave to file a motion for summary determination of violation against the Defaulted Respondents. With no opposition from the Commission Investigative Staff (“Staff”) assigned to this investigation, I granted the motion on March 4, 2020. Order No. 9. On April 7, 2020, Final filed a motion for summary determination of violation and request for a general exclusion order (1183-006). On May 5, 2020, prior to the Staff’s response, Final filed a motion for leave to supplement the summary determination motion, which I granted on May 8, 2020. Order No. 12. Thereafter, with leave granted by Order No. 11, the Staff submitted its response in support of the motion for summary determination on May 27, 2020.

On July 17, 2020, Final’s motion for summary determination was granted-in-part by initial determination and established Final’s claims of importation, infringement, and technical prong domestic industry, while leaving economic prong domestic industry, remedy and bonding, and claims of infringement under claim 20 of the 641 patent as remaining issues. *See generally* Order No. 13. On the same day, I issued Order No. 14, instructing Final and the Staff to consider various options for continuing the investigation, and on July 31, 2020, the parties selected an additional round of summary determination briefing to address the economic prong and remedy issues that had been denied in Order No. 13. The Commission determined not to review Order No. 13 on August 18, 2020. EDIS Doc. ID 717625.

On August 7, 2020, Final submitted the present motion (cited herein as “Mot.”) (1183-009), along with an accompanying memorandum (cited herein as “Mot. Mem.”), seeking partial

[REDACTED]

summary determination of economic prong domestic industry, a remedy in the form of a general exclusion order, and a bond of 100% during the Presidential review period. On August 14, 2020, Final moved for leave to replace an exhibit within its motion for summary determination (1183-0010), which was granted on August 20, 2020. Order No. 16. On August 24, 2020, the Staff filed a statement in support of Final’s motion for partial summary determination (cited herein as “Staff Resp.”).

Additionally, on August 17, 2020, Final moved (1183-011) to terminate the investigation with respect to asserted claim 20 by reason of withdrawal. On August 26, 2020, this motion was granted via initial determination. Order No. 17. The Commission determined not to review Order No. 17 on September 15, 2020. EDIS Doc. ID 719666. No other motions remain pending.

## **II. STANDARDS OF LAW**

### **A. Summary Determination**

Commission Rule 210.18 provides that “[a]ny party may move with any necessary supporting affidavits for a summary determination in its favor upon all or any part of the issues to be determined in the investigation” and that determination “shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.” 19 C.F.R. § 210.18(a), (b). The Commission has analogized summary determination to summary judgment, wherein “the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Certain Carburetors and Products Containing Such Carburetors*, Inv. No. 337-TA-1123, Comm’n Op. at 5-6 (Oct. 28, 2019) (“*Carburetors*”) (citing *Liebel-Flarsheim Co. v. Medrad, Inc.*, 481 F.3d 1371, 1377 (Fed. Cir. 2007) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986))). Where

[REDACTED]

the moving party bears the burden of proof on a particular issue, the moving party must show that there is no genuine issue of material fact as to every element. *See Meyers v. Asics Corp.*, 974 F.2d 1304, 1307 (Fed. Cir. 1992). Where the nonmoving party bears the burden of proof on a particular issue, the moving party must show that the nonmoving party failed to produce evidence on an essential element of its claim or defense. *See Eli Lilly and Co. v. Barr Labs., Inc.*, 251 F.3d 955, 962 (Fed. Cir. 2001).

Commission Rule 210.18 further provides:

If on motion under this section a summary determination is not rendered upon the whole case or for all the relief asked and a hearing is necessary, the administrative law judge, by examining the pleadings and the evidence and by interrogating counsel if necessary, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. The administrative law judge shall thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the investigation as are warranted. The facts so specified shall be deemed established.

19 C.F.R. § 210.18(e). A party moving for summary determination must identify the legal basis of its motion, and must point to those portions of the record that demonstrate the absence of a genuine issue of material fact. *Carburetors*, Inv. No. 337-TA-1123, Comm’n Op. at 6 (citing *Novartis Corp. v. Ben Venue Labs., Inc.*, 271 F.3d 1043, 1046 (Fed. Cir. 2001) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986))).

**B. Economic Prong**

In a patent-based complaint, a violation of section 337 can be found “only if an industry in the United States, relating to the articles protected by the patent ... concerned, exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2). Under Commission precedent, this “domestic industry requirement” of section 337 includes an economic prong. *Stringed Instruments*, Inv. No. 337-TA-586, Comm’n Op. at 12-14.

**[REDACTED]**

The economic prong of the domestic industry requirement is satisfied when there exists in the United States, in connection with products practicing at least one claim of the patent at issue: (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, and licensing. 19 U.S.C. § 1337(a)(3). Establishment of the “economic prong” is not dependent on any “minimum monetary expenditure” and there is no need for complainant “to define the industry itself in absolute mathematical terms.” *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm’n Op. at 25-26 (May 16, 2008) (“*Stringed Instruments*”).

A critical step in the evaluation of domestic industry is to determine if the investment amounts identified above are “significant,” as in subsections (A) and (B), or “substantial” as in subsection (C). The most recent precedential decision by the Court of Appeals for the Federal Circuit addressing this determination is *Lelo*, which restated law applicable to a number of issues surrounding the economic prong of domestic industry. *See* 786 F.3d 879, 883-85 (Fed. Cir. 2015). In particular, the Federal Circuit held that the statutory terms “‘significant’ and ‘substantial’ refer to an increase in quantity, or to a benchmark in numbers” and “[a]n ‘investment in plant and equipment’ therefore is characterized quantitatively, *i.e.*, by the amount of money invested in the plant and equipment.” *Id.* at 883. Continuing, the Federal Circuit held “[a]ll of the foregoing requires a quantitative analysis in order to determine whether there is a ‘significant’ increase or attribution by virtue of the claimant’s asserted commercial activity in the United States.” *Id.* In short, “[q]ualitative factors cannot compensate for quantitative data that indicate insignificant investment and employment.” *Id.* at 885. The Commission has since made clear that some sort of comparative analysis must be made before significant or substantial can be found. *See, e.g.*,

**[REDACTED]**

*Certain Gas Spring Nailer Products and Components Thereof*, Inv. No. 337-TA-1082, Notice of Comm’n Determination at 3 (Dec. 12, 2019) (“*Gas Spring Nailers*”); *Carburetors*, Inv. No. 337-TA-1123, Comm’n Op. at 17-19. Importantly, the Commission has clarified that investments in plant and equipment, labor, and capital that may fairly be considered investments in research and development under subsection (C) are eligible for consideration under subsections (A) and (B) as well. *Certain Solid State Storage Drives, Stacked Electronics Components, and Products Containing Same*, Inv. No. 337-TA-1097, Comm’n Op. at 14 (June 29, 2018).

In general, “[t]he purpose of the domestic industry requirement is to prevent the ITC from becoming a forum for resolving disputes brought by foreign complainants whose only connection with the United States is ownership of a U.S. patent.” *Certain Battery-Powered Ride-On Toy Vehicles*, Inv. No. 337-TA-314, USITC Pub. No. 2420, Initial Determination at 21 (Aug. 1991). The complainant bears the burden of establishing that the domestic industry requirement is satisfied. *See Certain Set-Top Boxes and Components Thereof*, Inv. No. 337-TA-454, Initial Determination at 294 (June 21, 2002) (not reviewed in relevant part). Where a complainant seeks a general exclusion order, as in this investigation, the elements of the alleged violation (including the existence of a domestic industry) must be “established by substantial, reliable, and probative evidence.” 19 U.S.C. § 1337(g)(2)(B); 19 C.F.R. § 210.16(c)(2); *Certain Water Filters and Components Thereof*, Inv. No. 337-TA-1126, Comm’n Op. at 5-6 (Nov. 15, 2019) (“[T]he text of section 337(g)(2) explicitly states that the underlying violation of section 337 must be ‘established by substantial, reliable, and probative evidence’ (see § 1337(g)(2)(B)), [and] a GEO under section 337(d)(2) must also rest upon a violation established by the same standard of proof.”).

### **III. DOMESTIC INDUSTRY - ECONOMIC PRONG**

Final contends the economic prong is met under subsections (B) and (C). Final explains it started as a successful campaign via Kickstarter, a crowd-funding website, and went “live” in 2018.

[REDACTED]

Mot. Mem. at 11-12. Since then, Final claims, its sales have grown exponentially and it sells several designs for its foldable reusable drinking straws. *Id.* Final describes its domestic investments as being in “engineering, research and development, technical and customer support, and marketing” and totaling “greater than five percent of its domestic industry product sales in the United States.” *Id.* at 13.

**A. Subsection (B) - Labor and Capital**

For subsection (B), Final argues it “utilizes contractors located throughout the United States that are involved in the engineering, research, development, operations, marketing, sales, service, packaging and shipment, and, in many instances, assembly of Final products.” Mot. Mem. at 13 (citing Complaint, Ex. 29)). Final argues it transacted with [REDACTED] such contractors as of the filing of the complaint, and identifies those individuals and the amounts paid in the declaration of its CEO, Ms. Emma Cohen. *Id.* at 13-14; Mot., Ex. 11C at ¶¶ 7-10. Final concludes, “from January 1, 2018 through August 31, 2019, Final has expended approximately [REDACTED] in salaries for U.S. contractors and employees for activities related to the domestic industry product,” and states, “[t]hese salaries and/or contractor payments cover *all* of Final’s labor expenditures on the domestic industry but for the labor required to manufacture the physical products.” Mot. Mem. at 14 (citing Mot., Ex. 11C at ¶ 10 (emphasis in original)).

Final explains a portion of these labor expenses are for order fulfillment (packing and shipping) (Mot. Mem. at 13-14), but others represent “continued investments in perfecting the design of all aspects of its foldable reusable drinking straw products as well as sales, marketing, and order fulfillment labor expenses” and website build and maintenance expenses (*see id.* at 15 (citing Mot., Ex. 11C at ¶ 14), 17-18; Mot., Ex. 11C at ¶ 17). Final continues, “due to the unique circumstances of Final’s initial popularity growth following the Kickstarter campaign and

[REDACTED]

SharkTank appearance, its associated sales, marketing, and order fulfillment labor expenses should not be excluded from calculations deriving a significant investment in labor and capital in the United States.” *Id.* Final claims, however, that even if “marketing, sales, or order fulfillment related salaries are entirely removed,” the total salary amounts to [REDACTED]. *Id.* at 16 n.5 (listing individuals to be removed from calculus).<sup>1</sup>

As for foreign investments cognizable under subsection (B), Final reports “a total of [REDACTED] through August 2019 for foreign labor costs” paid to the manufacturer of the domestic industry products in China and a graphic designer. Mot. Mem. at 16 (citing Mot., Ex. 11C at ¶ 10, 15).

Final presents several perspectives for why the above domestic labor amounts are “significant” under the statute. First, Final argues significance comes from the fact that 100% of its domestic labor as of August 2019 (excluding expenses associated with any other products) is associated with the products protected by the 641 patent, and, separately, that the [REDACTED] figure represents 88% of global headcount and 70% of global labor expenditures. Mot. Mem. at 15 (citing Mot., Ex. 11C at ¶¶ 8-10, 12), 16 (noting domestic labor is more than double foreign labor). With marketing, sales, and order fulfillment removed, Final argues the investment drops to [REDACTED], but is nonetheless significant considering that it was spent over Final’s initial fifteen months of operation and still constitutes 55.86% of its global labor spend. *See id.* at 16, 17. Final concludes:

Overall, Final’s investment in domestic labor is significant inasmuch as virtually all of Final’s labor force required to function as a successful

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<sup>1</sup> For each amount, Final also posits an additional [REDACTED] in equipment costs could be added given that the term “capital” in 19 U.S.C. § 1337(a)(3)(B) “has been held to mean ‘a stock of accumulated goods,’ which could include the accumulated Final goods such as the aforementioned fixtures, furniture, software, etc. . . .” Mot. Mem. at 18-19. To properly consider this amount, however, would also require consideration of foreign equipment costs, which Final does not do.

[REDACTED]

consumer product brand are located in the United States with the exception of one graphic designer with minimal expenses over time and—like many United States based entities—its foreign manufacturer. The distribution of Final’s labor force and their respective responsibilities also is indicative of the fact that Final is not a mere importer. Nor is this an instance like those the ITC has attempted to avoid in the past where the complainant’s “only connection to the United States is ownership of a U.S. patent.” *Certain Battery-Powered Ride-On Toy Vehicles*, Inv. No. 337-TA-314, USITC Pub. No. 2420, Initial Determination at 21 (Aug. 1991).

*Id.* at 18.

The Staff calculates the investment differently but agrees, overall, that “there is no dispute as to any material fact that Final satisfies the economic prong of the domestic industry requirement under 19 U.S.C. § 1337(a)(3)(B) . . .” Staff Resp. at 12. For domestic labor through the filing of the complaint, the Staff removes the sales, marketing, and order fulfillment labor as Final had done [REDACTED] (Staff Resp. at 18-19; Mot. Mem. at 16 n.5), and adds to it a reduced “capital” equipment cost [REDACTED] (Staff Resp. at 21-24) to arrive at a figure of [REDACTED]. For foreign labor, the Staff again starts with the [REDACTED] figure promoted by Final (*id.* at 21) and adds: tooling for the Chinese manufacturer (\$73,200) (Staff Resp. at 21-22 (citing Mot., Ex. 11C at ¶ 19)), a 2018 foreign cost of goods sold as reported in Final’s profit and loss statement [REDACTED] (*id.* at 22 (citing Order No. 13 at 42; Mot., Ex. 11C at Ex. D)), and an estimated 2019 foreign cost of goods sold [REDACTED] (*id.* at 22 n.15, 23), to arrive at a figure of [REDACTED]. With these figures—[REDACTED] domestic labor and [REDACTED] foreign labor—the Staff concludes the domestic labor may be either 26% or 19% of global labor investment (depending on whether an estimated 2019 foreign cost of goods sold is used), and with “the invention, design, engineering, and testing associated with the DI Products [taking] place solely within the United States,” Final satisfies the domestic industry requirement of 19 U.S.C. § 1337(a)(3)(B). *See id.* at 24-25; *see also id.* at 14 (citing *Certain Collapsible Sockets for Mobile Electronic Devices and Components Thereof*, Inv. No. 337-TA-1056, Comm’n Op., 2018 WL 7680630, \*12 (July 9, 2018)).

[REDACTED]

With respect to subsection (B), Final’s motion is denied, primarily due to two issues of material fact. First, the work performed by Final’s contractors is not clearly cognizable. In arriving at the [REDACTED] domestic investment amount, Final claims to have removed its sales, marketing, and order fulfillment staff. Mot. Mem. at 16 n.5; see Mot. Ex. 11C at ¶ 10. This is reasonable considering the Commission’s longstanding practice of generally not recognizing activities associated with a mere importer of goods. See, e.g., *Collapsible Sockets*, Inv. No. 337-TA-1056, Comm’n Op. at 19 (“[I]t is well-settled that evidence of sales and marketing investments alone are not sufficient to demonstrate the existence of a domestic industry . . . While the Commission has, in some investigations, credited such investments in its assessment of a complainant’s domestic industry under subsections (A) and (B). . . the analysis has always been conducted on a case-by-case basis.”); *Certain Kinesiotherapy Devices and Components Thereof*, Inv. No. 337-TA-823, Comm’n Op. at 29 n.8 (July 12, 2013) (finding sales and marketing are generally no different from the activities of an importer), *rev’d on other grounds, Lelo*, 786 F.3d 879.

But based on the job titles of Final’s remaining contractors, more sales, marketing, and order fulfillment staff would appear to remain. These include the: “VP of Wholesale,” “Shipping Assistant,” and “Customer Success.” See Mot., Ex. 11C at ¶ 10. Additional job titles include “Brand Protection” and “IP Manager,” which imply intellectual property acquisition and enforcement/monitoring activities. *Id.* These too are not ordinarily recognized by the Commission without a clear connection to a licensing effort. See, e.g., *Certain Mobile Device Holders and Components Thereof*, Inv. No. 337-TA-1028, Initial Determination at 75 (Sep. 12, 2017), *aff’d in relevant part*, Comm’n Op. at 19 (Mar. 22, 2018); *John Mezzalingua Assocs. Inc.*

[REDACTED]

*v. Int'l Trade Comm'n*, 660 F.3d 1322, 1328 (Fed. Cir. 2011). Final has not alleged any such effort exists.

Further, another large portion of the [REDACTED] is dedicated to the development of Final's website, finalstraw.com. Mot. Ex. 11C at ¶¶ 10, 17. Final's witness, Ms. Cohen, describes the website as developed "to allow[] customers to receive customer service information and initiate warranty processing" (Mot., Ex. 11C at ¶ 17), but Final's briefing describes the website as also "for marketing and sales of the foldable reusable drinking straws protected by the '641 Patent . . . [which] allows consumers to design and customize the color and finish of purchased Final products" (Mot. Mem. at 17). The screenshots referenced in Final's briefing and attached to its complaint clearly demonstrate a promotional (*i.e.*, sales and marketing), non-cognizable function. *Id.* (citing Complaint, Ex. [4]). To the extent the website is also used for warranty processing, an activity which has at times been recognized by the Commission, Final's records show that activity is *de minimis*. See Mot. Mem. at 21 ("about [REDACTED] in warranty related services").

Finally, Final leaves in place the entire salary of Ms. Cohen as if none of her activities are sales, marketing, or promotion. Mot. Mem. at 16 n.5. This is difficult to reconcile with, as an example, her role as CEO of this startup company, its history of media appearances, and her concession that only 15% of her time was spent on research and development. See, *e.g.*, Mot., Ex. 11C at ¶ 19.

Thus there is a genuine issue as to nature of the activities behind Final's labor investments. These facts are material because removal or adjustment of the investments as described above would significantly reduce domestic labor; potentially to around [REDACTED].<sup>2</sup> Even with the

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<sup>2</sup> This is the sum of "VP of Operations," "Chief of Staff," all "customer success" roles, "bookkeeper," "engraving services," "Co-Founder/Product Designer," and 15% of "CEO" under

[REDACTED]

addition of Final's claimed capital, [REDACTED], this total amounts to around 12% of the Staff's reasonably reliable global labor and capital total of [REDACTED]. In a rough sense, one domestic worker for every eight foreign workers in support of an article protected by the 641 patent is not significant for what is supposed to be a U.S.-based startup. Mot. Mem. at 15 ("Final's product is a United States based venture homegrown in the digital age of crowdfunding and social media.").

Beyond the domestic expenditures, a second genuine issue involves Final's foreign labor and capital. As observed by the Staff, Final's total of [REDACTED] ignores the [REDACTED] "Cost of Goods Sold" listed in its 2018 profit and loss statement, and whatever the same amount may have been for January through August 2019. See Staff Resp. at 22. Given that Final already reports its subsection (A) foreign plant and equipment investment as [REDACTED] (Staff Resp. at 21 n. 14; Mot., Ex. 11C at ¶ 19), the most reasonable inference is that "Cost of Goods Sold" is the kind of capital or labor expense that must be considered under subsection (B). That Final does not mention its own "Cost of Goods Sold" at all is peculiar, given Order No. 13's reliance on it as a barrier to summary determination at that time. Order No. 13 at 42-43. Thus a genuine issue exists as to the nature of this recorded expense.

Further, based on the circumstances of Final's business operations, the proper influence of this expense on the economic prong calculus cannot be conclusively determined. *Lelo*, 786 F.3d at 883 ("An 'investment in plant and equipment' therefore is characterized quantitatively, *i.e.*, by the amount of money invested in the plant and equipment. . . . All of the foregoing requires a quantitative analysis in order to determine whether there is a 'significant' increase or attribution by virtue of the claimant's asserted commercial activity in the United States."). The difference

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an assumption that a significant portion of their activities are not sales, marketing, or order fulfillment. See Mot., Ex. 11C at ¶ 10, 19(d).

[REDACTED]

between [REDACTED] and potentially [REDACTED] in foreign costs is too much of a genuine issue for a grant of summary determination, given the previously discussed issues surrounding domestic investments. *Certain Movable Barrier Operation Systems and Components Thereof*, Inv. No. 337-TA-1118, Comm’n Op. at 5 (May 4, 2020) (holding economic prong summary determination should not be granted when calculation adjustments, otherwise warranted, leave the investment amounts “unknown”).

Accordingly, Final has not shown beyond a genuine issue of material fact that it satisfies the economic prong requirement under subsection (B).

**B. Subsection (C) – Research and Development**

For subsection (C), Final argues it invested approximately [REDACTED] in the United States, at the time of filing the complaint, for “designing, engineering, 3-D modelling, and developing the intellectual property for various aspects of the foldable reusable drinking straws protected by the ’641 Patent.” Mot. Mem. at 19 (citing Complaint, Ex. 29; Mot., Ex. 11C at ¶¶ 18, 19). This amount is the sum of [REDACTED] paid to Mr. Miles Pepper, the inventor of the 641 patent and co-founder of Final, [REDACTED] paid to Ms. Cohen, [REDACTED] paid to non-party [REDACTED] to design and create prototypes, and various other items listed in a table of research and development expenses. *See id.* at 19-21; Mot., Ex. 11C at ¶¶ 18, 19; Mot., Ex. 11C, Exhibit B at \*1-2. Final asserts that these amounts are exclusive of any intellectual property acquisition or research and development of non-domestic industry products. *See, e.g.*, Mot. Mem. at 11 n.2, 19-20, 20 n.6; Mot., Ex. 11C, Exhibit G.

Final acknowledges that some research and development was performed overseas, stating “Final’s domestic investment in research and development for products covered by the ’641 Patent totals approximately 80% of its overall global investment in research and development.” Mot.

[REDACTED]

Mem. at 21 (citing Mot., Ex. 11C at ¶ 19). Final argues, however, that this 80% figure, along with the overall sum of [REDACTED], demonstrates the investment is substantial under subsection (C) of the statute. *Id.* Final views the fact that it did not sell any products besides the domestic industry product at the time of the complaint (*id.* at 22), and that 93% of its sales are U.S.-based (*id.* at 22-23), as also showing a substantial investment has occurred.

The Staff agrees, noting “the technologies claimed in the ’641 Patent were invented and developed in the United States.” Staff Resp. at 26 (citing Mot., Ex. 11C at ¶¶ 2, 3; Complaint, Ex. 29 at ¶ 6). The Staff argues “the evidence shows that Final worked with, among others, [REDACTED], [REDACTED], in developing prototypes, whose work was integral to turning Final’s idea and concept into marketable products covered by the ’641 Patent” (*id.*) and concurs that [REDACTED] is attributable to this effort (*id.* at 26-27). The Staff similarly views this as “substantial” under the statute, using the same 80% of global research and development and 100% of all products sold metrics promoted by Final. *See id.* at 28-29. The Staff disagrees, however, that the fact that 93% of Final’s sales are U.S.-based is relevant to the analysis “given that, as of the filing date of the Complaint, Final did not sell any products other than those covered by the ’641 Patent.” *Id.* at 29 n.25 (citing *Certain Electric Skin Care Devices, Brushes and Chargers Therefor, and Kits Containing Same*, Inv. No. 337-TA-959, [no document cited] (April 11, 2016)).

Consistent with Final and the Staff’s position, the record supports finding that there has been a “substantial” investment in the research and development of the technology claimed in the 641 patent pursuant to subsection (C), beyond any genuine issue of material fact. The [REDACTED] figure is reasonably justified as Final has provided ordinary business records evidencing the payments made to [REDACTED], Mr. Pepper, Ms. Cohen, and the various other vendors. Mot., Ex.

[REDACTED]

11C, Exhibit B; Mot., Ex. 11C, Exhibit A at -569, -585. In addition to the uncontested declaration from Ms. Cohen, the payments were mostly made before the first sales of the domestic industry product (*compare* Mot., Ex. 11C, Exhibit A at -569, -585 *with* Mot., Ex. 11C at Exhibit C; Mot., Ex. 11C at Exhibit B), and the [REDACTED] invoice descriptions of the research and development work performed match Ms. Cohen's, including the creation of prototypes (*see, e.g.*, Mot., Ex. 11C at Exhibit B at -874; Mot., Ex. 11C at ¶ 19). Further, Final has provided evidence fairly showing the [REDACTED] paid to Mr. Pepper was not for intellectual property acquisition. Mot., Ex. 11C at ¶ 19; Mot., Ex. 11C, Exhibit G; *see* Order No. 13 at 45-46.

The nexus between the identified research and development activities and the 641 patent is almost unavoidable. Claim 1 recites the rigid external tube elements and the inner flexible tubing which is essentially the entirety of the straw. 641 patent at cl. 1. Claim 15 recites the same along with the cleaning element and storage case. 641 patent at cl. 15. Altogether, these claim elements cover essentially all aspects of the domestic industry product. *See* Mot. Mem. at 10-11. Thus, efforts to develop or improve these elements, or any feature of the product, have a nexus to the 641 patent. *See generally Gas Spring Nailers*, Inv. No. 337-TA-1082, Comm'n Op. at 79-82.

Lastly, the evidence of record shows [REDACTED] is substantial given the circumstances. Final is a new company, having only been in existence for a few years. *See* Mot. Mem. at 10-11. To have spent [REDACTED] in total researching and developing the domestic industry product in that time is noteworthy, especially given the relative simplicity of the technology—a resilient flexible tube member placed within several outer rigid tube segments. It is reasonable to conclude that the marketplace for these products does not and, due to price points, cannot require intense research and development costs. Thus, the benchmark for “substantial” research and development investment is relatively low compared to other technological arts. *Mobile Device Holders*, Inv.

[REDACTED]

No. 337-TA-1028, Initial Determination at 79 (Sept. 12, 2017), *aff'd in relevant part*, Comm'n Op. at 19 (Mar. 22, 2018). These considerations, along with the fact that roughly 80% of all global research efforts behind the domestic industry product were expended domestically, strongly supports finding a substantial investment in the exploitation of the 641 patent within the United States. With that said, Final's other proposed metrics for evaluating substantiality are not persuasive. The fact that 93% of domestic industry product sales have been to U.S. customers has no connection to the [REDACTED] investment, the investing entity (*e.g.*, young company), or the relevant market (*e.g.*, technologically simple product); and that 100% of all company sales were domestic industry products only generally shows that the domestic industry products are substantial to Final itself. And that latter metric has no connection to the [REDACTED] in a quantitative sense.

Accordingly, summary determination is granted for the economic prong of domestic industry under subsection (C).

#### **IV. RECOMMENDED DETERMINATION ON REMEDY AND BOND**

The Commission has broad discretion in selecting the form of the remedy in a section 337 investigation. *See Fuji Photo Film v. Int'l Trade Comm'n*, 386 F.3d 1095, 1106-1107 (Fed. Cir. 2004); *Certain Hydraulic Excavators and Components Thereof*, Inv. No. 337-TA-582, Comm'n Op. at 15 (Feb. 3, 2009). When a violation is found, the Commission generally issues a limited exclusion order directed to each respondent found in violation of the statute. 19 U.S.C. § 1337(d)(1). In certain circumstances, however, the Commission may issue a general exclusion order, or cease and desist orders. 19 U.S.C. § 1337(d)(2), (f), (g)(2).

##### **A. General Exclusion Order**

In this investigation, Final requests a general exclusion order ("GEO"), which the Staff supports. Mot. Mem. at 25; Staff. Resp. at 30. Additionally, as explained in Order No. 8, no

[REDACTED]

respondent appeared in this investigation to contest Final's claims of a violation, and those who had been successfully served with the complaint and notice of investigation were subsequently held in default. Order No. 8 at 2-3.

Section 337(g)(2) grants the Commission the authority to issue a GEO under default circumstances if:

- (A) no person appears to contest an investigation concerning a violation of the provisions of this section,
- (B) such a violation is established by substantial, reliable, and probative evidence, and
- (C) the requirements of subsection (d)(2) are met.

19 U.S.C. § 1337(g)(2). The requirements of subsection (d)(2) are as follows:

- (A) a general exclusion order from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or,
- (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19 U.S.C. § 1337(d)(2). Final has shown each of the elements of sections 337(d)(2) and (g)(2).

The record supports finding a widespread pattern of unauthorized use with unclear origin under section 337(d)(2)(B). At present, there are fifteen defaulted respondents. Order No. 13 at 3; Order No. 8. The accused products of these respondents are sold through online marketplaces such Alibaba.com (Complaint, Ex. 28) and many are so similar in design as to be indistinguishable (*see, e.g.*, Order No. 13 at 8-13; Complaint Exs. 11-20, 22, 24-27). And the packaging associated with thirteen of these products is identical and incorporates Final's own product imagery without authorization. *See* Mot. Mem. at 41-43 (citing Mot., Ex. 11C at ¶ 24; Complaint, Exs. 11-20, 22, 24-27).

[REDACTED]

As determined in Order No. 13, each of these products infringes the 641 patent. Order No. 13 at 33-34. Thus, there is a widespread, literal pattern of unauthorized use, just amongst the defaulted respondents in this investigation. The record shows there are likely more; for example, those in the spreadsheet where Final recorded the “thousands of take-down requests [it] has made of various online marketplaces.” Mot., Ex. 11C at ¶ 22 (citing Mot., Ex. 11C, Exhibit F at -854).

There is also a difficulty in identifying the source of infringing products. Two of the originally named respondents, now terminated, were unable to be located for service of the complaint. *See* Order No. 7. Final also presented evidence of “duplicative and confusing” postings of the same accused product, from the same respondent, taken from Alibaba.com on a single day. Mot. Mem. at 28-29 (citing Complaint, Exs. 11-13, 15, 18, 21, 23, 25-27); *see* Mot., Ex. 11C, Exhibit F; *Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm’n Op. at 14 (June 26, 2015). Further, Final has shown that the shipping or supplier address for many of the products imported into the United States and received by Final’s counsel, Mr. Gordon, are “intentionally or unintentionally illegible, confusing, contradictory, and [are] often incomplete return addresses and, in some instances, no return addresses at all . . . .” Mot. Mem. at 31-32 (citing Complaint, Ex. 28; Mot. Ex. 11C at ¶¶ 22-24); *see also id.* at 39.

These facts combined with the natural anonymity of online marketplaces and the simplicity and portability of the tooling equipment needed to create these products (*see* Mot. Mem. at 33-38 (citing Complaint, Ex. 29 at ¶¶ 14-16)), demonstrate the difficulty in ascertaining the sources of imported foldable reusable drinking straws, should those sources seek to remain obscured. Thus, the requirements of section 337(d)(2)(B) are satisfied.

For many of the same reasons, the record supports finding a GEO as necessary to prevent circumvention of limited exclusion orders under section 337(d)(2)(A). The failure to locate two

[REDACTED]

originally named respondents, the similarity in package and product design between infringing products (and Final’s design), the unintelligible shipping addresses, the simplicity of manufacturing operations, and duplicative seller listings all support Final’s contention that “[t]hese entities involved in the sale for importation and importation of infringing foldable reusable drinking straws are not legitimate business operations, but rather fly-by-night entities that would have no qualms about changing or obscuring their identities in order to evade a limited exclusion order.” Mot. Mem. at 43 (citing *Certain Protective Cases and Components Thereof*, Inv. No. 337-TA-780, Comm’n Op. at 25-26 (Nov. 19, 2012)). Indeed, the disregard for Final’s intellectual property is clear for at least one defaulted respondent, Xiamen One Piece, who communicated a knowledge of the 641 patent and warned it could be a “problem” when Final’s counsel arranged to purchase its accused product. *See* Mot. Mem. at 27-28 (citing Complaint, Ex. 25). It is not unreasonable to infer that this disregard of a duly issued U.S. patent would extend to any limited exclusion order issued by the Commission. Thus, the requirements of section 337(d)(2)(A) have been satisfied by substantial, reliable, and probative evidence. *Certain Water Filters*, Inv. No. 337-TA-1126, Comm’n Op. at 5-6.

The same standard of proof has been met under section 337(g)(2). Order No. 13, not reviewed by the Commission, determined that the issues of infringement and technical prong domestic industry had been established by substantial, reliable, and probative evidence. Order No. 13 at 34, 36. It is clear from the evidence discussed within the order that importation was similarly established. *See id.* at 20-29. The sole remaining issue of economic prong domestic industry, addressed here, has also been shown by substantial, reliable, and probative evidence. As it concerns subsection (C), Final provided business record evidence of its expenditures, contractors,

[REDACTED]

and a declaration from a witness involved in Final’s research and development efforts. *See, e.g.*, Mot., Ex. 11C at ¶ 19; Mot., Ex. 11C, Exhibit B.

Accordingly, it is recommended that a GEO issue in the event the Commission finds a violation.

**B. Bond**

In this investigation, Final seeks a 100% bond rate for any product imported during the Presidential review period. Mot. Mem. at 25. The Staff supports a 100% rate. Staff Resp. at 30.

Pursuant to section 337(j)(3), the Commission must determine the amount of bond to be set during the 60-day Presidential Review period following the issuance of a remedy. The purpose of the bond is to protect the complainant from injury during the Presidential review period. 19 U.S.C. § 1337(j)(3); 19 C.F.R. §§ 210.42(a)(1)(h), 210.50(a)(3). Complainants bear the burden of establishing the need for a bond, which is typically calculated from the pricing difference between complainant’s and respondent’s products. *Mobile Device Holders*, Inv. No. 337-TA-1028, Comm’n Op. at 29 (Mar. 22, 2018).

Here, Final requests a bond, but provides no discussion on why a bond, of any amount, is justified. *See* Mot. Mem. at 6, 25. Nevertheless, the Staff explains that a bond of 100% is appropriate, as “[n]one of the Respondents participated in this Investigation, which prevented Final from seeking discovery on pricing and royalty information.” Staff Resp. at 44. Given the circumstances of this investigation, the factual considerations which led to the recommendation of a GEO, and the Commission’s general policy to set a 100% bond for defaulting respondents who provide no information during discovery (*Mobile Device Holders*, Inv. No. 337-TA-1028, Comm’n Op. at 29-30), it is fair to treat the Staff as carrying Final’s burden. It is therefore

[REDACTED]

recommended that the Commission set a bond rate of 100% of the entered value for the accused products to protect Final during the Presidential review period.<sup>3</sup>

## **V. INITIAL DETERMINATION AND ORDER**

As discussed above, there are no genuine issues of material fact concerning subsection (C) of the economic prong of domestic industry. This issue, and all supporting facts relied on above, are without substantial controversy and hereby established under 19 C.F.R. § 210.18(e). Accordingly, Final's motion for partial summary determination for the existence of a domestic industry (1183-009) is granted.

In conjunction with the issues of importation, infringement, and technical prong domestic industry determined to be satisfied by Order No. 13, it is hereby determined that a violation concerning claims 1-12 and 14-17 of the 641 patent has occurred. It is further recommended that the Commission issue a general exclusion order and set a bond of 100% for any products imported during the Presidential review period. This initial determination is hereby certified to the Commission and the investigation is terminated.

Within seven days of the date of this document, the parties shall submit to the Office of the Administrative Law Judges a joint statement as to whether or not they seek to have any portion of this document deleted from the public version. If the parties do seek to have portions of this document deleted from the public version, they must submit to this office a copy of this document

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<sup>3</sup> There is some evidence in the record on the pricing of respondents' accused products, which could have been used for a bond calculation—the sale prices of the products purchased and received by Final's counsel. Complaint, Exs. 11-20, 22, 24-27. Nonetheless, such evidence falls short of what would normally be expected for a bond calculation.



with red brackets indicating the portion or portions asserted to contain confidential business information. The submission may be made by email and/or hard copy by the aforementioned date and need not be filed with the Commission Secretary.

**SO ORDERED.**

A handwritten signature in cursive script, appearing to read "Cameron Elliot".

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Cameron Elliot  
Administrative Law Judge

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **INITIAL DETERMINATION** has been served via EDIS upon the Commission Investigative Attorney, **Paul Gennari, Esq.**, and the following parties as indicated, on 9/30/2020.



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
500 E Street, SW, Room 112  
Washington, DC 20436

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of Availability to Download

**UNITED STATES INTERNATIONAL TRADE COMMISSION**  
**Washington, D.C.**

**In the Matter of**

**CERTAIN FOLDABLE REUSABLE  
DRINKING STRAWS AND COMPONENTS  
AND ACCESSORIES THEREOF**

**Investigation No. 337-TA-1183**

**NOTICE OF COMMISSION DETERMINATION NOT TO REVIEW  
AN INITIAL DETERMINATION GRANTING IN PART A MOTION FOR  
SUMMARY DETERMINATION**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (“ID”) (Order No. 13) of the presiding administrative law judge (“ALJ”) granting in part the complainant’s motion for summary determination.

**FOR FURTHER INFORMATION CONTACT:** Lynde Herzbach, Office of the General Counsel, U.S. International Trade Commission, 500 E Street S.W., Washington, D.C. 20436, telephone (202) 205-3228. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email [EDIS3Help@usitc.gov](mailto:EDIS3Help@usitc.gov). General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

**SUPPLEMENTARY INFORMATION:** The Commission instituted this investigation on November 13, 2019, based on a complaint filed on behalf of The Final Co. LLC (“Final” or “Complainant”) of Santa Fe, New Mexico. 84 FR 61639 (Nov. 13, 2019). The complaint, as amended, alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (“section 337”), in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain foldable reusable drinking straws and components and accessories thereof by reason of infringement of claims 1-12, 14-17, and 20 of U.S. Patent No. 10,123,641 (“the ‘641 patent”). *Id.* The complaint further alleges that a domestic industry exists. *Id.* The Commission's notice of investigation names seventeen respondents, specifically, Huizhou Sinri Technology Company Limited of Guangdong, China; Hebei Serun Import and Export Trade Co., Ltd. of Hebei, China; Dongguan Stirling Metal Products Co., Ltd. of Guangdong, China; Ningbo Wwpartner Plastic Manufacture

Co., Ltd. of Zhejiang, China; Shenzhen Yuanzhen Technology Co., Ltd. of Shenzhen, China; Jiangmen Boyan Houseware Co., Ltd. of Guangdong, China; Shanghai Rbin Industry And Trade Co., Ltd. of Shanghai, China; Jiangmen Shengke Hardware Products Co., Ltd. of Guangdong, China; Funan Anze Trading Co., Ltd. of Anhui, China; Hangzhou Keteng Trade Co., Ltd. of Zhejiang, China; Hunan Jiudi Shiye Import And Export Trading Co., Ltd. of Hunan, China (“Hunan Jiudi”); Shenzhen Yaya Gifts Co., Ltd. of Guangdong, China; Ningbo Weixu International Trade Co., Ltd. of Zhejiang, China (“Ningbo Weixu”); Ningbo Beland Commodity Co., Ltd. of Zhejiang, China; Xiamen One X Piece Imp. & Exp. Co., Ltd. of Fujian, China; Hunan Champion Top Technology Co., Ltd. of Hunan, China; and Yiwu Lizhi Trading Firm of Zhejiang, China. *Id.* at 61639-40. The Office of Unfair Import Investigations (“OUII”) is also named as a party in this investigation. *Id.* at 61640.

The Commission previously terminated respondents Ningbo Weixu and Hunan Jiudi from the investigation based on Complainant’s partial withdrawal of the complaint. *See* Order No. 7 (Feb. 13, 2019), *unreviewed by* Comm’n Notice (Mar. 9, 2020).

On March 16, 2020, the Commission found the remaining fifteen respondents (collectively, the “Defaulted Respondents”) in default. Order No. 8 (March 3, 2020), *unreviewed by* Notice (March 16, 2020).

On April 7, 2020, Complainant filed a motion for summary determination of domestic industry and violation of section 337 by Defaulted Respondents. On May 5, 2020, Complainant filed a motion for leave to supplement its motion, and the ALJ granted leave on May 8, 2020. Order No. 12 (May 8, 2020). On May 27, 2020, OUII filed its response in support of Complainant's motion. *See* Order No. 11 (May 1, 2020) (granting leave for extension of time for OUII to file a response).

On July 17, 2020, the ALJ issued the subject ID (Order No. 13) granting in part the motion for summary determination. *See* Order No. 13. The subject ID finds that there is importation of the accused products and infringement of claims 1-12 and 14-17 of the ’641 patent by Defaulted Respondents, and that Complainant satisfies the technical prong of the domestic industry requirement for the ’641 patent. No party petitioned for review of the subject ID.

Having reviewed the record of the investigation, the Commission has determined not to review the subject ID. Further, the ALJ denied Complainant’s motion for summary determination as to the economic prong of the domestic industry requirement. The denial of summary determination is not an initial determination subject to Commission review. 19 CFR 210.42.

The Commission vote for this determination took place on August 18, 2020.

The authority for the Commission’s determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission’s Rules of Practice and Procedure (19 CFR Part 210).

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', written in a cursive style.

Lisa R. Barton  
Secretary to the Commission

Issued: August 18, 2020

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served via EDIS upon the Commission Investigative Attorney, **Paul Gennari, Esq.**, and the following parties as indicated, on 8/18/2020.



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
500 E Street, SW, Room 112  
Washington, DC 20436

**On Behalf of Complainant The Final Co. LLC:**

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- Via First Class Mail
- Other: Email Notification  
of Availability to Download

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**Washington, D.C.**

**In the Matter of**

**CERTAIN FOLDABLE REUSABLE  
DRINKING STRAWS AND  
COMPONENTS AND ACCESSORIES  
THEREOF**

**Inv. No. 337-TA-1183**

**ORDER NO. 13: INITIAL DETERMINATION GRANTING-IN-PART  
COMPLAINANT FINAL'S MOTION FOR SUMMARY  
DETERMINATION OF VIOLATIONS BY THE DEFAULTING  
RESPONDENTS, FOR THE EXISTENCE OF A DOMESTIC  
INDUSTRY, FOR A GENERAL EXCLUSION ORDER, AND FOR  
A RECOMMENDED DETERMINATION ON REMEDY AND  
BONDING**

(July 17, 2020)



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## I. INTRODUCTION

### A. Procedural Background

Complainant The Final Co. LLC (“Final” or “Complainant”) filed the complaint underlying this Investigation on October 9, 2019, and amended the complaint on October 29, 2019. The amended complaint alleged numerous respondents import or sell in connection with an importation certain products that infringe one or more claims of U.S. Patent No. 10,123,641 (“the 641 patent”). Those respondents included: Huizhou Sinri Technology Company Limited of China; Hebei Serun Import and Export Trade Co., Ltd. of China; Dongguan Stirling Metal Products Co., Ltd. of China; Ningbo Wwpartner Plastic Manufacture Co., Ltd. of China; Shenzhen Yuanzhen Technology Co., Ltd. of China; Jiangmen Boyan Houseware Co., Ltd. of China; Shanghai Rbin Industry And Trade Co., Ltd. of China; Jiangmen Shengke Hardware Products Co., Ltd. of China; Funan Anze Trading Co., Ltd. of China; Hangzhou Keteng Trade Co., Ltd. of China; Hunan Jiudi Shiye Import And Export Trading Co., Ltd. of China; Shenzhen Yaya Gifts Co., Ltd. of China; Ningbo Weixu International Trade Co., Ltd. of China; Ningbo Beland Commodity Co., Ltd. of China; Xiamen One X Piece Imp. & Exp. Co., Ltd. of China; Hunan Champion Top Technology Co., Ltd. of China; and Yiwu Lizhi Trading Firm of China.

By publication of a notice in the *Federal Register* on November 13, 2019, the U.S. International Trade Commission ordered that:

Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of products identified in paragraph (2) by reason of infringement of one or more of claims 1-12, 14-17, and 20 of the '641 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337[.]

[REDACTED]

84 Fed. Reg. 61639 (Nov. 13, 2019). On December 3, 2019, I set a target date of March 12, 2021 for completion of this investigation. Order No. 3. Also on December 3, 2019, I set the evidentiary hearing for August 17-21, 2020. Order No. 4.

On January 8, 2020, Final moved for a show cause order as to certain respondents as to why they should not be found in default for failure to respond to the complaint and notice of investigation. A supplement to the motion was filed on February 10, 2020 with three additional respondents. I granted the motion on February 13, 2020 and ordered these respondents to show cause by February 24, 2020. Order No. 6. This deadline passed without any responses, and on March 3, 2020, I found the following respondents in default: Huizhou Sinri Tech Comp Ltd. (“Huizhou Sinri”), Ningbo Wwpartner Plastic Manufacturing (“Ningbo Plastic”), Shenzhen Yuanzhen Tech Co. Ltd. (“Shenzhen Yuanzhen”), Jiangmen Boyan Houseware Co. Ltd. (“Jiangmen Houseware”), Shanghai Rbin Industry And Trade Co. Ltd. (“Shanghai Rbin”), Jiangmen Shengke Hardware Prod. (“Jiangmen Hardware”), Hangzhou Keteng Trade Co., Ltd. (“Hangzhou Trade”), Shenzhen Yaya Gifts Co., Ltd. (“Yaya Gifts”), Ningbo Beland Commodity Co. (“Ningbo Beland”), Xiamen One X Piece Imp. Exp. (“Xiamen One Piece”), Hunan Champion Top Tech. (“Hunan Champion”), Yiwu Lizhi Trading Firm (“Yiwu Trading”), Dongguan Stirling Metal Products Co., Ltd. (“Dongguan Stirling”), Hebei Serun Import and Export Trade Co., Ltd. (“Hebei Serun”), and Funan Anze Trading Co., Ltd. (“Funan Trading”) (collectively, the “Defaulted Respondents”). Order No. 8.

In parallel with the motions to show cause, on February 10, 2020, Final moved to withdraw the complaint against a second group of respondents upon whom the complaint was unable to be served. On February 13, 2020, I granted the motion via initial determination, terminating the investigation as to these respondents. Order No. 7. These respondents included Ninbo Weixu

[REDACTED]

International Trade Co., Ltd. and Hunan Jiudi Shiye Import and Export Trading Co., Ltd. (collectively, the “Terminated Respondents”). *Id.*

Between the Defaulted Respondents and the Terminated Respondents, no other respondents remain in this investigation. Thus, on February 18, 2020, Final moved to suspend the procedural schedule and for leave to file a motion for summary determination of violation against the Defaulted Respondents. With no opposition from the Commission Investigative Staff (“Staff”) assigned to this investigation, I granted the motion on March 4, 2020. Order No. 9. On April 7, 2020, Final filed its motion for summary determination of violation and request for a general exclusion order (cited herein as “Mot. Mem.”) (1183-006). On May 5, 2020, prior to the Staff’s response, Final filed a motion for leave to supplement the summary determination motion, which I granted on May 8, 2020 (cited herein as “Mot. Supp.”). Order No. 12. Thereafter, with leave granted by Order No. 11, the Staff submitted its response in support of the motion for summary determination (cited herein as “Staff Resp.”) on May 27, 2020. No other motions remain pending.

**B. The Parties**

Complainant Final is a United States limited liability company organized and existing under the laws of New Mexico and having its principal place of business in Santa Fe, New Mexico. *See* Complaint at ¶ 5; *but see* Mot. Supp. at 1 (listing Seattle, Washington as principal place of business and citing Complaint at ¶ 5). Final “designs and develops foldable reusable straws that replace single-use plastic straws.” *Id.* at ¶ 6.

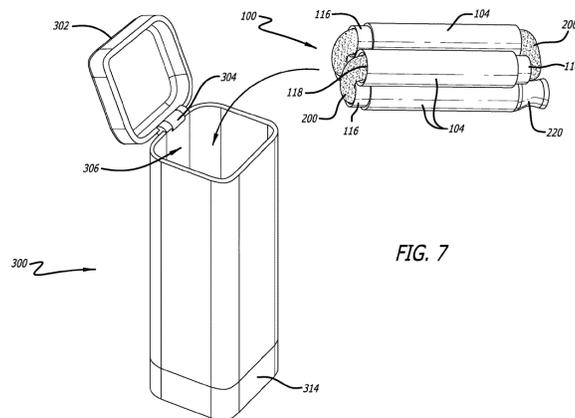
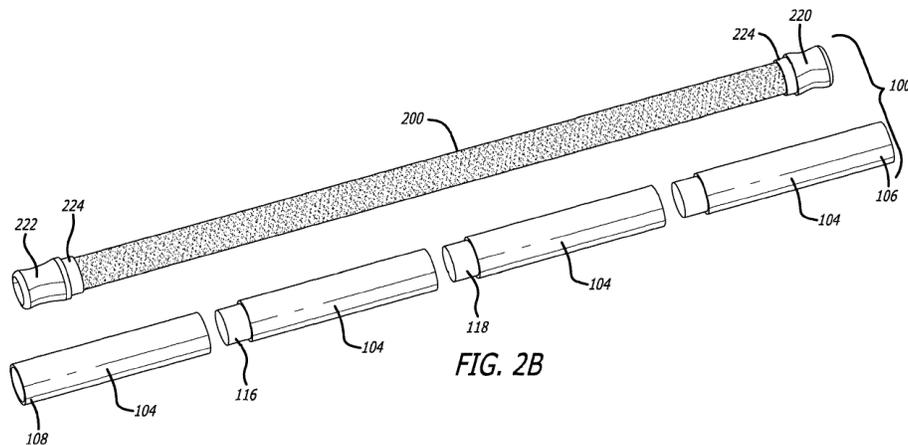
The following background on the Defaulted Respondents is based on information presented in Final’s Complaint. Respondent Huizhou Sinri is a foreign company listing a primary sales address in Huizhou, Guangdong, China. Complaint at ¶ 13. Respondent Hebei Serun is a foreign company listing a primary sales address in Shijiazhuang, Hebei, China. *Id.* at ¶ 14. Respondent

**[REDACTED]**

Dongguan Stirling is a foreign company listing a primary sales address in Dongguan, Guangdong, China. *Id.* at ¶ 15. Respondent Dongguan Stirling is a foreign company listing a primary sales address in Dongguan, Guangdong, China. *Id.* at ¶ 15. Respondent Ningbo Plastic is a foreign company listing a primary sales address in Ningbo, Zhejiang, China. *Id.* at ¶ 16. Respondent Shenzhen Yuanzhen is a foreign company listing a primary sales address in Longhua District, Shenzhen, China. *Id.* at ¶ 17. Respondent Jiangmen Houseware is a foreign company listing a primary sales address in Jiangmen, Guangdong, China. *Id.* at ¶ 18. Respondent Shanghai Rbin is a foreign company listing a primary sales address in Qingpu District, Shanghai, China. *Id.* at ¶ 19. Respondent Jiangmen Hardware is a foreign company listing a primary sales address in Jiangmen, Guangdong, China. *Id.* at ¶ 20. Respondent Funan Trading is a foreign company listing a primary sales address in Fuyang, Anhui, China. *Id.* at ¶ 21. Respondent Hangzhou Trade is a foreign company listing a primary sales address in Hangzhou, Zhejiang, China. *Id.* at ¶ 22. Respondent Yaya Gifts is a foreign company listing a primary sales address in Shenzhen, Guangdong, China. *Id.* at ¶ 24. Respondent Ningbo Beland is a foreign company listing a primary sales address in Ningbo, Zhejiang, China. *Id.* at ¶ 26. Respondent Xiamen One Piece is a foreign company listing a primary sales address in Xiamen, Fujian, China. *Id.* at ¶ 27. Respondent Hunan Champion is a foreign company listing a primary sales address in Changsha City, Hunan Province, China. *Id.* at ¶ 28. Respondent Yiwu Trading is a foreign company listing a primary sales address in Jinhua, Zhejiang, China. *Id.* at ¶ 29. The record shows each of the Defaulted Respondents is involved in, at least, the sale of certain foldable reusable drinking straw products. *See* Complaint, Exs. 11-20, 22, 24-27.

### C. The Asserted Patent

The sole patent asserted in this investigation is U.S. Patent No. 6,123,641. The 641 patent is entitled, “Reusable Foldable Drinking Straw in Storage Case.” 641 patent. The application leading to the 641 patent was filed on May 23, 2018 and claims priority to two provisional applications, No. 62/658,976 filed on April 17, 2018 and No. 62/579,013 filed on October 30, 2017. *Id.* The 641 patent issued on November 13, 2018. *Id.* It relates to a foldable drinking straw made of reusable materials, along with a storage case for holding the straw in its collapsed configuration. *See id.* at Abstract. The straw is preferably made of several interlocking outer rigid segments, and a single flexible inner segment, shown below:





641 patent at Figs. 2B, 7. The inner segment is designed to compress the outer segments along a major axis when in an extended position. *See id.* at 2:28-37. This enables drinking through the straw. *See id.* at 2:18-27. A cleaning tool, such as a squeegee, can be provided with the straw which is placed inside the internal segment and pulled through. *Id.* at 2:43-48. It stands undisputed that Final is the owner of the 641 patent. Mot. Mem. at 14 (citing Complaint, Exs. 2, 3); Staff Resp. at 16.

**D. Products at Issue**

The domestic industry products in this investigation are foldable, reusable straws developed and sold by Final. Mot. Mem. at 1. Similar to the embodiments of the 641 patent, the domestic industry products use outer, tubular, rigid segments around a flexible, inner segment, which can be configured in extended and collapsed positions:

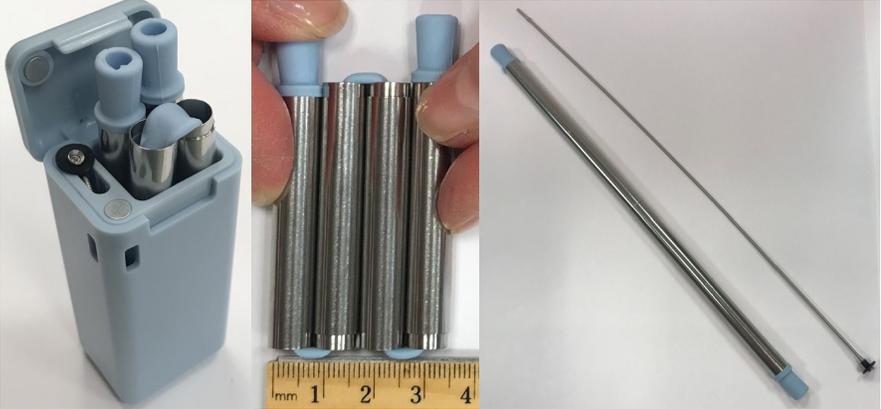


Mot. Supp. at 2. As shown, when in the collapsed position, the straw fits into a storage case along with a cleaning member. According to Final’s expert, Mr. Kemnitzer, Final has sold the products in two variations, a version 1.0 and version 2.0 (hereafter, “the Domestic Industry Products”). Mot., Ex. 2 at ¶ 87. According to the expert, “[b]oth versions include identical reusable drinking



straws foldable for storage. In version 2.0, the storage case and cleaning element have been updated.” *Id.*; *see id.* at 48-49 (imagery of versions 1.0 and 2.0).

The accused products in this investigation are also foldable, reusable straws. According to Final’s expert, Mr. Kemnitzer, they are “nearly, if not entirely, identical to the Final product.” Mot., Ex. 2 at ¶ 95. Like the 1.0 version of the Domestic Industry Products, the accused products include a straw, cleaning element, and carrying case, as shown below (hereafter, “Accused Products”):

Respondent	Product Imagery
Huizhou Sinri (Complaint, Ex. 11)	
Hebei Serun (Complaint, Ex. 12)	



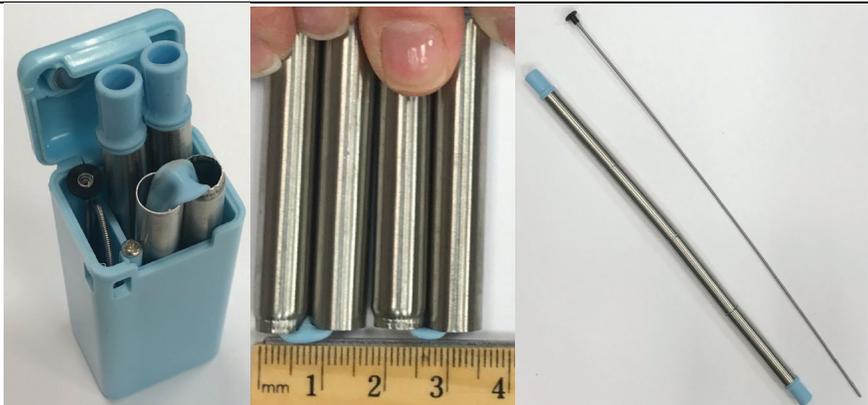
<p>Dongguan Stirling (Complaint, Ex. 13)</p>	
<p>Ningbo Plastic (Complaint, Ex. 14)</p>	
<p>Shenzhen Yuanzhen (Complaint, Ex. 15)</p>	



Jiangmen  
Houseware  
(Complaint, Ex. 16)



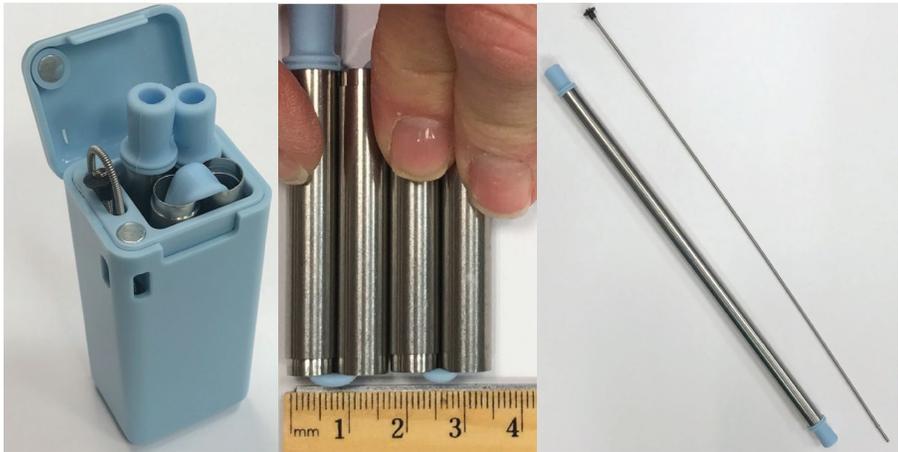
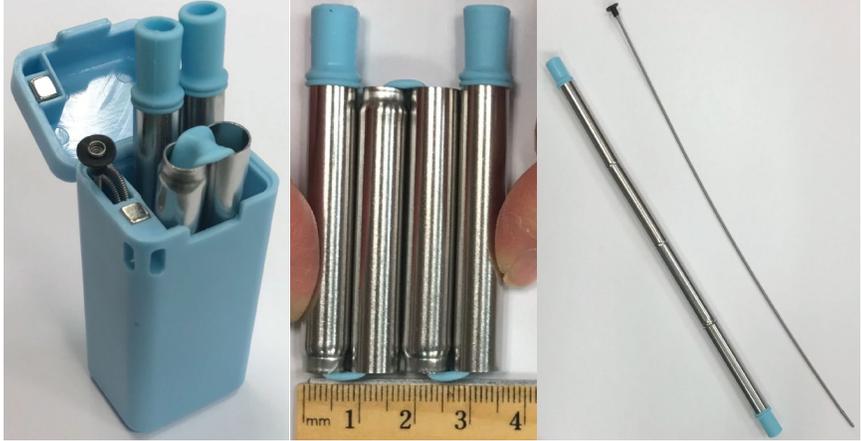
Shanghai Rbin  
(Complaint, Ex. 17)



Jiangmen Hardware  
(Complaint, Ex. 18)





<p>Funan Trading (Complaint, Ex. 19)</p>	
<p>Hangzhou Trade (Complaint, Ex. 20)</p>	
<p>Yaya Gifts (Complaint, Ex. 22)</p>	



<p>Ningbo Beland (Complaint, Ex. 24)</p>	
<p>Xiamen One Piece (Complaint, Ex. 25)</p>	
<p>Hunan Champion (Complaint, Ex. 26)</p>	



**II. STANDARDS OF LAW**

**A. Summary Determination**

Commission Rule 210.18 provides that “[a]ny party may move with any necessary supporting affidavits for a summary determination in its favor upon all or any part of the issues to be determined in the investigation” and that determination “shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.” 19 C.F.R. § 210.18(a), (b). The Commission has analogized summary determination to summary judgment, wherein “the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Certain Carburetors and Products Containing Such Carburetors*, Inv. No. 337-TA-1123, Comm’n Op. at 5-6 (Oct. 28, 2019) (citing *Liebel-Flarsheim Co. v. Medrad, Inc.*, 481 F.3d 1371, 1377 (Fed. Cir. 2007) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986))). Where the moving party bears the burden of proof on a particular issue, the moving party must show that there is no genuine issue of material fact as to every element. *See Meyers v. Asics Corp.*, 974 F.2d 1304,

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1307 (Fed. Cir. 1992). Where the nonmoving party bears the burden of proof on a particular issue, the moving party must show that the nonmoving party failed to produce evidence on an essential element of its claim or defense. *See Eli Lilly and Co. v. Barr Labs., Inc.*, 251 F.3d 955, 962 (Fed. Cir. 2001). Commission Rule 210.18 further provides:

If on motion under this section a summary determination is not rendered upon the whole case or for all the relief asked and a hearing is necessary, the administrative law judge, by examining the pleadings and the evidence and by interrogating counsel if necessary, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. The administrative law judge shall thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in the investigation as are warranted. The facts so specified shall be deemed established.

19 C.F.R. § 210.18(e). A party moving for summary determination must identify the legal basis of its motion, and must point to those portions of the record that demonstrate the absence of a genuine issue of material fact. *Certain Carburetors*, Inv. No. 337-TA-1123, Comm’n Op. at 6 (citing *Novartis Corp. v. Ben Venue Labs., Inc.*, 271 F.3d 1043, 1046 (Fed. Cir. 2001) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986))).

## **B. Claim Construction**

“The construction of claims is simply a way of elaborating the normally terse claim language in order to understand and explain, but not to change, the scope of the claims.” *Embrex, Inc. v. Serv. Eng’g Corp.*, 216 F.3d 1343, 1347 (Fed. Cir. 2000). Claim construction focuses on the intrinsic evidence, which consists of the claims themselves, the specification, and the prosecution history. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005) (en banc); *see also Markman v. Westview Instr., Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) (en banc). As the Federal Circuit in *Phillips* explained, courts must analyze each of these components to determine the “ordinary and customary meaning of a claim term” as understood by a person of ordinary skill

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in art at the time of the invention. 415 F.3d at 1313. “Such intrinsic evidence is the most significant source of the legally operative meaning of disputed claim language.” *Bell Atl. Network Servs., Inc. v. Covad Commc'ns Grp., Inc.*, 262 F.3d 1258, 1267 (Fed. Cir. 2001).

“It is a ‘bedrock principle’ of patent law that ‘the claims of a patent define the invention to which the patentee is entitled the right to exclude.’” *Phillips*, 415 F.3d at 1312 (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004)). “Quite apart from the written description and the prosecution history, the claims themselves provide substantial guidance as to the meaning of particular claims terms.” *Id.* at 1314; *see Interactive Gift Express, Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1331 (Fed. Cir. 2001) (“In construing claims, the analytical focus must begin and remain centered on the language of the claims themselves, for it is that language that the patentee chose to use to ‘particularly point [ ] out and distinctly claim [ ] the subject matter which the patentee regards as his invention.’”). The context in which a term is used in an asserted claim can be “highly instructive.” *Phillips*, 415 F.3d at 1314. Additionally, other claims in the same patent, asserted or unasserted, may also provide guidance as to the meaning of a claim term. *Id.* “Courts do not rewrite claims; instead, we give effect to the terms chosen by the patentee.” *K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1364 (Fed. Cir. 1999). “[T]he specification ‘is always highly relevant to the claim construction analysis. Usually it is dispositive; it is the single best guide to the meaning of a disputed term.’” *Phillips*, 415 F.3d at 1315 (quoting *Vitronics Corp. v. Conceptoronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)). “[T]he specification may reveal a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess. In such cases, the inventor’s lexicography governs.” *Id.* at 1316.

[REDACTED]

In addition to the claims and the specification, the prosecution history should be examined, if in evidence. *Phillips*, 415 F.3d at 1317; see *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 913 (Fed. Cir. 2004). The prosecution history can “often inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be.” *Phillips*, 415 F.3d at 1317; see *Chimie v. PPG Indus. Inc.*, 402 F.3d 1371, 1384 (Fed. Cir. 2005) (“The purpose of consulting the prosecution history in construing a claim is to exclude any interpretation that was disclaimed during prosecution.”).

When the intrinsic evidence does not establish the meaning of a claim, then extrinsic evidence (*i.e.*, all evidence external to the patent and the prosecution history, including dictionaries, inventor testimony, expert testimony, and learned treatises) may be considered. *Phillips*, 415 F.3d at 1317. Extrinsic evidence is generally viewed as less reliable than the patent itself and its prosecution history in determining how to define claim terms. *Id.* “The court may receive extrinsic evidence to educate itself about the invention and the relevant technology, but the court may not use extrinsic evidence to arrive at a claim construction that is clearly at odds with the construction mandated by the intrinsic evidence.” *Elkay Mfg. Co. v. Ebco Mfg. Co.*, 192 F.3d 973, 977 (Fed. Cir. 1999).

The construction of a claim term is generally guided by its ordinary meaning. However, courts may deviate from the ordinary meaning when: (1) “the intrinsic evidence shows that the patentee distinguished that term from prior art on the basis of a particular embodiment, expressly disclaimed subject matter, or described a particular embodiment as important to the invention;” or (2) “the patentee acted as his own lexicographer and clearly set forth a definition of the disputed claim term in either the specification or prosecution history.” *Edwards Lifesciences LLC v. Cook*

[REDACTED]

*Inc.*, 582 F.3d 1322, 1329 (Fed. Cir. 2009); *see GE Lighting Sols., LLC v. AgiLight, Inc.*, 750 F.3d 1304, 1309 (Fed. Cir. 2014) (“the specification and prosecution history only compel departure from the plain meaning in two instances: lexicography and disavowal.”); *Omega Eng’g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1324 (Fed. Cir. 2003) (“[W]here the patentee has unequivocally disavowed a certain meaning to obtain his patent, the doctrine of prosecution disclaimer attaches and narrows the ordinary meaning of the claim congruent with the scope of the surrender.”); *Rheox, Inc. v. Entact, Inc.*, 276 F.3d 1319, 1325 (Fed. Cir. 2002) (“The prosecution history limits the interpretation of claim terms so as to exclude any interpretation that was disclaimed during prosecution.”). Nevertheless, there is a “heavy presumption that a claim term carries its ordinary and customary meaning.” *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002) (citations omitted). The standard for deviating from the plain and ordinary meaning is “exacting” and requires “a clear and unmistakable disclaimer.” *Thorner v. Sony Computer Entm’t Am. LLC*, 669 F.3d 1362, 1366-67 (Fed. Cir. 2012); *see Epistar Corp. v. Int’l Trade Comm’n*, 566 F.3d 1321, 1334 (Fed. Cir. 2009) (requiring “expressions of manifest exclusion or restriction, representing a clear disavowal of claim scope” to deviate from the ordinary meaning) (citation omitted).

### **C. Infringement**

“An infringement analysis entails two steps. The first step is determining the meaning and scope of the patent claims asserted to be infringed. The second step is comparing the properly construed claims to the device accused of infringing.” *Markman*, 52 F.3d at 976.

A patentee may prove infringement either literally or under the doctrine of equivalents. Infringement of either sort must be proven by a preponderance of the evidence. *SmithKline Diagnostics, Inc. v. Helena Labs. Corp.*, 859 F.2d 878, 889 (Fed. Cir. 1988). A preponderance of

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the evidence standard “requires proving that infringement was more likely than not to have occurred.” *Warner-Lambert Co. v. Teva Pharm. USA, Inc.*, 418 F.3d 1326, 1341 n.15 (Fed. Cir. 2005).

Literal infringement, a form of direct infringement, is a question of fact. *Finisar Corp. v. DirecTV Group, Inc.*, 523 F.3d 1323, 1332 (Fed. Cir. 2008). “To establish literal infringement, every limitation set forth in a claim must be found in an accused product, exactly.” *Microsoft Corp. v. GeoTag, Inc.*, 817 F.3d 1305, 1313 (Fed. Cir. 2016) (quoting *Southwall Techs., Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1575 (Fed. Cir. 1995)). If any claim limitation is absent, there is no literal infringement of that claim as a matter of law. *Bayer AG v. Elan Pharm. Research Corp.*, 212 F.3d 1241, 1247 (Fed. Cir. 2000).

#### **D. Domestic Industry**

In an investigation based on a claim of patent infringement, Section 337 requires that an industry in the United States, relating to the articles protected by the patent, exist or be in the process of being established. 19 U.S.C. § 1337(a)(2). Under Commission precedent, the domestic industry requirement has been divided into (i) a “technical prong” (which requires articles covered by the asserted patent) and (ii) an “economic prong” (which requires certain levels of activity with respect to the protected articles or patent itself). See *Certain Video Game Systems and Controllers*, Inv. No. 337-TA-743, Comm’n Op. at 6-7 (April 14, 2011) (“*Video Game Systems*”).

##### **1. Technical Prong**

The technical prong of the domestic industry requirement is satisfied when the complainant in a patent-based section 337 investigation establishes that it is practicing or exploiting the patents at issue. See 19 U.S.C. §§ 1337 (a)(2), (3); *Certain Microsphere Adhesives, Process for Making Same and Prods. Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm’n Op. at 8 (U.S.I.T.C. Jan. 16, 1996). “In order to satisfy the technical prong of the

[REDACTED]

domestic industry requirement, it is sufficient to show that the domestic industry practices any claim of that patent, not necessarily an asserted claim of that patent.” *Certain Ammonium Octamolybdate Isomers*, Inv. No. 337-TA-477, Comm’n Op. at 55 (U.S.I.T.C. Aug. 28, 2003). Historically, the Commission permits the complainant’s products, and those of its licensees, to be considered for technical prong purposes. *See Certain Magnetic Tape Cartridges and Components Thereof*, Inv. No. 337-TA-1058, Comm’n Op. at 28-29 (April 9, 2019).

The test for claim coverage for the purposes of the technical prong of the domestic industry requirement is the same as that for infringement. *See Certain Doxorubicin and Preparations Containing Same*, Inv. No. 337-TA-300, Initial Determination at 109 (U.S.I.T.C. May 21, 1990), *aff’d*, Views of the Commission at 22 (U.S.I.T.C. Oct. 31, 1990); *Alloc, Inc. v. Int’l Trade Comm’n*, 342 F.3d 1361, 1375 (Fed. Cir. 2003). “First, the claims of the patent are construed. Second, the complainant’s article or process is examined to determine whether it falls within the scope of the claims.” *Certain Doxorubicin and Preparations Containing Same*, Inv. No. 337-TA-300, Initial Determination at 109. As with infringement, the technical prong of the domestic industry can be satisfied either literally or under the doctrine of equivalents. *Certain Dynamic Sequential Gradient Devices and Component Parts Thereof*, Inv. No. 337-TA-335, ID at 44, Pub. No. 2575 (U.S.I.T.C. May 15, 1992). In short, the patentee must establish by a preponderance of the evidence that the domestic product practices one or more claims of the patent.

## **2. Economic Prong**

The “economic prong” of the domestic industry requirement is satisfied when there exists in the United States, in connection with products practicing at least one claim of the patent at issue: (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, and licensing. 19 U.S.C. § 1337(a)(3). Establishment of the “economic prong” is not dependent

[REDACTED]

on any “minimum monetary expenditure” and there is no need for complainant “to define the industry itself in absolute mathematical terms.” *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm’n Op. at 25-26 (May 16, 2008) (“*Stringed Instruments*”). However, a complainant must substantiate the significance of its activities with respect to the articles protected by the patent. *Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Comm’n Op. at 30 (Feb. 17, 2011) (“*Imaging Devices*”). Further, a complainant can show that its activities are significant by showing how those activities are important to the articles protected by the patent in the context of the company’s operations, the marketplace, or the industry in question. *Id.* at 27-28. That significance, however, must be shown in a quantitative context. *Lelo Inc. v. Int’l Trade Comm’n*, 786 F.3d 879, 886 (Fed. Cir. 2015). The Federal Circuit noted that when the ITC first addressed this requirement, it found the word “‘significant’ denoted ‘an assessment of the *relative* importance of the domestic activities.’” *Id.* at 883-4 (internal citation omitted) (emphasis added). In general, “[t]he purpose of the domestic industry requirement is to prevent the ITC from becoming a forum for resolving disputes brought by foreign complainants whose only connection with the United States is ownership of a U.S. patent.” *Certain Battery-Powered Ride-On Toy Vehicles*, Inv. No. 337-TA-314, USITC Pub. No. 2420, Initial Determination at 21 (Aug. 1991).

### III. IMPORTATION AND JURISDICTION

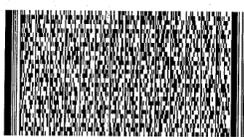
In its motion, Final asserts “the Defaulting Respondents sell for importation into the United States, import into the United States, and/or sell within the United States after importation, certain foldable, reusable drinking straws and components thereof.” Mot. Mem. at 8. Final refers to the exhibits attached to its complaint as evidencing specific instances of this importation for each respondent. *See id.* (citing Complaint at ¶¶ 12-29, 52-59; Complaint, Exs. 11-28, 30-46). Final also provides an opinion from its expert, Mr. Kemnitzer, that such importation has taken place.

[REDACTED]

*See id.* at 8-9 (citing Mot., Ex. 2 at ¶¶ 98-99, 101-102, 104-105, 107-108, 110-111, 113-114, 116-117, 118-119, 121-122, 124-126, 128-129, 131-132, 134-135, 137-138, 140-141). The Staff concurs, finding the importation requirement satisfied. Staff Resp. at 32-33.

Final has shown importation of the Accused Products by each of the Defaulted Respondents. “It has long been recognized that an importation of even one accused product can satisfy the importation requirement of section 337.” *Certain Arrowheads with Deploying Blades and Components Thereof and Packaging Therefor*, Inv. No. 337-TA-977, Initial Determination at 15 (Aug. 22, 2016) (non-reviewed in relevant part). The importation requirement may be satisfied even when the purchaser of the imported product is the Complainant or its agent. *See Certain Food Processing Equipment and Packaging Materials Thereof*, Inv. No. 337-TA-1161, Initial Determination at 24 (Feb. 18, 2020) (non-reviewed).

The exhibits to the Complaint, cited by Final and relied on by Mr. Kemnitzer—in particular, the declaration from Final counsel Kelley Gordon (Complaint, Ex. 28)—show a reusable folded straw product purchased from each of the Defaulted Respondents and delivered to an address within the United States from an origin outside the United States as summarized in the table below:

Respondent	Evidence of Importation	
Huizhou Sinri	Complaint, Ex. 11; Complaint, Ex. 28 at ¶¶ 3-5	<p>From: 1588521188      Origin ID: HUZA      Ship Date: 25JUL19  Linhai Huang      HUIZHOU OUYUN COMMERCE CO LTD      ActWgt: 0.50 KG  HUZHOU OUYUN COMMERCE CO LTD      CAD: 11166655PDFS1403  Hongqi Opposite the market Hongqi  Village Zhongkai            REF:      Blue Reusable Collapsible Straw.  Huizhou, gu 516006      CHINA      DESC-1:      DESC-2:      DESC-3:      DESC-4:</p> <p>SHIP TO: 14746300      BILL SENDER  Kelley Gordon  Kelley Gordon  233 S Wacker Dr, Ste. 6300, Chicago  Illinois, United States of America</p> <p>CHICAGO, IL 60606  US</p> <p>COUNTRY MFG: CN  CARRIAGE VALUE: 0.00 USD  CUSTOMS VALUE: 1.80 USD  T/C: S 802226649      D/T: R  SIGN: Linhai Huang  ENVAT:  PKG.PAK</p> <p>10:30A  INTL PRIORITY</p> <p>TRK# 7886 7668 3067        NA CHIA      60606  IL-US  ORD</p> <p></p> <p><small>* If commodities, technology or software are being imported from the United States, this may be accompanied with the Export Administration Regulations. Overview of these items contrary to U.S. laws and other applicable export laws is prohibited.  ** Wisconsin Commodities may apply and will govern and in most cases limit the liability of Federal agencies for loss or delay of or damage to your shipment. Subject to the conditions of these contracts.  ONSIGNEE COPY- PLEASE PLACE IN FRONT OF POUCH</small></p>
Hebei Serun	Complaint, Ex. 12; Complaint, Ex. 28 at ¶¶ 6-8	<p>ORIGIN ID: SJWA 86 18638838975      Ship Date: 27JUL19  MRSWANG      ActWgt: 0.50 KG MAN  SHIJIAZHUANGVITUREN CO LTD      CAD: 1447208/GSMW1161  SHIJIAZHUANG      BILL SENDER  SHIJIAZHUANG      EIN/VAT:  SHIJIAZHUANG, 050091      CHINA, CN      (312) 474-6649</p> <p>TO KELLEY GORDON</p> <p>233 S. WACKER DR., STE6300, CHICAGO        ILLINOIS 60606 USA      Express  CHICAGO, IL 60606      (US)        ANB</p> <p>XH CHIA  PKG TYPE: PAK</p> <p>      TRK# 1081 5515 2610      Form 0430</p> <p>10:30A  INTL PRIORITY</p> <p>REF:  DESC1: PLASTIC STARW  DESC2:  DESC3:  DESC4:</p> <p>..</p> <p>COUNTRY MFG: CN      SIGN: MRSWANG  CARRIAGE VALUE: 0.00 USD      T/C: S 658233505  CUSTOMS VALUE: 2.00 USD      D/T: R</p>

<p>Dongguan Stirling</p>	<p>Complaint, Ex. 13; Complaint, Ex. 28 at 9-11</p>	<p>ORIGIN ID:DXBA 0525887165 GUANGZHOU MAIYING TRADING C/O USKY GENERAL TRADING C/O DTDC DAFZADUBAIAE</p> <p>SHIP DATE: 26JUL19 ACTWGT: 0.10 KG CAD: 114357032WWSX13300</p> <p>DUBAI, DU UNITED ARAB EMIRATES AE</p> <p>BILL SENDER</p> <p>TO <b>KELLEY GORDON</b> <b>KELLEY GORDON</b> <b>233 S WACKER DR,STE. 6300</b></p> <p><b>CHICAGO IL 60606</b> (US)</p> <p>4746300 REF: 566000580949 INV: DEPT: PC:</p>  <p>TRK# 7887 0219 3640 INTL PRIORITY 0430 ETD <b>XH CHIA</b> 60606 IL-US ORD</p>
<p>Ningbo Plastic</p>	<p>Complaint, Ex. 14; Complaint, Ex. 28 at 12-14</p>	<p>EXPRESS WORLDWIDE <b>WPX</b> <b>DHL</b></p> <p>2019-07-29 XMLPI 6.2 / *90-1604*</p> <p>From : SHY/Guangzhou Zhuo Yue Trading Co. Ltd. Origin: <b>SHA</b> SHY No 2 Building A 289 Huaxu Highway Qingpu District 201702 Qingpu Shanghai China Contact: 021-54382955</p> <p>To: Kelley Gordon Contact: 0000000000 Kelley Gordon 233 S Wacker Dr, Ste. 6300 Chicago, Illinois, United states of America.60606. <b>60606 CHICAGO Illinois</b> United States</p> <p><b>US-ORD-CHI</b></p> <p>C Day Time</p> <p>Ref: P808MFR7NX3XZ7108 Pce/Shpt Weight Piece <b>0.5 kg 1/1</b></p> <p>Contents: Collapsible str aws kits</p>

<p>Shenzhen Yuanzhen</p>	<p>Complaint, Ex. 15; Complaint, Ex. 28 at 15-17</p>	<p>EXPRESS WORLDWIDE <b>WPX</b> <b>PH</b> 2019-07-28 XJLPLI 6.2 / *0-1604*</p> <p>From: YI DAO HAI NA MAYA MI NIUMENDI INDUSTRIAL ZONE XIAMEILIN LONGWEI ROAD, FUTIAN DISTRICT SHENZHEN 1-114 518049 SHENZHEN CHINA PEOPLES REPUBLIC</p> <p>Contact: 0755-83956820</p> <p>To: Kelley Gordon Kelley Gordon 233 S. Wacker Dr., Ste. 6300, Chicago, Illinois is 60606 <b>60606 CHICAGO Illinois</b> <b>United States Of America</b></p> <p><b>CVGU US-ORD-CHI</b></p> <p><b>C</b> Day Time</p> <p>Ref: A-021010610224578      Pcs/Shpt Weight      Pcs <b>0.5 kg 1/1</b></p> <p>Contents: straw set 20 = 200</p>
<p>Jiangmen Houseware</p>	<p>Complaint, Ex. 16; Complaint, Ex. 28 at 18-20</p>	<p>To: KELLEY GORDON KELLEY GORDON 233 S WACKER DR STE 6300 CHICAGO ILLINOIS <b>60606 CHICAGO Illinois</b> <b>United States Of America</b></p> <p>Contact: 14745300</p> <p><b>CVGU US-ORD-CHI</b></p> <p><b>C</b> Day Time</p> <p>Ref: Y7281621830      Pcs/Shpt Weight      Pcs <b>0.5 kg 1/1</b></p> <p>不锈钢吸管:</p> <p>Contents: REUSABLE STAINLESS STEEL COLLAPSIBLE STRAW</p> <p>WAYBILL 54 1262 3834</p>

<p>Shanghai Rbin</p>	<p>Complaint, Ex. 17; Complaint, Ex. 28 at 21-23</p>	<p><b>EXPRESS WORLDWIDE WPX</b> </p> <p>ES 5.03.19.00/PRN006</p> <p><b>FROM:</b> SHANGHAI QIANGYAN TRADING CO LTD HUOYAN ZUO CHINA 31 C/O NICE EXPRESS CMC OFFICE DUBAI AIRPORT FREEZONE UNITED ARAB EMIRATES</p> <p><b>Origin:</b> DXB</p> <p><b>TO:</b> KELLEY GORDON KELLEY GORDON 233 S WACKER DR STE 6300 ILLINOIS 60606 CHICAGO, ILLINOIS UNITED STATES OF AMERICA</p> <p><b>Contact:</b> Ph:3124746649</p> <p><b>US-ORD-CHI</b></p> <p>Shipment Ref: JULY 31 EK2 Shipment Weight: 0.50kg Date: 2019-07-31 Pieces: 1/1 Content: DRINKING STRAW SAMPLE</p>
<p>Jiangmen Hardware</p>	<p>Complaint, Ex. 18; Complaint, Ex. 28 at 24-26</p>	<p><b>EXPRESS WORLDWIDE WPX</b> </p> <p>2019-09-21 ESHIP 1.0 / "Certified"</p> <p><b>From:</b> THE SUNRAIN NO.68 XINYUAN 2 ROAD SONGBAILANG COUNTRY DONGGUAN 523792 DONGGUAN China, People's Republic</p> <p><b>Origin:</b> DGM Contact: 07692307833 THE SUNRAIN</p> <p><b>To:</b> KELLEY GORDON 233 S WACKER DR STE 6300 CHICAGO IL USA</p> <p><b>Contact:</b> KELLEY GORDON 3124746649</p> <p><b>CHICAGO 60606</b> <b>United States Of America</b></p> <p><b>CVGU US-ORD-CHI</b></p> <p><b>C</b></p> <p>Ref:HOL- Pce/Shpt Weight: 0.40 kg Piece: 1/1</p> <p>吸管 无牌 6120705635</p> <p>Content: COLLAPSIBLE STRAW</p>

Funan Trading

Complaint, Ex. 19;  
Complaint, Ex. 28 at  
27-29

FROM		Invoice					
Tax ID/EIN/VAT No.: Contact Name: MS Feng JIAXING YINGHE TRADING CO LTD RM 1307 JINFENGHUANG MANSION NO JINGYA ROAD JIAXING 314500  China, People's Republic of Phone: 13967381507		Waybill number: 1Z5315WW0406121359 Shipment ID: 5315WW4FVLQ  Date: invoice NO.: Purchase No.: ALS00200657960 Terms of Sale(IncoTerm): Reason for Export: Sample					
SHIP TO		SOLD TO INFORMATION					
Tax ID/EIN/VAT No.: Contact Name: Kelley Gordon Kelley Gordon 233 South Wacker Drive, Ste 6300 VAT: 312.474.6649 Chicago 60606  United States of America Phone: 4746300233		Tax ID/VAT NO.: Contact Name: Same as Ship to  Phone:					
Units	U/M	Description of Goods/Part No.	Harm. Code	C/O	Unit Value	Total Value	Material/Use for
5	pcs	Stainless Steel Drinking Straws	7323930000	CN	4.15	20.75 USD	stainless steel sample

Hangzhou Trade

Complaint, Ex. 20;  
Complaint, Ex. 28 at  
30-32

EXPRESS WORLDWIDE **WPX** **24**

2019-08-05 XMLPI 6.2 / "99-1604"

From: hangzhou keheng trade co, ltd  
 Maggie Lim  
 Room C533, Block C, Digital Information Indus  
 -trial Park Phase II, No. 8 Xiyuan 9th Road,  
 West Lake District, Hangzhou, Zhejiang  
 310030 HANGZHOU  
 CHINA, PEOPLES REPUBLIC

To: Kelley Gordon  
 Kelley Gordon  
 233 S Wacker Dr., Ste. 6300 Chicago Illinois  
 United States of America, 60606  
 60606 CHICAGO Illinois  
 United States Of America

Contact: 0571-86  
 Contact:  
 3124746649

**US-ORD-CHI**

Ref: \_\_\_\_\_ Day \_\_\_\_\_ Time \_\_\_\_\_

Pce/Shpt Weight Piece  
 0.5 kg 1/1

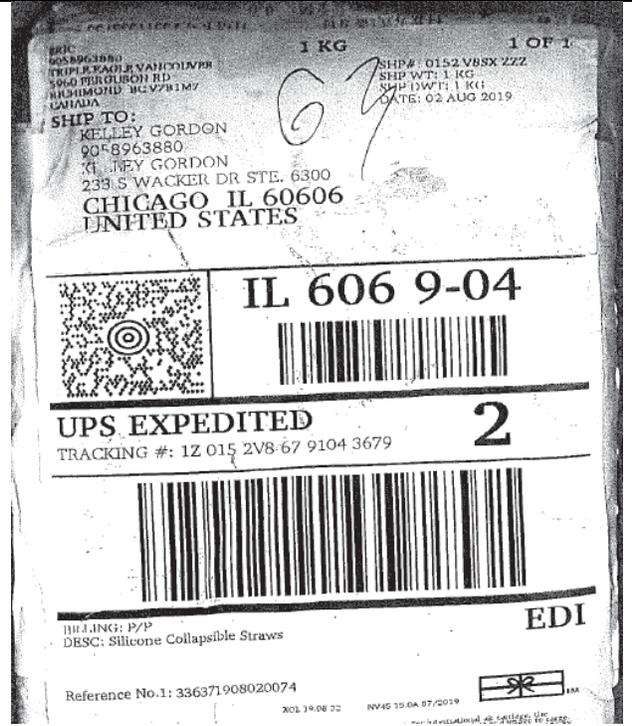
Contents: Stainless  
 straw 1pcs

WAYBILL 32 0212



Yaya Gifts

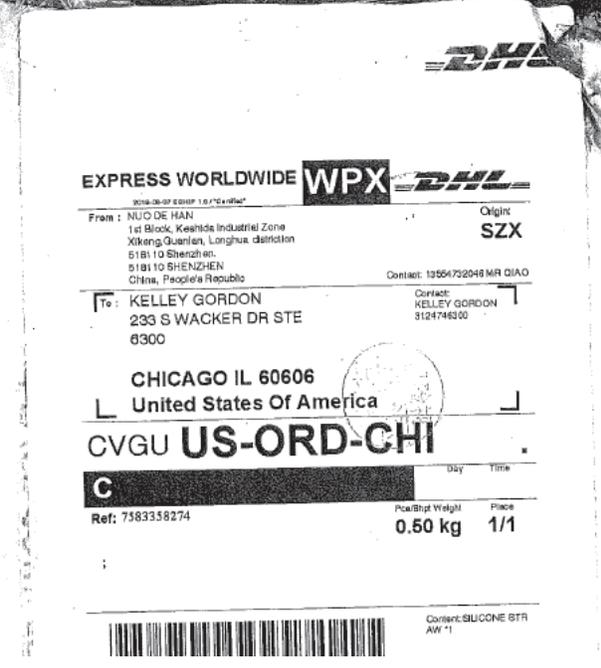
Complaint, Ex. 22;  
Complaint, Ex. 28 at ¶¶ 36-38



Ningbo Beland

Complaint, Ex. 24;  
Complaint, Ex. 28 at ¶¶ 43-45



<p>Xiamen One Piece</p>	<p>Complaint, Ex. 25; Complaint, Ex. 28 at 46-49</p>	 <p><b>EXPRESS WORLDWIDE WPX</b> <b>DHL</b></p> <p>2019-08-09 XMLPI 8.2 / "90-1604"</p> <p>From: XIAMEN EHTECH ELECTRIC CO LTD RICKY CHAN-66622 C/O HKDATA IF RTO PLS RIN TO HKG FOR SHPR INST. HONG KONG HONG KONG</p> <p>Origin: <b>HKG</b></p> <p>To: KELLEY GORDON KELLEY GORDON 233 S WACKER DR STE 6300 CHICAGO ILLINOIS <b>60606 CHICAGO Illinois</b> <b>UNITED STATES OF AMERICA</b></p> <p><b>US-ORD-CHI</b></p> <p>Ref: 5361730043</p> <p>Pcs/Sht Weight Piece 0.5/1.0 kg 1 / 1</p> <p>Contents: STRAW</p>
<p>Hunan Champion</p>	<p>Complaint, Ex. 26; Complaint, Ex. 28 at 50-52</p>	 <p><b>EXPRESS WORLDWIDE WPX</b> <b>DHL</b></p> <p>2019-08-07 8080P 1.0 / "90-1604"</p> <p>From: NUO DE HAN 1st Block, Keande Industrial Zone Xikang-Quanlan, Longhua district 518110 SHENZHEN China, People's Republic</p> <p>Origin: <b>SHZ</b></p> <p>Contact: 1355472048 MR QIAO</p> <p>To: KELLEY GORDON 233 S WACKER DR STE 6300</p> <p>Contact: KELLEY GORDON 3124746300</p> <p><b>CHICAGO IL 60606</b> <b>United States Of America</b></p> <p><b>CVGU US-ORD-CHI</b></p> <p>Ref: 7583358274</p> <p>Pcs/Sht Weight Piece 0.50 kg 1/1</p> <p>Contents: SILICONE STR AW *1</p>



<p>Yiwu Trading</p>	<p>Complaint, Ex. 27; Complaint, Ex. 28 at ¶¶ 53-55</p>	<p>MR. WANG 0573-83700343 JIAXING HZ E-COMMERCE CO., LTD 8C-1 YUANYANG BLDG 314801 JIAXING ZJ CHINA, PEOPLE'S REPUBLIC OF</p> <p>1 KG</p> <p>SHIP TO: KELLEY 3124746649 KELLEY 6300, CHICAGO, ILLINEIS 60606, USA 233 S. WACKER DR., STE. CHICAGO IL 60606 UNITED STATES</p> <p>SHIP# : A200 98VK YQP SHIP WT: 0.5 KG SHIP DWT: 0.5 KG DATE: 12 AUG 2019</p> <p>1 OF</p> <p>6300</p> <p>II 606 9-04</p> <p>UPS SAVER 1P</p> <p>TRACKING #: 1Z A20 098 04 9824 0828</p> <p>ED</p> <p>BILLING: P/P DESC: reusable straw</p> <p>Dept No.: 5121266452</p> <p>2002.10.08.12 NY48 15.0A 07/2019</p>
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Mot. Mem. at 9-14; Complaint, Exs. 11-20, 22, 24-27; *see* Complaint, Ex. 28. Accordingly, the importation requirement under 19 U.S.C. § 1337(a)(1)(B) is satisfied, and the Commission has *in rem* jurisdiction over the Accused Products.

**IV. U.S. PATENT NO. 10,123,641**

**A. Level of Ordinary Skill in the Art**

For the purpose of ascertaining the plain and ordinary meaning of the terms of the asserted claims, Final provides the opinion of its expert, Mr. Kemnitzer, who explains a person having ordinary skill in the art at the time of the 641 patent invention “would be a person having a Bachelor’s degree in industrial design and would have a year or more of work experience in designing and assembling small, injection-molded components, or, in the alternative, a person having at least three (3) or more years of work experience in designing and assembling small,

[REDACTED]

injection-molded components.” Mot. Ex. 2 at ¶ 71. The Staff has no objection to the definition. Staff Resp. at 41. Without controversy, it is applied throughout this order.

**B. Claims-at-Issue**

Claims 1-12, 14-17, and 20 of the 641 patent are at issue in this investigation, either through allegations of infringement or of the domestic industry technical prong. *See* 84 Fed. Reg. 61639 (Nov. 13, 2019); Mot. Mem. at 1, 219. Final’s motion for summary determination, however, does not address claim 20, and seeks a determination of violation only on claims 1-12 and 14-17. *See* Mot. at 2. Thus, only this subset of asserted claims are reproduced below, as relevant to the present motion:

1. A reusable drinking straw foldable for storage, the drinking straw comprising:

a rigid external tube formed of a plurality of tubular segments, said external tube having a proximal end, an opposite distal end, a hollow interior and a central longitudinal axis passing through said ends, said hollow interior being accessible through said ends and having an interior diameter, each of said tubular segments configured to be coupled to at least another one of said tubular segments when positioned adjacent to one another along the central longitudinal axis to form said external tube; and

a flexible internal tubing having a proximal end, an opposite distal end, and a passageway through said ends of said internal tubing, said internal tubing being formed of an elastic material for conducting liquid through said passageway and being impermeable to liquids, said internal tubing having an outer diameter and an inner diameter, said outer diameter being less than said inner diameter of said external tube, said internal tubing being positioned within said external tube with said proximal and distal ends of said internal tubing proximate to said proximal and distal ends, respectively, of said external tube to conduct liquid therethrough,

wherein said drinking straw is in an extended configuration when at least two of said tubular segments are coupled together to form said rigid external tube with said flexible internal tubing therethrough, said flexible internal tubing being under tension within said external tube to maintain said tubular segments coupled together,

wherein said drinking straw is in a folded configuration when at least two of said tubular segments are uncoupled and moved apart along said flexible

internal tubing by stretching said internal tubing and folding said internal tubing between said at least two tubular segments.

2. The drinking straw of claim 1, wherein in the extended configuration the tubular segments are positioned coaxial to one another along the central longitudinal axis, and in the folded configuration the tubular segments are positioned generally parallel to one another.

3. The drinking straw of claim 1, wherein at least one of said tubular segments includes a male end and a female end.

4. The drinking straw of claim 1, wherein at least one of said tubular segments has an inner diameter that is the same at both of its ends.

5. The drinking straw of claim 1, wherein at least one of said tubular segments has an inner diameter that is different at each of its ends.

6. The drinking straw of claim 1, wherein at least one of said tubular segments has an outer diameter that is the same at both of its ends.

7. The drinking straw of claim 1, wherein at least one of said tubular segments has an outer diameter that is different at each of its ends.

8. The drinking straw of claim 1, wherein at least one of said tubular segments has an inner diameter that is in the range of 2 mm to 30 mm.

9. The drinking straw of claim 1, wherein at least one of said tubular segments has an outer diameter that is in the range of 3 mm to 35 mm.

10. The drinking straw of claim 1, wherein at least one of said tubular segments has length that is in the range of 2.5 cm to 16.5 cm.

11. The drinking straw of claim 1, wherein each of said tubular segments having one of a circular cross section, an oval cross section, and a rectangular cross section.

12. The drinking straw of claim 1, wherein each of said tubular segments are formed of materials including at least one of metal, stainless steel, titanium, wood, carbon fiber, composite materials, non-recycled plastics, plant-based plastics, recyclable, materials, and renewable materials.

....

14. The drinking straw of claim 1, wherein said internal tubing is formed of materials including at least one of plastics, non-recycled plastics, thermoplastic elastomers (TPE), thermoplastic polyurethane (TPU), silicones, natural rubbers including latex, plant-based plastics, recyclable material, and renewable material.

15. A system for drinking liquids, comprising:

a reusable drinking straw foldable for storage, the drinking straw comprising:

a rigid external tube formed of a plurality of tubular segments, said external tube having a proximal end, an opposite distal end, a hollow interior and a central longitudinal axis passing through said ends, said hollow interior being accessible through said ends and having an interior diameter, each of said tubular segments configured to be coupled to at least another one of said tubular segments when positioned adjacent to one another along the central longitudinal axis to form said external tube; and

a flexible internal tubing having a proximal end, an opposite distal end, and a passageway through said ends of said internal tubing, said internal tubing being formed of an elastic material for conducting liquid through said passageway and being impermeable to liquids, said internal tubing having an outer diameter and an inner diameter, said outer diameter being less than said inner diameter of said external tube, said internal tubing being positioned within said external tube with said proximal and distal ends of said internal tubing proximate to said proximal and distal ends, respectively, of said external tube to conduct liquid therethrough,

a cleaning element configured to clean the passageway of said flexible tubing; and

a storage case configured to contain said drinking straw and storing said cleaning element,

wherein said drinking straw is in an extended configuration when at least two of said tubular segments are coupled together to form said rigid external tube with said flexible internal tubing therethrough, said flexible internal tubing being under tension within said external tube to maintain said tubular segments coupled together,

wherein said drinking straw is in a folded configuration when at least two of said tubular segments are uncoupled and moved apart along said flexible internal tubing by stretching said internal tubing and folding said internal tubing between said at least two tubular segments,

wherein said storage case contains said drinking straw in said folded configuration,

wherein said storage case stores said cleaning element.

16. The system of claim 15, wherein said cleaning element includes a squeegee sized and configured to pass through said passageway of said internal tubing.

17. The system of claim 15, wherein said storage case includes a first area for storing said drinking straw and second area for storing said cleaning element.

641 patent at cls. 1-12, 14-17.

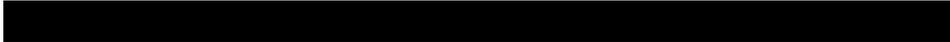
**C. Validity**

Issued patents are presumed valid as a matter of law. 35 U.S.C. § 282. No party to this investigation has challenged the validity of the 641 patent. *See* Mot. Mem. at 14; Staff Resp. at 31. It is therefore determined that there is no issue of material fact as to the validity or enforceability of the 641 patent. *Lannom Mfg. Co. v. Int'l Trade Comm'n*, 799 F.2d 1572, 1580 (Fed. Cir. 1986).

**D. Infringement**

According to Final's motion, the use, manufacture, or sale of each Accused Product infringes claims 1-12 and 14-17 of the 641 patent. Mot. Mem. at 15. Of these claims, claims 1 and 15 are independent, and claims 2-14 and 16-17 are dependent. *See* 641 patent at cls. 1-12, 14-17. Independent claim 1, and those depending therefrom, are apparatus claims directed to the drinking straw itself. *See id.* at cl. 1. Independent claim 15, and those depending therefrom, are system claims including the drinking straw, a cleaning element, and storage case. *See id.* at cl. 15. There is no dispute from the Staff as to Final's allegations of infringement. *See* Staff Resp. at 42.

The record supports finding infringement of claims 1-12 and 14-17 for each Accused Product. Final has provided a convincing mapping between each element of the claims and Accused Product features, using photographs similar to those reproduced above. *See* Mot. Mem. at 15-207. Additionally, Final has provided an undisputed opinion from its expert, Mr. Kemnitzer, analyzing similar imagery and the physical products themselves, which arrives at the same conclusion. *See* Mot., Ex. 2 at ¶¶ 12-27.



In summary, the drinking straws of the Accused Products are nearly identical to one another. Each includes four outer cylindrical segments, with one of those segments having two female-style openings, and the other three having one male and one female opening on either end. This arrangement satisfies many of the limitations of claims 1 and 15, and the entirety of claims 2-7. The manner in which these segments are allowed to nest within each other when in an extended configuration, and fold up against one another via an inner tube connecting member in a collapsed configuration, is also identical. For all products, the inner tube member holds the segments together in the extended position through compression (*i.e.*, the inner tube is in tension). These features satisfy the remaining limitations of claim 1 and additional limitations of claim 15. Many of the photographs, including but not limited to those reproduced above, include a ruler, clearly showing infringement of claims 8-10, which require certain quantifiable dimensions. The evidence is equally clear that the segments are made of metal and have a circular cross section—thereby satisfying claims 11 and 12. Apart from the straws themselves, the storage cases of all Accused Products are dimensioned so as to contain a folded straw along with a cleaning element in separate compartments—thereby satisfying the remaining limitations of claim 15, and claims 16 and 17. Given the mechanical nature of the 641 patent claims and Accused Products, the provided photographs and opinion evidence are more than sufficient for demonstrating infringement.

Therefore, Final has established by substantial, reliable, and probative evidence that the Accused Products from the Defaulted Respondents infringe claims 1-12 and 14-17 of the 641 patent. No determination is made as to whether claim 20 is infringed.

**[REDACTED]**

**E. Domestic Industry – Technical Prong**

According to Final’s motion, claims 1-12 and 14-17 of the 641 patent are practiced by the use, manufacture, or sale of the Domestic Industry Products. Mot. Mem. at 219. There is no dispute from the Staff on this issue. See Staff Resp. at 64-70.

The record supports finding practice of claims 1-12 and 14-17 of the 641 patent by the Domestic Industry Products. Final has mapped each element of the claims to features of the Domestic Industry Products, using photographs similar to those reproduced above. See Mot. Mem. at 219-231. Additionally, Final provides the undisputed opinion of Mr. Kemnitzer that the products do indeed practice the claims. See Mot., Ex. 2 at ¶¶ 85-93.

In summary, like the Accused Products, the Domestic Industry Products include four outer, rigid segments, made of metal with cylindrical cross-sections. These segments are held together by an internal, single piece, elastic tube segment. One outer segment has two female-style openings, and the remaining three segments have one male and one female opening on opposite ends. This arrangement allows the outer segments to nest within each other when the straw is in an extended position, and fold up against one another via the internal tube segment in a folded position. The elastic segment is responsible for holding the segments together in the extended position through compression (*i.e.*, the elastic segment is in tension). Together, these features satisfy the majority of limitations of claims 1 and 15, and claims 2-7, 11, and 12 in their entirety. In certain photographs, the segments are placed next to rulers, which demonstrate satisfaction of claims 8-10, requiring certain quantifiable dimensions. Apart from the straw itself, both versions of Domestic Industry Product include a storage case, which contains the straw in the folded position in one compartment, and a cleaning squeegee tool in another. This satisfies the remaining limitations of claim 15, and claims 16 and 17. Again, given the mechanical nature of the 641

[REDACTED]

patent claims and the Domestic Industry Products, this collection of photograph and opinion evidence is more than sufficient for demonstrating practice of the claims.

Therefore, Final has established by substantial, reliable, and probative evidence that the Domestic Industry Products practice claims 1-12 and 14-17 of the 641 patent. No determination is made as to whether claim 20 is practiced.

## **V. DOMESTIC INDUSTRY - ECONOMIC PRONG**

In a patent-based complaint, a violation of Section 337 can be found “only if an industry in the United States, relating to the articles protected by the patent ... concerned, exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2). Under Commission precedent, this “domestic industry requirement” of Section 337 includes an economic prong. *Stringed Instruments*, Inv. No. 337-TA-586, Comm’n Op. at 12-14. The complainant bears the burden of establishing that the domestic industry requirement is satisfied. *See Certain Set-Top Boxes and Components Thereof*, Inv. No. 337-TA-454, Initial Determination at 294 (June 21, 2002) (not reviewed in relevant part). Where a complainant seeks a general exclusion order, as in this investigation, the elements of the alleged violation (including the existence of a domestic industry) must be “established by substantial, reliable, and probative evidence.” 19 U.S.C. § 1337(g)(2)(B); 19 C.F.R. § 210.16(c)(2).

The economic prong of the domestic industry requirement is defined in subsection (a)(3) of Section 337 as follows:

(3) For purposes of paragraph (2), 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 concerned --

(A) Significant investment in plant and equipment;

(B) Significant employment of labor or capital; or

[REDACTED]

(C) Substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. § 1337(a)(3). The economic prong of the domestic industry requirement is satisfied by meeting the criteria of any one of the three factors listed above. Importantly, the Commission has clarified that investments in plant and equipment, labor, and capital that may fairly be considered investments in research and development are eligible for consideration under subsections (A) and (B), in addition to subsection (C). *Certain Solid State Storage Drives, Stacked Electronics Components, and Products Containing Same*, Inv. No. 337-TA-1097, Comm’n Op. at 14 (June 29, 2018).

A critical step in the evaluation of domestic industry is to determine if the investment amounts identified above are “significant,” as in subsections (A) and (B), or “substantial” as in subsection (C). The most recent precedential decision by the Court of Appeals for the Federal Circuit addressing this determination is *Lelo*, which restated law applicable to a number of issues surrounding the economic prong of domestic industry. *See* 786 F.3d at 883-85. In particular, the Federal Circuit held that the statutory terms “‘significant’ and ‘substantial’ refer to an increase in quantity, or to a benchmark in numbers” and “[a]n ‘investment in plant and equipment’ therefore is characterized quantitatively, *i.e.*, by the amount of money invested in the plant and equipment.” *Id.* at 883. Continuing, the Federal Circuit held “[a]ll of the foregoing requires a quantitative analysis in order to determine whether there is a ‘significant’ increase or attribution by virtue of the claimant’s asserted commercial activity in the United States.” *Id.* In short, “[q]ualitative factors cannot compensate for quantitative data that indicate insignificant investment and employment.” *Id.* at 885. The Commission has since made clear that some sort of comparative analysis must be made before significant or substantial can be found. *See, e.g., Certain Gas Spring Nailer Products and Components Thereof*, Inv. No. 337-TA-1082, Notice of Comm’n

[REDACTED]

Determination at 3 (Dec. 12, 2019) (“*Gas Spring Nailers*”); *Certain Carburetors and Products Containing Such Carburetors*, Inv. No. 337-TA-1123, Comm’n Op. at 17-19 (Oct. 28, 2019) (“*Carburetors*”).

Final contends the economic prong is met under subsections (A), (B), and (C) through its domestic activities and investments. Final explains it started as a successful campaign via Kickstarter, a crowd-funding website, and went “live” in 2018. Mot. Supp. at 2-3. Since then, Final claims that its sales have grown exponentially and that it sells several designs for its foldable reusable drinking straws. *Id.* at 3. Final describes its domestic investments as being in “engineering, research and development, technical and customer support, and marketing” and totaling “greater than five percent of its domestic industry product sales in the United States.” *Id.* at 4.

For subsection (A), specifically, Final argues “all of [its] design and development activities take place in the United States, as do all of the equipment used to design, develop, test and service its domestic industry products.” Mot. Supp. at 4 (citing Complaint, Ex. 29). Final records this domestic investment of plant and equipment as [REDACTED] *Id.* at 5 (citing Mot., Ex. 10C at ¶¶ 13, 16). Final acknowledges, however, it has also invested [REDACTED] in tooling costs in China to enable the actual production of the Domestic Industry Products. Final contends the [REDACTED] is nevertheless significant because its “domestic investments in fixtures, furniture, contractors, and computer software and equipment represent approximately [REDACTED] of Final’s total global investments in plant and equipment through August 2019” and “[a]ll, or 100%, of Final’s U.S. based investments in fixtures and furniture used by contractors, and in computer software and equipment used for design, engineering, operations and management are attributable to products protected by the ’641 Patent.” *Id.*

[REDACTED]

Final has not met its summary determination burden under subsection (A), for a number of reasons. Most important is that even accepting Final’s investment amounts as alleged, Final has not explained how the [REDACTED] could be considered significant for itself, the marketplace, or any other context. Final reports that [REDACTED] equals [REDACTED] of its worldwide plant and equipment investments, but does not actually explain or even claim that that metric reflects significance. Mot. Supp. at 5. The Staff opines that it is not, and I agree. *See* Staff Resp. at 55-56. Even if [REDACTED] represented all equipment, worldwide, used to produce and support the Domestic Industry Products, there is little reason to find it significant. *See, e.g., Stringed Instruments*, Inv. No. 337-TA-586, Comm’n Op. at 25-26 (finding, for example, a “substantial” or “significant” investment did not exist with investment of \$8500 representing, impliedly, a 100% domestic value-add.”); *Lelo*, 786 F.3d at 885 (“The Commission determined that Standard Innovation’s investment and employment under prongs (A) and (B) were quantitatively ‘modest,’ Comm’n Op. at 34, which we take to mean ‘insignificant.’ . . . We agree with the Commission’s finding that investment and employment under prongs (A) and (B) were modest and insignificant.”); *Certain Thermoplastic-Encapsulated Electric Motors, Components Thereof, and Products and Vehicles Containing Same II*, Inv. No. 337-TA-1073, Comm’n Op. at 14 (Aug. 12, 2019) (“IV’s investments are too modest to meet the domestic industry requirement of section 337(a)(3)”). The amount is roughly equal to the purchase of a handful of laptop computers for Final’s twenty-two domestic employee/contractors to share, with no other expenses. Final’s only other statement on significance—that all of Final’s plant and equipment investments “are attributable to products protected by the ’641 Patent”—is no more persuasive. In Final’s provided balance sheets, these “Fixed Assets” of plant and equipment are dwarfed by the other listed funds and assets. *See* Mot., Ex. 10C at Exhibit D.

[REDACTED]

Additionally, there is a genuine issue whether the [REDACTED] can be considered for section 337 economic prong in the first place. Final’s motion describes the amount as for “fixtures and furniture used by contractors, and in computer software and equipment used for the design, engineering, operations, and management.” Mot. Supp. at 5. Yet Final’s employees and contractors seem to be engaged primarily in sales, marketing, and order fulfillment. *See* Mot., Ex. 10C at 5 (table, listing most employee/contractor roles as “marketing,” “customer success,” “brand protection,” “Influencer Strategist,” “Shipping assistant,” “website development,” “packing and shipping,” etc.). These are the hallmarks of a mere importer of goods and generally non-cognizable. *See, e.g., Certain Collapsible Sockets for Mobile Electronic Devices and Components Thereof*, Inv. No. 337-TA-1056, Comm’n Op. at 19 (July 9, 2018) (“[I]t is well-settled that evidence of sales and marketing investments alone are not sufficient to demonstrate the existence of a domestic industry . . . While the Commission has, in some investigations, credited such investments in its assessment of a complainant’s domestic industry under subsections (A) and (B). . . the analysis has always been conducted on a case-by-case basis.”); *Certain Kinesiotherapy Devices and Components Thereof*, Inv. No. 337-TA-823, Comm’n Op. at 29 n.8 (July 12, 2013) (finding sales and marketing are generally no different from the activities of an importer), *rev’d on other grounds, Lelo*, 786 F.3d 879 (Fed. Cir. 2015). Indeed, it appears clear that the completed straws, cleaning tools, cases, and box packaging are all produced in China and imported to the United States, which is also a hallmark of a mere importer. Mot. Supp. at 11; *see id.* at 21-25 (photos).

Accordingly, economic prong domestic industry under subsection (A) has not yet been shown.

[REDACTED]

As for subsection (B), labor or capital, Final refers to the same groups of employees/contractors as with subsection (A), those “that are involved in the engineering, research, development, operations, marketing, sales, service, packaging and shipment, and, in many instances, assembly of Final products.” Mot. Supp. at 5 (citing Complaint, Ex. 29). Final provides records of the payments to these individuals with invoices and other spreadsheets. *Id.* at 6 (citing Mot., Ex. 10C at ¶¶ 6-8). In particular, Final highlights its order fulfillment services which have allegedly packed and shipped [REDACTED] products per month, or [REDACTED] from January 1, 2018 through September 15, 2019. *Id.* (citing Complaint, Ex. 29 at ¶ 8); *see id.* at 7-8. Final claims [REDACTED] in total salaries paid to these persons in this approximate timeframe. *See id.* (citing Mot., Ex. 10C at ¶ 10).<sup>1</sup> Final argues this [REDACTED] is significant “inasmuch as 100% of its domestic labor as of the date of filing Final’s Complaint is associated with the products protected by the ’641 [patent] and represents 88% of its headcount globally, and 97.36% of its labor and employment expenditures globally.” *Id.* (citing Mot., Ex. 10C at ¶¶ 6-12). Final also makes reference to the [REDACTED] in equipment used by these workers as “capital” properly recognizable under subsection (B). *Id.* at 8.

The Staff agrees with Final in that it has shown a domestic industry exists under subsection (B). Staff Resp. at 56-61. In particular, the Staff reasons “the activities and expenditures referenced above, including product design, development, engineering, packaging and shipping, and in some cases product assembly, take place solely in the United States, making these investments significant by definition.” *Id.* at 60-61.

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<sup>1</sup> Final also references payments made for custom engraving services, additional specialized services, and website development, but does not appear to include them in the subsection (B) amount. *See* Mot. Supp. at 7-8, 12-13.

[REDACTED]

There are several reasons why Final has not yet shown significant domestic employment of labor or capital. First and foremost is the genuine issue of whether the activities of the twenty-two contractors/employees are properly cognizable under section 337 domestic industry. From the information so far provided, they appear to be dedicated to sales, marketing, and order fulfillment—little more than the activities of an importer. This does not appear to be a case where such expenses may be included because there are other qualifying activities taking place.<sup>2</sup> *Collapsible Sockets*, Inv. No. 337-TA-1056, Comm’n Op. at 19-20.

Additionally, Final’s rationale for significance is not persuasive. That Final’s identified labor force represents “88% of its headcount globally” or “97.36% of its labor and employment expenditures globally” (Mot. Supp. at 6) does little to show the domestic value-add to the Domestic Industry Products under *Lelo*. 786 F.3d at 884-885. What goes completely unmentioned (in contrast to the subsection (A) plant and equipment records discussion above) is the amount of labor or capital invested with China to produce the Domestic Industry Products. *See generally* Mot. Supp.; Mot., Ex. 10C. For example, there is a line item in Final’s 2018 profit and loss statement which reads “Cost of Goods Sold – 50100 Purchases – Finished Goods” totaling [REDACTED]. Mot., Ex. 10C at Exhibit D. Given the facts as laid out in Final’s motion, this apparently reflects the cost to manufacture/purchase the Domestic Industry Products in China. While these workers may not be part of Final’s workforce by name, they are clearly a source of value-add to the products and should be discussed and compared to Final’s cognizable domestic activities (*e.g.*, other than

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<sup>2</sup> There are mentions of activities which have been previously recognized by the Commission, such as warranty services; but for this example, the amount of [REDACTED] is relatively small as compared to the available evidence on the [REDACTED] spent to acquire the goods. *See* Mot., Ex. 10C at ¶ 10; Mot., Ex. 10C at Ex. D.

[REDACTED]

sales, marketing, order fulfillment). *See, e.g.*, Mot., Ex. 10C at Exhibit D (summary of Final’s expenditures with descriptors).

The Staff’s reasoning on significance—“the activities and expenditures referenced above, including product design, development, engineering, packaging and shipping, and in some cases product assembly, take place solely in the United States, making these investments significant by definition”—is equally not persuasive. Activities that take place solely in the United States would be significant “by definition” only when those activities constitute all of the value-add to a Domestic Industry Product (and are not otherwise *de minimis* in isolation (*see, e.g., Stringed Instruments*, Inv. No. 337-TA-586, Comm’n Op. at 25-26)). Clearly that is not the case here, because the products are manufactured in China. *See* Mot. Supp. at 11, 20-25.

A related issue is clearly identifying the amount of that foreign investment. Final CEO Emma Cohen notes in her declaration that services provided by [REDACTED], a California entity, should not be counted as labor costs because the individuals do not reside in the U.S. Mot., Ex. 10C at ¶ 8. The implication is that they would be counted if they were domestic. Logically, then, these foreign payments, like those given to China, should be weighed against the remaining domestic costs, but they were not. But Ms. Cohen instead states flatly, “[t]otal foreign labor costs through August 2019 are limited to those paid to contractor [REDACTED].” Mot., Ex. 10C at ¶ 12; *see* Mot. Supp. at 5-8. Thus, there is a genuine issue over the extent of foreign investment/expenditures.

Another genuine issue involves the accuracy of Final’s contention that “100%” of Final’s domestic labor as of the date of the complaint is “associated” with the products protected by the 641 patent. Mot. Supp. at 6. If Final’s use of “associated” means “attributable,” then it must necessarily follow that these individuals have not worked on any other products (*i.e.*, no other

[REDACTED]

products exist). This conclusion is belied by Final’s qualifying statement elsewhere in its motion that “Final utilizes contractors located throughout the United States for services provided in the U.S., relating *almost exclusively* to foldable reusable drinking straws protected by the ’641 patent.” Mot. Supp. at 9 (emphasis added); *see id.* at 10 (“As of the date of filing, Final did not *sell* any other products other than those covered by the ’641 Patent” (emphasis added)). Clearly, there is a suggestion here that there are products other than the Domestic Industry Products, and so a genuine issue exists over the reliability of Final’s 100% metric.

Accordingly, economic prong domestic industry under subsection (B) has not yet been shown.

For subsection (C), Final’s case is stronger, but ultimately still subject to genuine issues of material fact preventing summary determination. Final contends it has made “substantial investments in its exploitation of the ’641 Patent in the United States, for example, through engineering, research, development, operations, and assembly of the domestic industry Final products in the United States.” Mot. Supp. at 8. More specifically, Final claims “[t]he technologies claimed in the ’641 Patent were invented and developed in the United States” (*id.* at 9 (citing Complaint, Ex. 29 at ¶ 2)) and, at the time of its complaint, Final had invested [REDACTED] in designing various aspects of the Domestic Industry Products in the United States (*id.* (citing Complaint, Ex. 29 at ¶ 6; Mot., Ex. 10C at ¶¶ 15-16)). This amount is the sum of: a subtotal of entries in a spreadsheet listing various vendors and costs (Mot., Ex. 10C at Exhibit B (totaling)); [REDACTED] paid to Miles Pepper (Mot. Supp. at 9); and [REDACTED] paid to Ms. Cohen (*id.*).<sup>3</sup> Final

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<sup>3</sup> Final also mentions, but does not appear to include in the presented total for consideration under subsection (C), costs associated with all its employees/contractors doing sales, marketing, order fulfillment, website development, and warranty work. *See* Mot. Supp. at 9-10, 11, 13.

[REDACTED]

argues [REDACTED] is substantial because “[a]s of the date of filing, Final did not sell any other products other than those covered by the ’641 Patent. Thus, Final’s exploitation of the ’641 Patent measured and allocated as a percentage of sales of other products, is 100%.” *Id.* at 10. Final also argues that 93% of its sales are to U.S. customers and, thus, all of that revenue (approximately, [REDACTED]) “is attributable to the substantial investment in the exploitation of the ’641 Patent in the United States, thereby evidencing a substantial investment in the exploitation of the ’641 Patent.” *Id.* at 10-11.<sup>4</sup>

The Staff agrees that a domestic industry exists under subsection (C) through an investment of [REDACTED]. *See* Staff Resp. at 62-64. In assessing whether the amount is substantial, the Staff observes it is roughly 91% of Final’s total worldwide research and development investment and is thus “substantial” on that ground alone. *See id.* at 63.

A domestic industry for subsection (C) has not yet been shown. First, there is an issue as to whether the investments are “substantial.” Final’s reference to 93% of total sales being U.S. customers and therefore “attributable to the substantial investment in the exploitation of the ’641 Patent” (Mot. Supp. at 11) effectively asks me to consider revenue as investment, which is not the law. Final’s parallel argument, that there was “substantial” exploitation because it “did not sell any other products other than those covered by the ’641 Patent” (*id.* at 10) is equally irrelevant, because it does not address the very dollar amount, [REDACTED], calculated for consideration. The Staff’s observation that [REDACTED] represents 91% of Final’s worldwide research and development

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<sup>4</sup> Final also reports a [REDACTED] revenue amount in its summary table of key subsection (C) figures without explanation. *See* Mot. Supp. at 13; *see generally id.* This does not appear to be revenue at all, but a summation of Final’s alleged domestic labor costs ([REDACTED]), website development labor ([REDACTED]), capital equipment ([REDACTED]), and research and development costs ([REDACTED]). *See id.* at 12-13. This amount is not considered because there is no explanation of a nexus between these activities and the patented invention (in addition to those indications that many of these activities are merely sales, marketing, and order fulfillment).

[REDACTED]

expenses is important, but that percentage is only one indicator of substantiality. Further, the fact that no other products were *sold* at the time of Final’s complaint (*id.* at 10) says nothing about whether other products were in development. Indeed, a quick review of Final’s website (*see* Mot. Supp. at 8 (referencing “FinalStraw.com”) and of the assignment of intellectual property from Miles Pepper to Final (Complaint, Ex. 3 at Schedules 1, 3) strongly suggests other, non-Domestic Industry Products have been investigated or developed in some part by Final. In particular, the assignment papers completely redact the identity of the other intellectual property assigned (Complaint, Ex. 3 at Schedules 1, 3) which only further raises suspicion that Final’s research and development efforts are not solely directed to the Domestic Industry Products as alleged.

Apart from whether it is substantial, there are additional genuine issues over the reliability of the [REDACTED], including whether there is a demonstrated nexus to the patented invention. Historically, subsection (C) required a specific showing of nexus between the domestic activities and the patented invention beyond the evaluation known as technical prong (*see, e.g., Certain Integrated Circuit Chips and Products Containing the Same*, Inv. No. 337-TA-859, Comm’n Op. at 44-45, 48-50 (Aug. 22, 2014) (finding “each of these chips practices each of the domestic industry patent claims” yet no nexus)), although the Commission has recently instructed that technical prong is enough (*see Certain Gas Spring Nailer Products and Components Thereof*, Inv. No. 337-TA-1082, Comm’n Op. at 80 (Apr. 28, 2020) (“The requisite nexus between Kyocera’s exploitation activities and the ’718 patent is met here because the activities here go toward developing DI products that embody and practice the asserted claims.”)). Even assuming that no nexus need be shown beyond proof of the technical prong, however, such a showing can have persuasive value, and Final has simply not gone beyond a cursory attempt to describe the nature of its activities. *See generally* Mot. Supp. at 9 (stating, “research and development costs for . . .

[REDACTED]

various aspects of the foldable reusable drinking straws . . . activities that are and will be performed in the U.S., such as material testing of various plastics to increase sustainability/reduce environmental impact, revising product dimensions for improved usability, development of new colors and customization offerings, and the like.”); Mot., Ex. 10C at ¶¶ 15-16 (“designing, engineering . . . various aspects of the foldable reusable straw”). This is insufficient for summary determination and the establishment of a violation by “substantial, reliable, and probative evidence.” 19 U.S.C. § 1337(g)(2)(B); 19 C.F.R. § 210.16(c)(2).

Another issue over the reliability of the [REDACTED] involves the [REDACTED] paid to 641 patent inventor Miles Pepper and whether it is a true research and development cost or a patent acquisition one. The assignment papers from Miles Pepper to Final mention either “valuable consideration” (Complaint, Ex. 3) or consideration of one dollar (Complaint, Ex. 2). Thus, there is a question of how Mr. Pepper was compensated for originating the technology. Further, the business record of the payments reflecting the [REDACTED] (Mot., Ex. 10C at Exhibit A, CM00000585) consists of round periodic payments in varying amounts, which do not suggest any sort of per-month or per-hour arrangement as would be expected of a consultant (*see, e.g.*, Mot., Ex. 10C at Exhibit A, CM00000585). The absence of these payments from the primary research and development cost spreadsheet (Mot., Ex. 10C at Exhibit B) is also peculiar given that a separate, single entry of [REDACTED] in “startup costs” paid to Mr. Pepper is so included. All of these facts above warrant further explanation from the relevant witnesses on the [REDACTED] amount because, as is consistent with Commission precedent, patent acquisition costs are non-cognizable. *See, e.g., Certain Mobile Device Holders and Components Thereof*, Inv. No. 337-TA-1028, Initial Determination at 75 (Sep. 12, 2017) (affirmed in relevant part).

[REDACTED]

An additional genuine issue concerns the spreadsheet of research and development expenses which forms the basis for [REDACTED] of the [REDACTED] alleged subsection (C) investment. Mot. Supp. at 9; Mot., Ex. 10C at ¶¶ 15-16, Exhibit B. Ms. Cohen notes that the spreadsheet records expenses of [REDACTED], but certain items attributable to [REDACTED] need to be removed, bringing the total to [REDACTED]. Mot., Ex. 10C at ¶ 16. She explains [REDACTED] was eliminated as a foreign expense, but offers no explanation why [REDACTED] should not be included. *See id.* This raises a genuine issue as to whether other entries also need to be removed; for example, an entry to [REDACTED] (Mot., Ex. 10C at Exhibit B) who is identified as a foreign-based contractor (*id.* at ¶ 12), or entries to [REDACTED] who may or may not have performed its relevant services within the United States.

With that said, a large majority of the [REDACTED] figure comes from payments made to “[REDACTED]” Mot., Ex. 10C at Exhibit B. If Final had described the activities of this entity, their location, a nexus to the invention of the 641 patent, and rationale for why it is substantial, this *may* satisfy subsection (C). But as the record presently stands, such a determination cannot be made as this entity and its payments go completely unmentioned by Final. *See generally* Mot. Supp.; Mot., Ex. 10C.

On balance, therefore, and in view of the requirement that any violation must be established with substantial, reliable, and probative evidence, Final has not met its burden to demonstrate that summary determination is warranted. Specifically, Final has not met its burden to show that the economic prong of domestic industry may be resolved by summary determination. The nature of further proceedings will be the subject of a separate order.



**VI. INITIAL DETERMINATION AND ORDER**

As discussed above, there are no genuine issues of material fact concerning importation of the accused products by the Defaulted Respondents, no genuine issues concerning infringement of claims 1-12 and 14-17 of the 641 patent by those products, and no genuine issue with the practice of claims 1-12 and 14-17 by Final’s own articles. These issues, and all supporting facts relied on above, are without substantial controversy and hereby established under 19 C.F.R. § 210.18(e). But genuine issues of material fact remain over the economic prong of Final’s asserted domestic industry under 19 U.S.C. § 1337(a)(3)(A), (B), (C), and on whether there has been any violation involving claim 20 of the 641 patent. Accordingly, Final’s motion on violation (1183-006) is granted-in-part. This initial determination is hereby certified to the Commission.

Within seven days of the date of this document, the parties shall submit to the Office of the Administrative Law Judges a joint statement as to whether or not they seek to have any portion of this document deleted from the public version. If the parties do seek to have portions of this document deleted from the public version, they must submit to this office a copy of this document with red brackets indicating the portion or portions asserted to contain confidential business information. The submission may be made by email and/or hard copy by the aforementioned date and need not be filed with the Commission Secretary.

**SO ORDERED.**

  
\_\_\_\_\_  
Cameron Elliot  
Administrative Law Judge

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **INITIAL DETERMINATION** has been served via EDIS upon the Commission Investigative Attorney, **Paul Gennari, Esq.**, and the following parties as indicated, on 7/28/2020.



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