

In the Matter of

CERTAIN ELECTRIC SLOW COOKERS

Investigation No. 337-TA-42



USITC PUBLICATION 994

AUGUST 1979

UNITED STATES INTERNATIONAL TRADE COMMISSION

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**Address all communications to
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United States International Trade Commission
Washington, D.C. 20436**

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

(337-TA-42)

CERTAIN ELECTRIC SLOW COOKERS

Notice of Commission Procedure on the
Presiding Officer's Recommendation for
Relief, Bonding, and the Public Interest

Recommendation of presiding officer issued

On September 12, 1978, the presiding officer in investigation No. 337-TA-42 (Certain Electric Slow Cookers), being conducted by the United States International Trade Commission under the authority of section 337 of the Tariff Act of 1930, issued his recommended determination that the Commission--

(1) Terminate this 337 action with respect to the Sanyei Corporation, Sanyei New York Corp., Kusumi Electric Manufacturing Co., Ltd., and NGK Insulators, Ltd. (also known as Nippon Gaishi Mfg., Ltd.);

(2) On the basis of licensing and assignment agreements executed between respondents Lakewood Manufacturing Co. (Lakewood) and Imarflex Manufacturing Company, Ltd. (Imarflex), and complainant Rival, terminate this investigation with respect to Lakewood and Imarflex; and

(3) Find H & H Manufacturing Company and H & H Appliances in default and in violation of section 337 of the Tariff Act of 1930.

An addendum to the recommended determination finding Electrical & Electronics in violation of section 337 was issued by the presiding officer on

October 20, 1978. The presiding officer has certified the evidentiary record to the Commission for its consideration. Copies of the presiding officer's recommended determination and the addendum thereto may be obtained by contacting the Office of the Secretary to the Commission, 701 E Street, N.W., Washington, D.C. 20436, telephone (202) 523-0161.

Requests for oral argument and oral presentation. At present, no oral argument is planned with respect to the recommended determination of the presiding officer. Similarly, no oral presentation is planned with respect to the subject matter of section 210.14(a) of the Commission's Rules of Practice and Procedure (19 CFR 210.14(a)) concerning relief, bonding, and the public-interest factors set forth in section 337(d) and (f) of the Tariff Act of 1930, as amended (19 U.S.C. 1337), which the Commission is to consider in the event it determines that there should be relief. However, the Commission will consider requests for an oral argument or an oral presentation if they are received by the Secretary to the Commission no later than 30 days after publication of this notice in the Federal Register.

Written submissions on the Recommended Determination.

Written submissions from the parties, other interested persons, government agencies and departments, governments, or the public with respect to the recommended determination will be considered by the Commission if received not later than 45 days after publication of this notice in the Federal Register.

Written presentations on relief, bonding, and the public interest

A party to the investigation, an interested agency, a public-interest group, or any interested member of the public may file a written submission on relief, bonding, or the public interest.

1. Relief. If the Commission finds a violation of section 337, it will issue (1) an order which could result in the exclusion from entry of certain electric slow cookers into the United States or (2) an order which could result in requiring respondents to cease and desist from alleged unfair methods of competition or unfair acts in the importation and sale of these slow cookers. Accordingly, the Commission is interested in what relief should be ordered, if any.

2. Bonding. If the Commission finds a violation of section 337 and orders some form of relief, such relief would not become final for a 60-day period, during which the President would consider the Commission's report. During this period, the slow cookers would be entitled to enter the United States under a bond determined by the Commission and prescribed by the Secretary of the Treasury. Accordingly, the Commission is interested in what bond should be determined, if any.

3. The public interest. If the Commission finds a violation of section 337 and orders some form of relief, it must consider the effect of such relief upon the public interest. Accordingly, the Commission is interested in the effect of any exclusion order or cease and desist order upon (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) the production of like or directly competitive articles in the United States, and (4) U.S. consumers.

Written submissions to the Commission. The Commission requests that written submissions of two types be filed in order to focus the issues.

1. Briefs on the presiding officer's recommendation. Parties to the Commission's investigation, interested agencies, and the Commission

investigative staff are encouraged to file briefs concerning exceptions to the presiding officer's recommendation. Briefs must be filed with the Secretary to the Commission no later than 45 days after publication of this notice in the Federal Register. Statements made in submissions should be supported by references to the record. Persons with the same positions are encouraged to consolidate their submissions, if possible.

2. Written comments and information concerning relief, bonding, and the public interest. Parties to the Commission's investigation, interested agencies, public-interest groups, and any other interested members of the public are encouraged to file written comments and information concerning relief, bonding, and the public interest. These written submissions will be very useful to the Commission if it determines that there is a violation of section 337 and that relief should be granted.

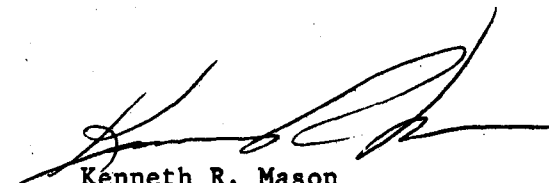
Written comments and information concerning relief, bonding, and the public interest shall be submitted as follows. First, complainant shall file a detailed proposed Commission action, including a proposed determination of bonding, a proposed remedy, and a discussion of the effect of its proposals on the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers, with the Secretary to the Commission no later than 30 days after publication of this notice in the Federal Register. Second, other parties, interested agencies, public-interest groups, and other interested members of the public shall file written comments and information concerning the action which complainant has proposed, any available alternatives, and the

advisability of any Commission action in light of the public interest considerations listed above no later than 45 days after publication of this notice in the Federal Register.

Additional information. The original and 19 true copies of all written submissions must be filed with the Secretary to the Commission. If you wish to submit a document (or a portion thereof) to the Commission in confidence, you must request in camera treatment. Your request should be directed to the Chairman of the Commission and must include a full statement of the reasons the Commission should grant such treatment. The Commission will either accept such submission in confidence or return the submission. All nonconfidential written submissions will be open to public inspection at the Secretary's Office.

Notice of the Commission's investigation was published in the Federal Register of July 6, 1977 (42 F.R. 34558).

By order of the Commission.



Kenneth R. Mason
Secretary

Issued: December 8, 1978

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of CERTAIN ELECTRIC SLOW COOKERS))))))))	Investigation No. 337-TA-42
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NOTICE OF AND ORDERS FOR TERMINATING CERTAIN
RESPONDENTS AND ACTION REGARDING RECOMMENDED
DETERMINATION OF THE PRESIDING OFFICER

This is a proceeding instituted pursuant to section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), by a notice published in the Federal Register on February 9, 1978 (43 F.R. 5590). The matter was assigned to administrative law judge Donald K. Duvall (the presiding officer) after the Commission instituted the investigation.

On September 12, 1978, the presiding officer recommended that the Commission grant certain motions to terminate certain respondents (Motion Nos. 42-1 and 42-4) and that the Commission find certain respondents in violation of the statute. On October 20, 1978, the presiding officer recommended that the Commission find an additional respondent in violation of the statute.

Upon consideration of the presiding officer's recommended determination and the record in this proceeding, the Commission --

- (1) grants the motion to terminate respondents Sanyei Corporation, Sanyei New York Corporation, Kusumi Electric Mfg. Co., Ltd., and NGK Insulators, Ltd. (also known as Nippon Gaishi Mfg., Ltd.) (Motion No. 42-1);

(2) grants the motion to terminate respondents Lakewood Manufacturing Company and Imarflex Manufacturing Company, Ltd. (also known as Imanishi Flexible Tube Manufacturing Company, Ltd.) (Motion No. 42-4); and

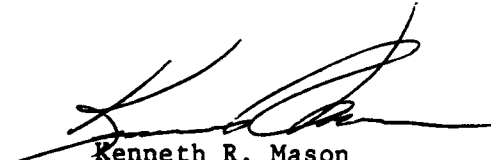
(3) declares the proceeding more complicated as to respondents H & H Manufacturing Co.; H & H Appliances; and Electrical and Electronics, Ltd., in regard to the issue of violation and remands to the presiding officer so that he may augment the record concerning the issue of violation and issue a new recommended determination not later than 90 days after the date these orders issue.

This investigation is designated as more complicated for the reason that there has been difficulty in obtaining information, resulting in an inadequate record upon which to base a reasoned determination. The Commission believes that additional time is necessary to resolve the difficulty by obtaining specific information as to the allegedly infringing imported articles, such as samples, and as to the effect or tendency of the unfair methods or unfair acts alleged to cause injury by these respondents to a domestic industry.

These Commission orders are effective on the date of their publication in the Federal Register. Any party wishing to petition for reconsideration of a Commission determination when such has been made must do so within fourteen (14) days of service of the Commission determination. Petitions must be in accord with section 210.56 of the Commission rules (19 CFR 210.56). Any person adversely affected by a Commission determination may appeal such determination to the U.S. Court of Customs and Patent Appeals.

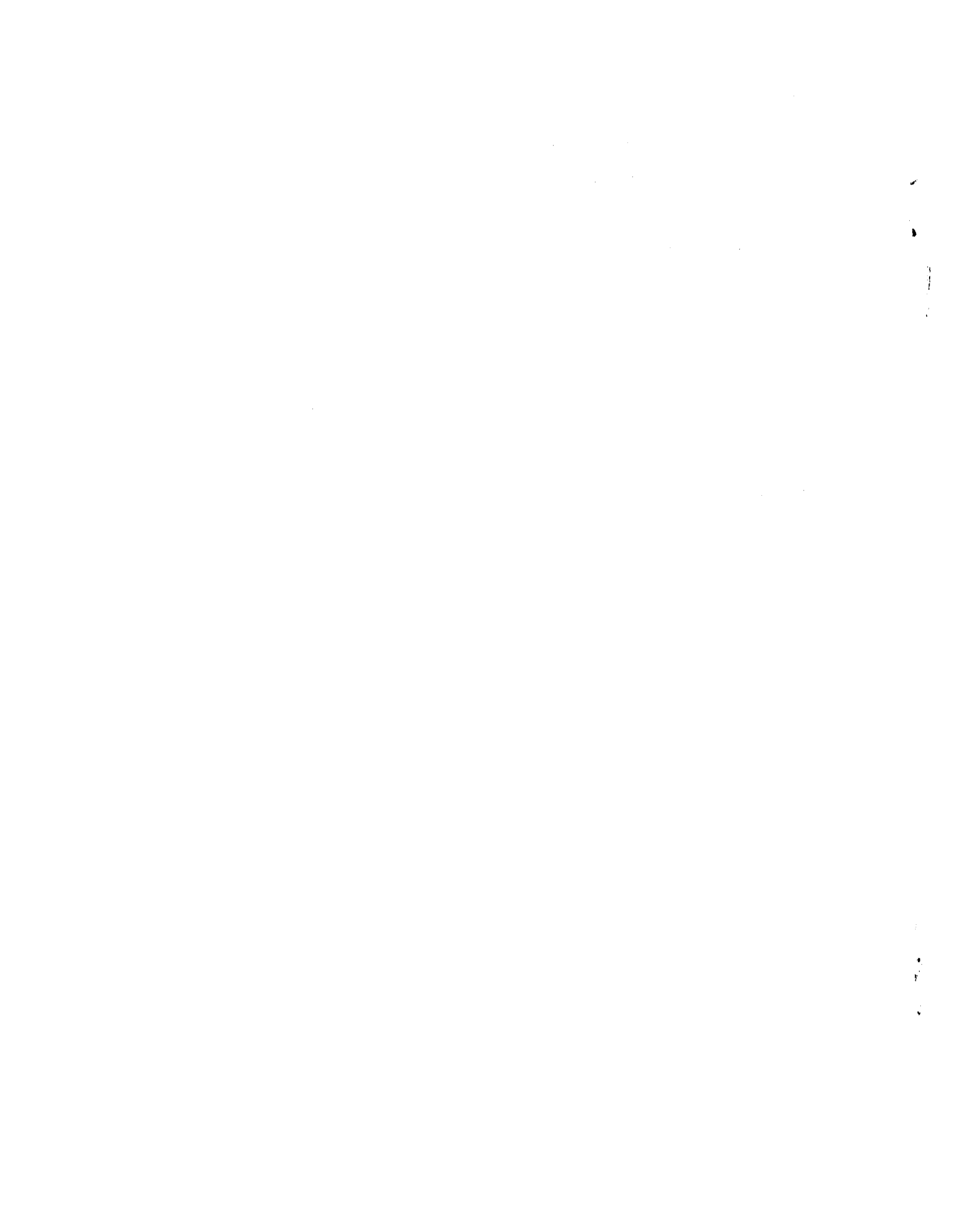
Copies of the Commission's orders and opinion in support of these orders are available to the public during official working hours at the Office of the Secretary, U.S. International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, telephone (202) 523-0161.

By order of the Commission.



Kenneth R. Mason
Secretary

Issued: February 9, 1979



UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of)
)
)
CERTAIN ELECTRIC SLOW COOKERS)
)
_____)

Investigation No. 337-TA-42

NOTICE OF THE COMMISSION PROCEDURE ON THE PRESIDING OFFICER'S
RECOMMENDED DETERMINATION, RELIEF, BONDING, AND THE
PUBLIC INTEREST, AND OF THE SCHEDULE FOR
FILING WRITTEN SUBMISSIONS

Recommendation of "violation" issued

In connection with this investigation by the U.S. International Trade Commission under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), of alleged unfair methods of competition and unfair acts in the importation and sale of certain electric slow cookers in the United States, the presiding officer recommended on May 9, 1979, that the Commission --

- (1) grant the joint motion for summary determination and
- (2) determine that there is a violation of section 337.

The presiding officer certified to the Commission for its consideration the evidentiary record, which had been augmented pursuant to the Commission's order to remand of February 9, 1979. Interested persons may obtain copies of the presiding officer's recommended determination of May 9, 1979 (and all other public documents), by contacting the office of the Secretary to the Commission, 701 E Street NW., Washington, D.C. 20436, telephone (202) 523-0161.

Requests for oral argument and oral presentation

At present, no oral argument is planned with respect to the recommended determination of the presiding officer. Similarly, no oral presentation is planned with respect to the subject matter of section 210.14(a) of the Commission's Rules of Practice and Procedure (19 CFR 210.14(a)) concerning relief, bonding, and the public-interest factors set forth in section 337(d), (f) and (g)(3) of the Tariff Act of 1930, as amended, which the Commission is to consider in the event it determines that there should be relief. However, the Commission will consider written requests for an oral argument or an oral presentation if they are received by the Secretary to the Commission no later than the close of business (5:15 p.m., e.d.t.), on June 28, 1979.

Written submissions to the Commission

The Commission requests that written submissions of three types be filed no later than the close of business on June 28, 1979:

1. Briefs on the presiding officer's recommended determination. Parties to the Commission's investigation, interested agencies, and the Commission investigative staff are encouraged to file briefs concerning exceptions to the presiding officer's recommended determination. Briefs must be served on all parties of record to the Commission's investigation on or before the date they are filed with the Secretary. Statements made in briefs should be supported by references to the record. Persons with the same positions are encouraged to consolidate their briefs, if possible.

2. Written comments and information concerning relief, bonding, and the public interest. Parties to the Commission's investigation, interested agencies, public-interest groups, and any other interested members of the public are encouraged to file written comments and information concerning relief, bonding, and the public interest. These submissions should include a proposed remedy, a proposed determination of bonding, and a discussion of the effect of the proposals on the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers. These written submissions will be very useful to the Commission if it determines that there is a violation of section 337 and that relief should be granted.

3. Requests for oral argument and oral presentation. Written requests that the Commission hold oral argument and/or oral presentation must be filed with the Secretary to the Commission as described above.

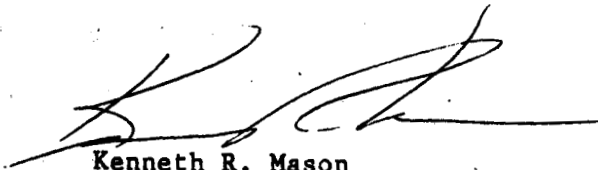
Additional information

The original and 19 true copies of all briefs, written comments, and any written request must be filed with the Secretary to the Commission.

Any person desiring to submit a document (or a portion thereof) to the Commission in confidence must request in camera treatment. Such request should be directed to the Chairman of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. The Commission will either accept such submission in confidence or return it. All nonconfidential written submissions will be open to public inspection at the Secretary's Office.

Notice of the Commission's investigation was published in the Federal Register of February 9, 1978 (43 F.R. 5590).

By order of the Commission.

A handwritten signature in black ink, appearing to read 'K. R. Mason', is written over the typed name.

Kenneth R. Mason
Secretary

Issued: June 6, 1979

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D. C.

OFFICE OF THE SECRETARY
U.S. INTL. TRADE COMMISSION

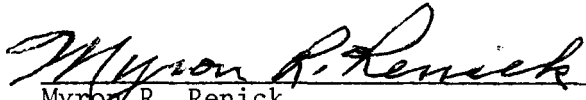
In the Matter of :
CERTAIN ELECTRIC SLOW
COOKERS

Investigation No. 337-TA-42

ORDER

Pursuant to my authority as Chief Administrative Law Judge of this Commission, I hereby designate Administrative Law Judge Donald K. Duvall as Presiding Officer in this investigation.

The Secretary shall serve a copy of this order upon all parties of record and shall publish it in the Federal Register.



Myron R. Renick
Chief Administrative Law Judge

Issued February 10, 1978

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

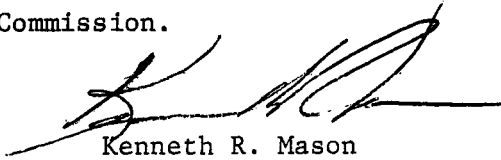
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In the Matter of))
CERTAIN ELECTRIC SLOW COOKERS) Investigation No. 337-TA-42
_____))

CORRECTION OF NOTICE OF INVESTIGATION

The United States International Trade Commission published in the Federal Register of February 9, 1978 (43 F.R. 5590) a notice of investigation in the matter of certain electric slow cookers investigation No. 337-TA-42.

The investigation was instituted on February 6, 1978, rather than January 6, 1978, and the number of the U.S. Letters Patent involved in the investigation was incorrectly identified at line 8 of page 5591 as 3,881,099 rather than 3,881,090. The notice of February 9, 1978, is corrected accordingly.

By order of the Commission.


Kenneth R. Mason
Secretary

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D. C.

In the Matter of

CERTAIN ELECTRIC SLOW
COOKERS

Investigation No. 337-TA-42

NOTICE OF INVESTIGATION

Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on December 20, 1977, under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), on behalf of Rival Manufacturing Company, Kansas City, Missouri 64129, alleging that unfair methods of competition and unfair acts exist in the importation of certain electric slow cookers into the United States, or in their sale, by reason of the alleged coverage of such electric slow cookers by the claims of U.S. Letters Patent 3,881,090. The complaint alleges such unfair methods of competition and unfair acts have the effect or tendency to destroy or substantially injure an industry, efficiently and economically operated, in the United States. Complainant requests permanent exclusion from entry into the United States of the articles in question. Complainant also requests exclusion from entry into the United States, except under bond, of the articles in question during the investigation of this matter.

Having considered the complaint, the United States International Trade Commission on January 6, 1978, ORDERED:

1. That, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), an investigation be instituted to determine, under subsection (c) whether, on the basis of the allegations set forth in the

complaint and the evidence adduced, there is a violation or reason to believe that there is a violation of subsection (a) of this section in the unauthorized importation of certain electric slow cookers or the components thereof into the United States, or in their sale, by reason of the alleged coverage of such electric slow cookers by the claims of U.S. Letters Patent 3,881,099, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

2. That, for the purpose of the investigation so instituted, the following persons alleged to be involved in the unauthorized importation of such articles into the United States, or in their sale, are hereby named as respondents upon which the complaint and this notice are to be served:

Importers and/or Agents

Lakewood Manufacturing Co., Inc.
530 East Wardlow Road
Long Beach, California 90807

H & H Appliances
5020 Rosemead Blvd.
Pico Rivera, California 90660

Sanyei New York Corp.
1199 Broadway
New York, New York 10001

Manufacturers, Exporters and/or Agents

Imanishi Flexible Tube Mf. Co., Ltd.
(also known as Imarflex Mfg. Co., Ltd.)
P.O. Box 75, Higashinari
Osaka, 537-91, Japan

Nippon Gaishi Mfg. Ltd.
No. 2-56, Suda-cho, Mizuho-ku
Nagoya City, Aichi Pref., Japan

Kusumi Electric Mfg. Co., Ltd.
1010 Tomuro, Atsugi City
Kanagawa Pref., Japan

Electrical & Electronics, Ltd.
7th-10th Floor, Yuen Shing Bldg.
64 Hoi Yuen Road (also P.O. Box 9594)
Kunu Tong, Kowloon, Hong Kong

H & H Mfg. Co.
Higashihaze, Kizu-cho
Soraku-gun
Kyoto 619-02, Japan

Sanyei Corporation
No. 1-2 4-chome
Kotobuki, Taito-ku
Tokyo, Japan

3. That, for the purpose of the investigation so instituted, Judge Myron R. Renick, U.S. International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, is hereby appointed as presiding officer.

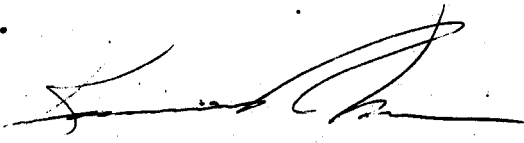
4. That, for the purpose of the investigation so instituted, Edward M. Lebow, U.S. International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, is hereby named Commission investigative attorney.

Responses must be submitted by the named respondents in accordance with section 210.21 of the Commission's Rules of Practice and Procedure, as amended (41 F.R. 17710, April 27, 1976). Pursuant to sections 201.16(d) and 210.21(a) of the Rules, such responses will be considered by the Commission if received not later than 20 days after the date of service of the complaint. Extensions of time for submitting a response will not be granted unless good and sufficient cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and of this notice, and will authorize the presiding officer and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both a recommended determination and a final determination, respectively, containing such findings.

The complaint, with the exception of confidential information referred to therein, is available for inspection by interested persons at the Office of the Secretary, U.S. International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, and in the New York City office of the Commission, 6 World Trade Center.

By Order of the Commission.



KENNETH R. MASON
Secretary

Issued: February 6, 1978

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

_____)
In the Matter of)
)
CERTAIN ELECTRIC SLOW COOKERS)
_____)

Investigation No. 337-TA-42

COMMISSION DETERMINATION, ORDER, AND OPINION

The U.S. International Trade Commission conducted an investigation under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), of alleged unfair methods of competition and unfair acts in the unauthorized importation into the United States of certain electric slow cookers covered by Claims 1 and 2 of U.S. Letters Patent No. 3,881,090, or in their sale by the owner, importer, consignee, or agent, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. On July 26, 1979, the Commission determined that there is a violation of section 337 and ordered that electric slow cookers falling within Claims 1 or 2 of U.S. Letters Patent No. 3,881,090 be excluded from entry into the United States for the term of that patent (until April 29, 1992) unless the importation is licensed by the patent owner.

The purpose of the Commission determination, order, and opinion is to provide for the final disposition of the Commission's investigation of certain electric slow cookers.

Determination

Having reviewed the record compiled in this investigation, the Commission on July 26, 1979, determined--

1. That with respect to H & H Manufacturing Company, H & H Appliances, and Electrical and Electronics, Ltd., which are respondents in investigation No. 337-TA-42, there is a violation of section 337 of the Tariff Act of 1930, as amended, in the importation into and sale in the United States of certain electric slow cookers by the owner, importer, consignee, or agent of either, the effect or tendency of which is to substantially injure an industry, efficiently and economically operated, in the United States;

2. That the appropriate remedy for such violation is to direct that electric slow cookers which infringe U.S. Letters Patent No. 3,881,090 be excluded from entry into the United States for the term of said patent, except where such importation is licensed by the owner of said patent;

3. That, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers, such electric slow cookers should be excluded from entry; and

4. That the bond provided for in subsection (g)(3) of section 337 of the Tariff Act of 1930, as amended, be in the amount of 50 percent ad valorem (ad valorem to be determined in accordance with section 402 of the Tariff Act of 1930, as amended (19 U.S.C. 1401a)) of the imported article.

Order

Accordingly, it is hereby ordered--


1. That electric slow cookers which infringe U.S. Letters Patent No. 3,881,090 are excluded from entry into the United States for the term of said patent, except where such importation is licensed by the owner of said patent;

2. That the electric slow cookers ordered to be excluded from entry are entitled to entry into the United States under bond in the amount of 50 percent ad valorem (ad valorem to be determined in accordance with section 402 of the Tariff Act of 1930, as amended (19 U.S.C. 1401a)) from the day after this order is received by the President pursuant to section 337(g) of the Tariff Act of 1930, as amended, until such time as the President notifies the Commission that he approves or disapproves this action, but, in any event, not later than 60 days after such date of receipt;

3. That this order be published in the Federal Register and that this order and the opinion in support thereof, be served upon each party of record in this investigation and upon the U.S. Department of Health, Education, and Welfare, the U.S. Department of Justice, the Federal Trade Commission, and the Secretary of the Treasury; and

5. That the Commission may amend this order at any time.

By order of the Commission.



Kenneth R. Mason
Secretary

Issued: August 9, 1979

COMMISSION OPINION

Procedural History

The present investigation was instituted by the Commission on February 9, 1978, on the basis of a complaint filed by Rival Manufacturing Company (complainant), alleging that nine respondents were in violation of section 337 of the Tariff Act of 1930, as amended, by reason of the unauthorized importation or sale of electric slow cookers which infringe complainant's patent, U.S. Letters Patent No. 3,881,090 ('090 patent).

The notice of investigation, published in the Federal Register on February 9, 1978 (43 F.R. 5590), named nine respondents as follows:

Sanyei Corporation, Sanyei New York Corporation, NGK Insulators, Ltd. (a/k/a Nippon Gaishi Mfg., Ltd.), and Kusumi Electric Mfg. Co., Ltd. (hereinafter collectively referred to as the Sanyei respondents);

Lakewood Manufacturing Company (Lakewood) and Imarflex Manufacturing Company, Ltd. (a/k/a Imanishi Flexible Tube Manufacturing Company, Ltd.) (Imarflex); and

H & H Manufacturing Company (H & H Japan), H & H Appliances (H & H USA), and Electrical and Electronics, Ltd. (E & E).

On February 9, 1979, the Commission issued a Notice of and Orders for Terminating Certain Respondents and Action Regarding Recommended Determination of the Presiding Officer, in which the Commission ordered that the investigation be terminated as to the Sanyei respondents, Lakewood, and Imarflex. 1/ The Commission also ordered that the investigation be declared

1/ See Commission Opinion in Support of Orders Terminating Certain Respondents, Declaring this Matter More Complicated, and Remanding this Matter for Further Proceedings, inv. No. 337-TA-42, at 2 and 4 (hereinafter Comm. Op. of Mar. 15). This opinion is found in App. B, infra.

more complicated as to H & H Japan, H & H USA, and E & E. The investigation as to the latter three respondents was remanded to the administrative law judge (ALJ) so that the record concerning the issue of violation could be augmented and a new recommended determination could be issued. This Commission action was based on the opinion that the record regarding H & H Japan, H & H USA, and E & E, none of whom answered the complaint or made any appearance and who were found in default by the ALJ, did not include sufficient evidence on which a determination could be made. 2/

The record was augmented by complainant, as well as by the Commission investigative attorney. On April 27, 1979, complainant and the Commission investigative attorney filed a joint motion for summary determination. 3/ No answers were filed by any of the three respondents.

On the basis of the record compiled in this investigation, the ALJ recommended on May 9, 1979, that the Commission find H & H Japan, H & H USA, and E & E in violation of section 337. No exceptions were filed regarding this recommended determination.

On June 6, 1979, a notice was issued providing interested parties with the opportunity to request oral argument and oral presentations before the Commission and to file written submissions regarding this investigation. No requests were received. Only the complainant and the Commission investigative attorney filed written submissions in the form of a joint brief. Therein, they supported the ALJ's recommended determination that H & H Japan, H & H

2/ Comm. Op. of Mar. 15, at 7.

3/ Motion Docket No. 42-7, Joint Motion of Complainant and Investigative Staff under 19 CFR 210.50 on all Issues and Matters in Support Thereof.

USA, and E & E be found in violation of section 337 on the basis of having imported into the United States or sold in the United States electric slow cookers which infringe the '090 patent and which substantially injured, or had the tendency to substantially injure, complainant, an efficiently and economically operated industry.

On July 26, 1979, the Commission determined by a 5 to 0 vote that all three respondents were in violation of section 337. In addition, the Commission determined by a 5 to 0 vote to exclude from entry into the United States electric slow cookers which infringe U.S. Letters Patent No. 3,881,090. The bond, pursuant to section 337(g)(3), was determined in the amount of 50 percent ad valorem (ad valorem as determined in accordance with section 402 of the Tariff Act of 1930, as amended (19 U.S.C. 1401a)) of the imported article.

The Issue of Violation

In the opinion of March 15, 1979, the Commission explained why the investigation as to H & H Japan, H & H USA, and E & E was remanded. The Commission noted that "where the Commission determination results in affirmative relief, it must be supported by 'reliable, probative, and substantial evidence.' 5 U.S.C. 556(d)." 4/ The Commission was of the opinion that "the record was not sufficiently developed to make a determination on the issue of violation. (footnote deleted)" 5/

4/ Id., at 7.

5/ Id., at 5.

The principal issues which the Commission was originally unable to address because of the insufficiency of the record were (1) whether the '090 patent was infringed, (2) whether infringing electric slow cookers were imported into the United States or sold in the United States by respondents, and (3) whether the injury to complainant was caused by such importation and sale.

As a result of the remand proceedings, the record now contains sufficient evidence on which a reasoned determination can be made. Additions to the record have addressed the previously unsupported allegations. These include physical exhibits of imported electric slow cookers, affidavits showing causation of injury, customs invoices illustrating substantial importations of electric slow cookers, and requests for admissions made to each of the three respondents.

An examination of the physical exhibits of respondents' products, which are now properly part of the record, 6/ indicates that the respondents' electric slow cookers read on Claims 1 and 2 of the '090 patent and therefore infringe that patent. 7/ The exhibits, purchased in the United States, are labeled as being made in Japan or Hong Kong indicating that they were imported into and sold in the United States. They also bear the names of two respondents, H & H USA and E & E. The affidavits 8/ are those of officers of

6/ See Exh. P, Q, and R, submitted by the Commission investigative attorney on April 27, 1979, in support of the joint motion for summary determination.

7/ In addition to the physical exhibits, one claim chart clearly shows through original, color photographs that E & E's products infringed the '090 patent.

8/ See Submission nos. VII, VIII, and IX, Affidavits of Miller, Ostroski, and Manning, respectively, submitted by the complainant on April 27, 1979, in support of the joint motion for summary determination.

complainant in which they state, on the basis of their own knowledge, that respondents' products are being imported into and sold in the United States to former or present customer of complainant thereby causing complainant to lose those sales. This evidence supports complainant's allegation that it is being substantially injured, or that there is a tendency of substantial injury, by the activities of the respondents. 9/ The customs invoices now introduced into the record 10/ show that 60,000 electric slow cookers have been imported into the United States by H & H USA.

Evidence on the record prior to remand shows that, after the successful introduction of complainant's product in 1973, 11/ complainant's sales of its patented electric slow cooker had decreased both in volume and in dollar value at the same time that respondents were introducing their products into the market. This decrease accrued in the face of projected growth in complainant's electric slow cooker sales. Statistics included in the record show the decline in the volume of sales and in the dollar value of the sales to former customers during the years 1975 to mid-1978. 12/ The number of

9/ No discovery was taken of complainant's customers because of complainant's estimation that such requests for information is potentially damaging to its goodwill among those businesses, some of whom have remained customers or are potentially customers. See Submission no. IX(a), Affidavit of Manning, submitted by complainant on April 27, 1979, in support of the joint motion for summary determination.

10/ See Exh. F, submitted by the Commission investigative attorney on April 27, 1979, in support of the joint motion for summary determination.

11/ See Complaint, at 15-16 and Exh. 3, (The information in the complaint was sworn to.)

12/ See Affidavit of Breeden, submitted by complainant on Aug. 21, 1978, in support of its motion for entry of default, at 1-3.

employees in the plants manufacturing complainant's electric slow cookers also decreased significantly during the years respondents were importing infringing articles. 13/

The requests for admission asked that the respondents admit that they manufacture, import, or sell electric slow cookers which infringe the '090 patent. Under Commission rule 210.34(b) (19 CFR 210.34(b)) the matters addressed in a request for admission--

may be deemed admitted unless, within ten (10) days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a sworn written answer or objection addressed to the matter.

No response was received at any time from any respondent.

No evidence on the record, either before or after remand, refutes complainant's allegations or the evidence summarized above.

The combination of (1) the evidence on the record before remand; (2) the additional evidence showing infringement, importation, and causation of injury; (3) the lack of any evidence refuting complainant's allegations; and (4) the requests for admission demonstrates to us that complainant and the Commission investigative attorney have not only attempted to, but also have succeeded in placing on the record the information upon which a reasoned determination can be made. Where information is unobtainable, the record now indicates that an attempt was made to obtain the information. 14/

13/ Complaint, at 17.

14/ For a discussion of our concern that the record show that all attempts are made to construct a record upon which a reasoned determination can be made, see Comm. Op. of March 15, at 8-9 and n. 13.

Thus, the Commission has found a violation of section 337 by H & H Japan, H & H USA, and E & E. In making a determination of violation of section 337 by these three respondents the Commission adopts the findings of fact, conclusions of law, and recommendations of the ALJ in his recommended determination of May 9, 1979.

Remedy, the Public Interest, and Bonding

1. Remedy.

The Commission finds that an exclusion order is the appropriate remedy for the violation of section 337 which is found to exist. Therefore, the Commission has ordered exclusion from entry into the United States of electric slow cookers which infringe U.S. Letters Patent No. 3,881,090, except where such importation is licensed by the owner. This exclusion will run for the term of this patent.

A cease and desist order would not be an appropriate remedy in this investigation, because it is not likely that such an order would be effective against foreign respondents and would not include within its scope any domestic importers not named in this investigation.

2. The Public Interest.

There are no public-interest factors which would oppose the issuance of an exclusion order in this investigation.

3. Bonding.

The Commission has determined that a bond in the amount of 50 percent ad valorem (ad valorem as determined in accordance with section 402 of the Tariff Act of 1930, as amended (19 U.S.C. 1401a)) of the imported article should be

required during the 60-day period in which the President may approve the Commission's determination or disapprove it for policy reasons. A bond of this amount is designed to offset any unfair competitive advantage accruing to importers of electric slow cookers which infringe the '090 patent.

APPENDIX A

U.S. Letters Patent No. 3,881,090

U. S. DEPARTMENT OF COMMERCE
United States Patent and Trademark Office

2 AUG 1979

(Date)

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office
of the printed specification and drawing of U. S. Patent No.
3,881,090.

By authority of the
COMMISSIONER OF PATENTS AND TRADEMARKS

Ruth C. Morant
Certifying Officer.

[54] **ELECTRIC COOKING UTENSIL HAVING A REMOVABLE CERAMIC VESSEL**

[75] Inventor: **Robert J. Scott, Blue Springs, Mo.**

[73] Assignee: **Rival Manufacturing Company, Kansas City, Mo.**

[22] Filed: **Dec. 3, 1973**

[21] Appl. No.: **420,951**

[52] U.S. Cl. 219/433; 219/424; 219/432; 219/436; 219/442; 219/535; 219/536

[51] Int. Cl. **F27d 11/02**

[58] Field of Search 219/424, 432, 433, 436, 219/438, 439, 441, 442, 535, 536

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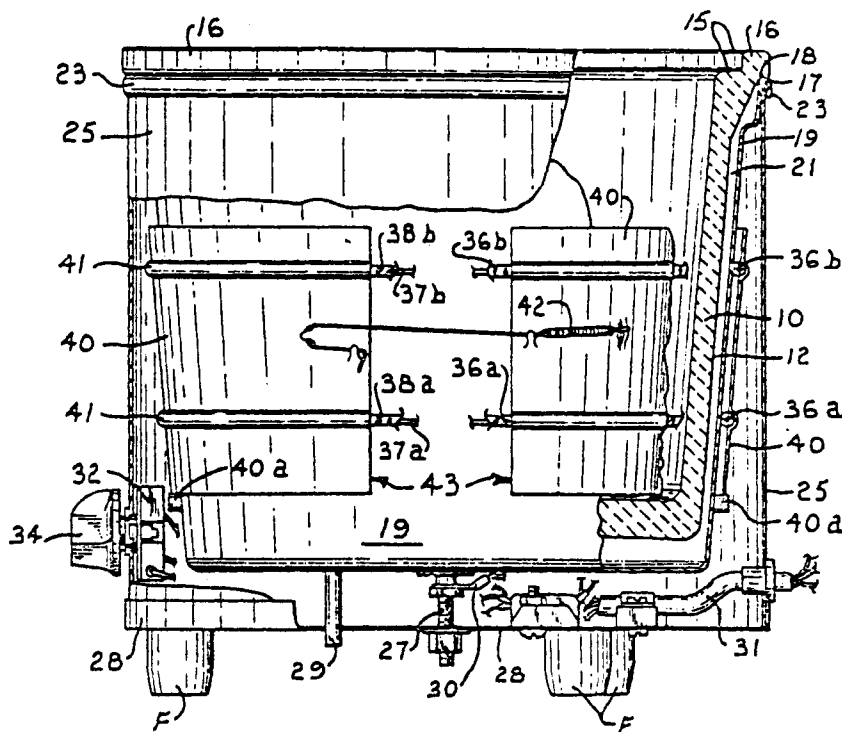
793,381 11/1935 France 219/438

Primary Examiner—Volodymyr Y. Mayewsky
Attorney, Agent, or Firm—Lowe, Kokjer & Kircher

[57] **ABSTRACT**

An electrically heated cooking utensil has a removable ceramic cup-shaped vessel for holding foodstuff. The ceramic vessel is retained in operative position by a metallic bowl shaped wall located interiorly of the cooking utensil. Electrically resistive heater wire is spiralled around the outwardly facing side of the retaining wall, within the channeled grooves of an adjacently attached compressive mounting unit. The mounting unit is held in place along the perimeter of the retaining structure by a spring in such a manner that automatic tension compensation is provided for in response to thermal expansion and contractions. The heater wires are encapsulated by glass fiber insulation thereby achieving electrical isolation.

2 Claims, 3 Drawing Figures



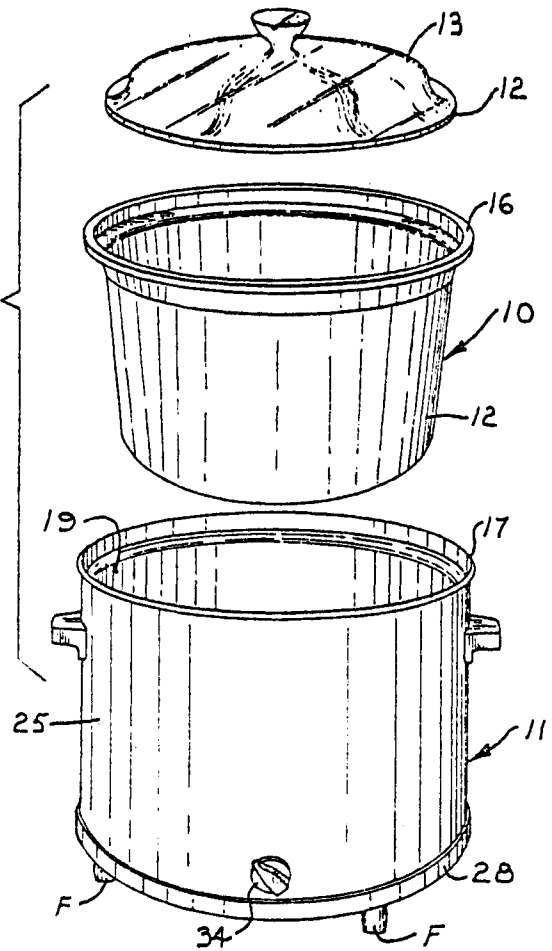


Fig. 1.

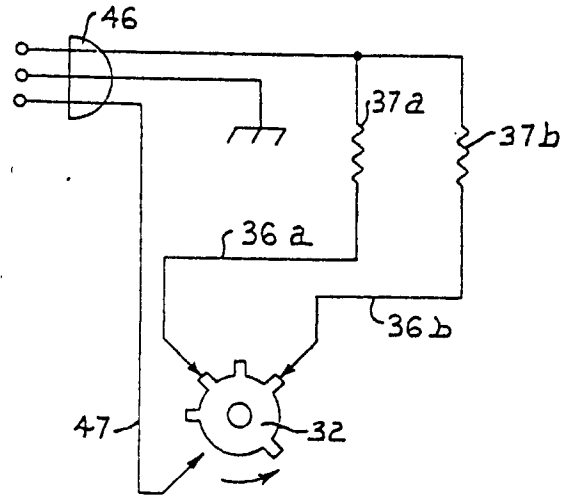


Fig. 3.

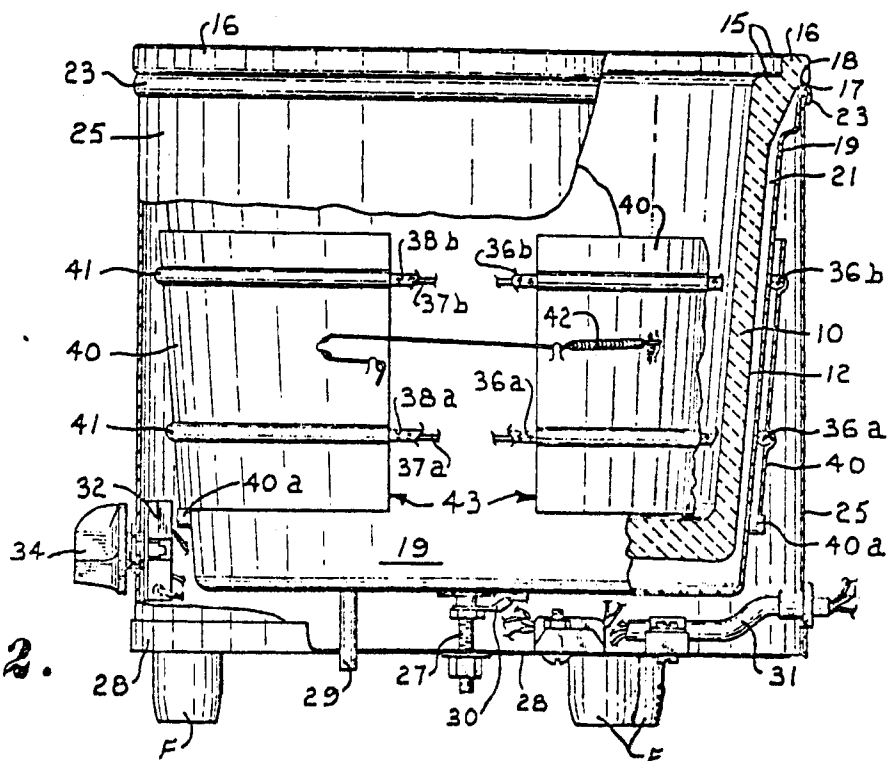


Fig. 2.

ELECTRIC COOKING UTENSIL HAVING A REMOVABLE CERAMIC VESSEL

BACKGROUND AND BRIEF DESCRIPTION OF THE INVENTION

Electric cooking utensils having heater wire wrapped about the outside of a vessel for the heating of food-stuffs contained therein are well known in the art. However, these devices are subject to various deficiencies.

If the ceramic utensil were to break it is possible that the user thereof could sustain serious electrical shocks if the foodstuff were to contact the "hot" electrical wiring. It is possible that even a small unseen crack in the ceramic or earthenware container may allow enough seepage of liquid foodstuffs to create a dangerous electrical shock hazard.

Accordingly, it is a primary object of the subject invention to eliminate or reduce the potential electrical shock hazard in a non-thermostatically controlled electric cooking utensil which normally results when the earthenware vessel breaks. The heater wires are encased in a separate metallic wall which is separate from the earthenware vessel. The metallic wall is electrically insulated, and if the vessel were to break or develop a small unseen crack, resultant liquid seepage would not result in a shock hazard. In fact, with the subject invention, the liquid is precluded from entirely contacting the heater wires. This feature is further enhanced by a substantially liquid proof seal that is formed by the upper portion of the inner metallic container and the wall of the outer container of the utensil.

In the prior art, thermally induced expansions and contractions of the heater wires will promote the susceptibility of the earthenware vessel to cracking or deteriorating, because of the physical contact of the wire. Also, since the wire is glued or otherwise fixedly attached to the earthenware vessel, expansions or contractions of the wire itself may ultimately result in a deterioration of the heater circuit as the wire consequently may break or become loose.

It is a further object of the subject invention to avoid the preceding difficulties through the utilization of a unique heater wire attachment means. As mentioned previously, the heater wires are not wound around the earthenware vessel, so that the vessel itself will not be subject to the strains of expansions or contractions thereof. The wires are encapsulated by glass fiber insulation and are held in place about the outer surface of the separate metallic wall within the grooves in an independent mounting unit. A spring connects the ends of the heater wire mounting unit so as to compensate for expansions and contractions. Varying spring tension thus insures that the wires will adjustably be held within the circumferential grooves of the mounting unit.

Another object of the subject device is to provide an electric cooking utensil having an earthenware vessel which may easily be washed and cleaned. Since no wires are attached to the earthenware vessel removability is allowed and washing may thus be accomplished by completely immersing the earthenware vessel in water. The vessel itself is completely waterproof since it is glazed on both sides. Prior art devices are not immersible in water because damage to the electrical circuitry would likely occur, and cleaning of the cooking surfaces thus becomes difficult.

It is yet another object of the subject invention to provide an electric cooking utensil having an easily re-

placeable earthenware vessel. If the cooking vessel should break no damage will occur to the heater, and the user may simply insert a replacement vessel. In prior art devices however, breakage of the earthenware vessel will necessitate expensive and time consuming factory repair. This is avoided by the aforementioned construction.

It is yet another object of the subject invention to provide an electric slow cooking utensil in which the possibility of the contents thereof being inadvertently burned is substantially minimized. In prior art devices having the heater wires attached directly to the exterior surface of the cooking vessel "hot spots" will develop along the heater wire region. Food contacting these areas may be burned under certain conditions. In the subject invention the heater wires are attached to a separate metallic wall. Between the other side of this metallic wall and the outer surface of the earthenware cooking vessel is an air pocket or chamber, which facilitates the uniform distribution of heat to the vessel. The vessel is thus uniformly heated and hot spots which may operate to burn the contents thereof are avoided.

It is yet another object to provide an electric slow cooking non-thermostatically controlled utensil which is particularly suited for the slow cooking of foodstuffs. The utilization of the aforementioned construction in which an air pocket or chamber operates to uniformly distribute heat is particularly suited to slow cooking applications. Slow cooking operations are particularly vulnerable to burning from "hot spots", which, as mentioned, are eliminated in the subject design.

Other and further objects of the invention, together with the features of novelty appurtenant thereto, will appear in the course of the following description.

DETAILED DESCRIPTION OF THE INVENTION

In the accompanying drawings which form a part of the specification and are to be read in conjunction therewith, and in which like reference numerals are employed to indicate like parts in the various views:

FIG. 1 is an exploded view of the device showing the top, the earthenware vessel, and the enclosure means;

FIG. 2 is a sectional and fragmentary view of the cooking utensil; and

FIG. 3 is a schematic diagram of the electrical wiring utilized by the subject device.

In FIG. 1, numeral 10 depicts a glazed earthenware cooking vessel that removably fits within the metallic shell (or outer container) structure 11 and which has a lid 13 removably located thereon. The outer edge 12 of the lid will engage circumferential inner surfaces 15 of lip structure 16 in vessel 10, thereby locating the lid. A bowl shaped metallic inner container 19 is positioned within the shell 11 with its upper circumferential edge 17 contacting the outside circumferential edge 18 on the underside of lip 16 on vessel 10. In this manner vessel 10 is located and retained within the metallic shell 11. It is significant to note that the only physical connection between the vessel 10 and the shell 11 occurs at the interface of edges 17 and 18 and that elsewhere an inner air chamber 21 (FIG. 2) separate wall 19 from the earthenware vessel.

As seen in FIG. 2, inner container 19 has an upper portion 23 that is crimped around the top of shell wall 25 to hold container 19 in place. This crimped portion also precludes liquid from entering the area where the later described heater wires are located during the nor-

mal and expected use of the utensil. Bolt 27 depends from the bottom of the inner container 19 and serves to further retain same by its connection to shell bottom 28. Pin 29 extends from the bottom of container 19 through wall 28 to thereby prevent container 19 from rotating with respect to shell 11. Bolt 27 also has solderless connector 30 mounted therethrough which facilitates the grounding of metallic structure 19 and the metal shell walls 28 and 25 to further significantly reduce electrical shock hazards. Finally, feet F support the entire unit in the usual manner.

Electrical current enters the device through cable 31, and is delivered via switch 32 to one or both of the heater wires, which are generally indicated at 36a and 36b. The rotary knob 34 actually facilitates the switching operation as indicated in FIG. 3. The heater wires are comprised of electrically resistive conductors 37a and 37b which are encapsulated by vinyl or silicone insulation 38a and 38b. The heater wires are located exteriorly of the substantially vertical wall of container 19 within grooves 41 which form a portion of the generally cylindrical heater wire mounting unit 40. This heater wire mounting unit serves to compressively retain and locate the wires against the side wall of the container 19.

It is to be noted that the disclosed construction is facilitated by the utilization of suitably insulated heater wire such as that which is commercially available from Springfield Wire, Inc., of Springfield, Mass., and which is described in a Sale Bulletin entitled "Springfield Wire," and printed in the U.S.A. in Oct., 1969.

Heater wire mounting unit 40 does not extend completely around the circumference of container 19. A spring 42 extends through the gap 43 between the ends of the mounting unit and holds same in place by the exertion of pressure. Also, the lower edge of unit 40 rests upon pins 40a which extend horizontally from container 19. This construction enables the mounting unit to compensate for thermally induced expansion of the heater wires and container 19 since the spring 42 will expand when necessary and at the same time maintain sufficient pressure on the mounting unit to insure appropriate heater wire position. If the heater wires were simply glued to the surface of wall 19, for example, thermal expansion could destroy the glued interface, ultimately causing the heater wires to detach and fall toward the inner bottom of the cooking utensil.

In operation, heat generated by the heater wires is conducted by adjacent wall 19 into the inner chamber 21. This causes a mass of hot air of substantially uniform temperature to contact the surface 12 of the earthenware vessel 10, and heat is conducted there-through to accomplish the cooking of foodstuffs within the vessel.

It is to be noted that the utilization of the air pocket virtually eliminates the hot spots which are characteristic of devices having heater wires attached directly to the cooking vessel. Since the construction as shown lessens the likelihood of hot spot burning of foodstuffs, it is particularly adapted for slow cooking operations.

The circuit as shown in FIG. 3 discloses the electrical circuitry utilized in the subject device. The center conductor of plug 46 is grounded as shown to the metallic inner container to guard against shock hazards. When switch 32 is rotated counterclockwise one position, wire 47 will be electrically connected to heater wire 36a thereby generating heat in the distributed resis-

tance 37a. When rotated an additional position, wires 36a and 36b will both be electrically connected to conductor 47 and both heater elements will be working. The latter position corresponds to the "high" setting of switch 34.

From the foregoing, it will be seen that this invention is one well adapted to attain all of the ends and objects hereinabove set forth together with other advantages which are obvious and which are inherent to the structure.

It will be understood that certain features and sub-combinations are of utility and may be employed without reference to other features and sub-combinations.

As many possible embodiments may be made of the invention without departing from the scope thereof, it is to be understood that all matter herein set forth or shown in the accompanying drawings is to be interpreted as illustrative and not in a limiting sense.

Having thus described my invention, I claim:

1. An electric non-thermostatically controlled cooking utensil for slow cooking or warming food, said utensil including a vessel comprised of ceramic or earthenware material, said vessel having an annular lip located at the upper end portion thereof and extending radially outwardly therefrom, said vessel further including a generally cylindrical side wall integrally formed with said lip and a bottom wall,

an inner container constructed of material having the ability to conduct heat and having a shape similar to said vessel and sized to permit at least a portion of said vessel to be received within said inner container, the inner container being substantially separated from said vessel by an air chamber located therebetween,

at least one electric heating element operable to supply heat to the utensil contents by heating said inner container, said inner chamber and said vessel, said heating element encircling said inner container and being attached to the exterior surface of said inner container and electrically insulated therefrom,

an outer container being of a size and shape to hold substantially all of said inner container and said vessel therein, said inner container having an upper end portion forming a seal with said outer container, said seal thereby precluding liquid located interiorly of said vessel from reaching said electric heating element while pouring out the contents of said vessel or in the event of said vessel becoming cracked or broken, said lip of said vessel contacting said seal and supporting substantially the entire weight of said vessel thereon in spaced relationship from said inner container so that neither said side wall nor said bottom contacts said inner container, said vessel structure including said lip permitting said vessel to be easily removed from said container without removing any other portions of the utensil or using special tools,

attaching means for securing and attaching said heating element to the exterior surface of said inner container, and

electric lead means for applying electric current to said electric heating element thereby effecting the heating of said heating element.

2. The combination as in claim 1 wherein said heating element attaching means includes a cylindrical mounting having a circumference less than said inner container, the mounting unit having ends connected by a spring member, said spring member operable to resiliently secure and locate the mounting unit on said inner container while at the same time compensating for thermally induced expansions or contractions of said mounting unit.

* * * * *

APPENDIX B

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

U.S. INTL. TRADE COMMISSION

In the Matter of)
CERTAIN ELECTRIC SLOW COOKERS)

Investigation No. 337-TA-42

COMMISSION OPINION IN SUPPORT OF ORDERS TERMINATING
CERTAIN RESPONDENTS, DECLARING THIS MATTER
MORE COMPLICATED, AND REMANDING THIS
MATTER FOR FURTHER PROCEEDINGS

Procedural History

This investigation was instituted pursuant to section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337). Notice of institution of the investigation was published in the Federal Register on February 9, 1978 (43 F.R. 5590). The complainant named in the notice was Rival Manufacturing Company (hereinafter complainant). The respondents named in the same notice were Sanyei Corporation, Sanyei New York Corporation, NGK Insulators, Ltd. (also known as Nippon Gaishi Mfg., Ltd.), and Kusumi Electric Mfg. Co., Ltd. (hereinafter collectively referred to as Sanyei); Lakewood Manufacturing Company (hereinafter Lakewood); Imarflex Manufacturing Company, Ltd. (also known as Imanishi Flexible Tube Manufacturing Company, Ltd.) (hereinafter Imarflex); H & H Manufacturing Company (hereinafter H & H Japan); H & H Appliances (hereinafter H & H USA); and Electrical and Electronics, Ltd. (hereinafter E & E). On September 12, 1978, the presiding officer recommended

termination of Sanyei as respondents on the basis that there was no past or current violation of section 337 by them. On that same date, the presiding officer also recommended termination of Lakewood and Imarflex as respondents on the basis that there was no current violation of section 337 by them.

The presiding officer, in his recommended determination of September 12, 1978, entered a finding of default under Commission rule 210.21(d) (19 CFR 210.21(d)) against H & H Japan, H & H USA, and E & E by reason of their failure to respond to the complaint. The complaint had been served upon H & H Japan and E & E by certified mail on February 7, 1978, and on H & H USA by certified mail on February 23, 1978. None of the respondents filed answers to the complaint, participated in this proceeding, or responded to this motion for default. The presiding officer further recommended in his recommended determination and addendum thereto (October 20, 1978) that the Commission determine that there was a violation by H & H Japan, H & H USA, and E & E because of the importation and sale by them of articles meeting the claims of U.S. Letters Patent No. 3,881,090, without license of the patent owner, the effect or tendency of which is to substantially injure an industry, efficiently and economically operated, in the United States.

No exceptions were filed with respect to the recommended determination or the addendum thereto. The Commission in its notice of Commission procedure of December 8, 1978 (43 F.R. 58232, Dec. 13, 1978) set dates for making submissions with respect to the recommended determination, but none were made except by complainant and the Commission investigative attorney who supported the recommended determination and the addendum. At the same time, the

Commission asked for comment on the remedy, public-interest factors, and bonding. Only the complainant and the Commission investigative attorney submitted comments on these matters, and they proposed an exclusion order arguing that such relief would not be adverse to the public interest.

The presiding officer in making his recommended determination and addendum thereto stated that "the mere entry of a default for non-appearance does not obviate the need for an affirmative showing to support a finding of violation of Section 337" (recommended determination, at 4). The presiding officer relied on his findings of fact and conclusions of law to recommend that H & H Japan, H & H USA, and E & E be found in violation of section 337. The presiding officer concluded that the Commission has jurisdiction over these respondents 1/ and found that they manufacture, export, and/or import infringing electric slow cookers; 2/ that complainant's sales of patented electric slow cookers have declined since 1975; 3/ that a substantial number of infringing electric slow cookers have been imported into the United States; 4/ and that foreign manufacturers have the capacity and know-how to produce substantial numbers of infringing slow cookers. 5/

We, however, do not find that a sufficient record has been developed to support a determination on the issue of violation. Our reasons are set out below. 6/

1/ Recommended determination as amended, at 10; conclusions of law No. 1.

2/ Id., at 7; findings of fact Nos. 3, 4, 5, and 15, respectively.

3/ Id., at 9, No. 16.

4/ Id., No. 17.

5/ Id., No. 18.

6/ At 7-9, infra.

Determination

Upon consideration of the presiding officer's recommended determination and the record in this proceeding, we grant the motion to terminate Sanyei as respondents (Motion No. 42-1) and the motion to terminate Lakewood and Imarflex as respondents (Motion No. 42-4).

Upon consideration of the presiding officer's recommended determination, the addendum thereto, and the record, we remand the investigation to the presiding officer and declare the case more complicated. The case is remanded for further development of the record concerning the issue of violation and for a new recommended determination to be issued not later than 90 days after the date these orders are issued. 7/ The respondents remaining in the investigation are H & H Japan, H & H USA, and E & E.

Discussion as to Termination of Certain Respondents

The record in connection with the motions for termination (Motion Nos. 42-1 and 42-4), including the presiding officer's recommendations to terminate Sanyei, Lakewood, and Imarflex as respondents, clearly supports their termination. For the reasons set forth in the presiding officer's opinion which we now adopt, we have granted these motions.

Discussion of the Recommended Determination Regarding H & H Japan, H & H USA, and E & E

Under the Commission rules, the granting of a motion for default does not determine the merits of the violation issue. Rule 210.21, "The response" (19

7/ Notice of and Orders for Terminating Certain Respondents and Action Regarding Recommended Determination of the Presiding Officer in the Matter of Certain Electric Slow Cookers, Investigation No. 337-TA-42, issued Feb. 9, 1979. See 44 F.R. 10136 (Feb. 16, 1979).

CFR 210.21), provides in subsection (d) the following:

(d) Default. Failure of a respondent to file a response within the time provided for in subsection (a) of this section may be deemed to constitute a waiver of its right to appear and contest the allegations of the complaint and of the notice of investigations, and to authorize the presiding officer, without further notice to that respondent, to find the facts to be as alleged in the complaint and notice of investigation and to enter a recommended determination (or a determination if the Commission is the presiding officer) containing such findings.

In view of the failure of H & H Japan, H & H USA, and E & E to file a response in this proceeding, rule 210.21(d) authorizes (but does not require) two actions by the presiding officer. First, he may deem the failure to constitute a waiver of their "right to appear and contest the allegations of the complaint and of the notice of investigation." This he did by his order granting default (recommended determination, order 8, Sept. 12, 1978), which is within the power of the presiding officer. Second, the presiding officer, upon the failure of these respondents to file answers, is authorized "to find the facts to be as alleged in the complaint and notice of investigation and to enter a recommended determination containing such findings." The presiding officer did find the facts to be as alleged and recommended a finding of violation of section 337 based on the record. We, however, do not think the record sufficiently developed to make a determination on the issue of violation. 8/

1. Motion for default.

The granting of a motion for default does not automatically result in a finding of violation, even if the presiding officer does find the facts to be

8/ For a full discussion of the deficiencies of the record, see pp. 7-9, infra.

as alleged in the complaint and notice of investigation. Commission rule 210.53, "Recommended determination" (19 CFR 210.53), indicates that when the presiding officer makes his findings of fact and draws his conclusions of law, such action is merely a recommendation. Under the Administrative Procedure Act (to which section 337 proceedings are subject), such a recommendation must be based upon "reliable, probative, and substantial evidence." 5 U.S.C. 556(d). Rule 210.53 provides that a recommended determination shall be filed with the Commission within 30 days after a finding that a party is in default. Under rule 210.52, "Proposed findings and conclusions" (19 CFR 210.52), when it is found that a party is in default "any party may file proposed findings of fact and conclusions of law, together with reasons therefor and, when appropriate, briefs in support thereof with the presiding officer for his consideration." This opportunity is important to the party seeking affirmative relief under circumstances of default, since the recommended determination under rule 210.53 must "include a statement of findings (with specific page references to principal supporting items of evidence in the record) and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record."

Therefore, the effect of a finding of default is to authorize the presiding officer to create certain procedural disabilities for the defaulting party and to entertain, without opposition, proposed findings and conclusions, based upon substantial, reliable, and probative evidence, which would support a recommended determination.

However, the recommended determination is not required to be affirmative, nor is any complainant permitted by the rules to rely solely upon the allegations of its complaint to support an affirmative determination.^{9/}

2. The issue of violation.

The policy behind rule 210.21(d) which we have described above is that notwithstanding the failure of a respondent to participate, an affirmative order of this agency may not issue except when the Commission determines that there is a violation of the statute. Where the Commission determination results in affirmative relief, it must be supported by "reliable, probative, or substantial evidence." 5 U.S.C. 556(d). After a motion for default has been granted, an evidentiary hearing may become nonessential. The evidence may then be presented by the complainant through affidavits and exhibits.

In this investigation, the infringement of complainant's patent, the importation and sale of an infringing article, and causation of injury to the complainant have not been demonstrated to our satisfaction by reliable, probative, and substantial evidence. Complainant has alleged solely on the basis of information, belief, or understanding^{10/} that H & H Japan, H & H USA, and E & E manufacture, export, or import infringing slow cookers. There

^{9/} Complainant in this investigation did not, in fact, rely exclusively upon the allegations of its complaint, which are under oath and are, in some cases, based on information and belief rather than knowledge, to support its motion for "default judgment." Rather, it submitted additional supporting information with the motion and, furthermore, at the order of the presiding officer which left the record open for augmented submissions, did supplement this information.

^{10/} See, for example, Complaint, at 11 and 14-15; Affidavit of Breeden accompanying Motion No. 42-3, at 2-3.

are no exhibits which sufficiently show that the items allegedly imported do indeed infringe complainant's patent. There are no statistics which clearly demonstrate that infringing articles were imported by the respondents in question or, if they were, in what amounts. 11/ There is little in the record, other than information, belief, and understanding, to support the allegation that the decline in sales of complainant's Crock-Pots was due to the sale to complainant's customers of infringing articles by the respondents. 12/ It is therefore evident that, on the basis of this record, there is not sufficient, substantial, reliable, and probative evidence of record, even taking into account complainant's affidavits, to support a determination.

The record suggests that some confusion on the part of the complainant existed about the burden that remained to it after the finding of default was entered. We are concerned, therefore, that complainant may not have realized the full extent of its burden and may not have presented information that might be probative of an affirmative determination. Additionally, it may be that this information was particularly difficult to obtain and that, misunderstanding our rule, complainant and/or the Commission investigative attorney did not choose to make the efforts that might have been necessary to

11/ The statistics from the Journal of Commerce which show electric slow cookers imported by H & H USA do not show that those articles were infringing articles. The letters attached to the Augmented Submissions (filed Sept. 25, 1978) show only that the items imported by E & E infringed a Sanyei trademark, not that those articles infringed Rival's patent. There are no statistics which show that H & H Japan exported infringing electric slow cookers to the United States.

12/ See affidavit accompanying Motion No. 42-3, at 2-3.

obtain this additional information. 13/ In either situation, in order to achieve a result which works substantial justice, we have decided to remand the investigation to the presiding officer in order to allow the parties the opportunity to make a more complete record.

No evidence, such as physical samples of an infringing electric cooker, claim charts clearly showing patent infringement by the respondents in question, customs invoices showing importation and sale of infringing electric slow cookers by the respondents, and affidavits of former customers which establish that they purchased infringing electric slow cookers from respondents rather than Crock-Pots from complainant, was submitted to develop

13/ The Commission has created an investigative service, the Office of Legal Services staffed by investigative attorneys, to carry out such investigation as is necessary or proper to demonstrate facts which the parties are unable or unwilling to bring forward to the Commission's attention. It may be that information which would support an affirmative determination in this investigation cannot completely be produced by the complainant, but could be obtained through the use of subpoenas and other discovery means by the Commission investigative attorney. In that instance, of course, the Commission investigative attorney will obtain and attempt to place in the record the information upon which a reasoned determination can be based. In the event such information cannot be obtained, the record should indicate that an attempt was made to obtain the information. These functions of the Commission investigative attorney are appropriate, since the statutory function of this agency is to act as an investigative body as well as a forum for the adjudication of private rights.

Commissioners Alberger and Stern note that noncooperation of respondents could, in some instances, be such a serious hindrance to the investigative function as to deny complainant an opportunity to prove a violation. In such cases the Commission might still make a finding of violation if (1) all reasonable efforts have been made to obtain probative evidence, (2) it is clear that the missing evidence is exclusively within the control of noncomplying respondents, and (3) the evidence obtained indicates violation. To deny complainants relief under such circumstances would be to make noncompliance an attractive course of conduct. It should be noted that the Commission's sanctions, rule 210.36 (19 CFR 210.36) is intended to deal with this entire problem.

a record on which a determination can be made. Additionally, the record does not include substantial, reliable, and probative evidence which indicates the legal relationship, if any, between H & H Japan and H & H USA. Nor does the record include the most current data possible to show injury suffered by complainant.

3. Complicated nature of the investigation.


This proceeding has acquired an "involved nature owing to . . . difficulty in obtaining information" Rule 210.15 (19 CFR 210.15). Whether such difficulties arise from the uncertainty that might have inhered in our rule or an actual difficulty in obtaining this information, the fact is that difficulty exists to the extent that the investigation has become substantially more complicated than we or any of the parties originally anticipated. ^{14/} By declaring the investigation more complicated, the total life of the case is extended by 6 months. The Commission believes it is reasonable that the presiding officer would be able to complete whatever further taking of evidence is necessary and prepare a new recommended determination in 90 days. Under the circumstances this appears to us to be a reasonable allocation of the extended time in this investigation.

^{14/} Section 337 investigations are, by rule, subject to a statutory deadline and a number of internal deadlines, such as the time within which the presiding officer must complete a hearing and the time within which he must submit a recommended determination to the Commission. These internal deadlines are set in such a way that each phase of these proceedings receives the maximum amount of time allowable given the overall statutory deadline to arrive at a determination. However, when a case such as this one, for which there was a statutory deadline of Feb. 9, 1979, develops complexities in its later stages, a remand to the presiding officer may be necessary to do substantial justice.

Conclusions

For the foregoing reasons, we have ordered that the parties recommended for termination in Motions Nos. 42-1 and 42-4 be terminated and that the remainder of this proceeding be remanded to the presiding officer in order to allow time, but not more than 90 days, for more fully developing the record and issuing a new recommended determination. We have also determined that this case is more complicated and have published the reasons for that determination in the Federal Register. 15/

By order of the Commission.


Kenneth R. Mason
Secretary

Issued: *March 15, 1979.*

15/ 44 F.R. 10136 (Feb. 16, 1979).

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