

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

In the Matter of

**CERTAIN SUCRALOSE, SWEETENERS
CONTAINING SUCRALOSE, AND
RELATED INTERMEDIATE
COMPOUNDS THEREOF**

Investigation No. 337-TA-604

**NOTICE OF COMMISSION DETERMINATION TO REVIEW A FINAL INITIAL
DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review the final initial determination (“ID”) of the presiding administrative law judge (“ALJ”) in the above-captioned investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (“section 337”). The ALJ found no violation of section 337 except with respect to certain non-participating and defaulted respondents.

FOR FURTHER INFORMATION CONTACT: James A. Worth, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3065. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.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 May 10, 2007, based upon a complaint filed on behalf of Tate & Lyle Technology Ltd. of London, United Kingdom, and Tate & Lyle Sucralose, Inc. of Decatur, Illinois (collectively, “Tate & Lyle”). The complaint alleged violations of section 337(a)(1)(B) of the Tariff Act of 1930 (19 U.S.C. § 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of sucralose, sweeteners containing sucralose, and related intermediate compounds thereof by reason of infringement of various claims of United States Patent Nos. 4,980,463 (“the ‘463 patent”); 5,470,969 (“the ‘969 patent”); 5,034,551 (“the ‘551 patent”); 5,498,709; and 7,049,435. The notice of investigation named twenty-five respondents.

On August 15, 2007, the Commission issued notice of its determination not to review an ID allowing JK Sucralose, Inc. to intervene as a respondent to the investigation. On August 30, 2007, the Commission issued notice of its determination not to review an ID terminating the investigation with respect to ProFood International Inc. on the basis of a consent order. On October 3, 2007, the Commission issued notice of its determination not to review an ID adding Heartland Sweeteners, LLC as a respondent to the investigation.

On September 22, 2008, the presiding administrative law judge issued a final initial determination (“final ID”) finding no violation of section 337 in the above-identified investigation (with the exception of certain non-participating and defaulted respondents).

On October 6, 2008, Tate & Lyle, four sets of respondents, and the Commission investigative each filed a petition for review. On October 14, 2008, each filed a response.

Having examined the final ID, the petitions for review, the responses thereto, and the relevant portions of the record in this investigation, the Commission has determined to review the final ID in its entirety.

The Commission requests briefing based on the evidentiary record on the issues on review. The Commission is particularly interested in responses to the following questions:

- (1) Regarding the issue of whether 19 U.S.C. § 1337(a)(1)(B)(ii) extends to the ‘551, ‘969, and ‘463 patents: Is this issue a matter of jurisdiction or does it go to the merits of whether there is a violation of section 337? Does the exclusion order in the investigation which was the subject of *In re Northern Pigment Co.*, 71 F.2d 447, 22 CCPA 166 (1934) suggest that § 1337(a)(1)(B)(ii) has the same scope as 35 U.S.C. § 271(g)?
- (2) Would a sucralose product containing the tin catalyst that is addressed by the process claimed in the ‘551 patent be safe for human consumption and otherwise salable as a commercial product? In your response, please include a discussion of the testimony of Dr. Fraser-Reid at page 1874 of the transcript.
- (3) Is there infringement of the asserted claims of the ‘463 patent under the doctrine of equivalents?
- (4) Was the presence of 1',6'-dichlorosucrose-6-ester necessary to distinguish the asserted claims of the ‘463 patent from the prior art? Is it necessary to interpret the phrase “in situ” in the Mufti reference in order to determine the validity of the ‘463 patent?
- (5) What proof would be necessary for Tate & Lyle to show infringement of the asserted claims of the ‘551 and ‘969 patents?

(6) Are the asserted claims of the '551 and '969 patents invalid for obviousness in light of the use of organic tin catalysts in the prior art?

In connection with the final disposition of this investigation, the Commission may issue (1) an 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 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 are likely to do so. For background information, see the Commission Opinion, *In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360.

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders 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 President has 60 days to approve or disapprove the Commission's action. During this period, the subject articles would be entitled to enter the United States under a bond, in an amount to be 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.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues under review. The submissions should be concise and thoroughly referenced to the record in this investigation, including references to exhibits and testimony. Additionally, the parties to the investigation, interested government agencies, and any other interested persons are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the ALJ's recommended determination on remedy and bonding. Complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is requested to supply the expiration dates of the patents at issue and the HTSUS numbers under which the accused products are imported. The written submissions and proposed remedial orders must be filed no later than the close of business on December 5, 2008. Reply submissions must be filed no later than the close of business on December 12, 2008. No further submissions will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file with the Office of the Secretary the original and 12 true copies thereof on or before the deadlines stated above. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 C.F.R § 201.6. Documents for which confidential treatment is granted by the Commission will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and under sections 210.42 - .46 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.42 - .46).

By order of the Commission.

/s/
William R. Bishop
Acting Secretary to the Commission

Issued: November 21, 2008