

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN SELF-ANCHORING BEVERAGE
CONTAINERS**

Investigation No. 337-TA-1092

**NOTICE OF A COMMISSION DETERMINATION TO REVIEW IN PART AN INITIAL
DETERMINATION GRANTING SUMMARY DETERMINATION OF A SECTION 337 VIOLATION;
SCHEDULE FOR FILING WRITTEN SUBMISSIONS**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review-in-part the presiding administrative law judge's initial determination (Order No. 15) granting summary determination that the defaulting respondents have violated section 337 in the above-captioned investigation. The Commission requests briefing from the parties, interested government agencies, and interested persons on the issues of remedy, the public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Clara Kuehn, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3012. 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 at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://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 January 8, 2018, based on a complaint, as amended, filed by Complainants Alfay Designs, Inc., of Rahway, New Jersey; Mighty Mug, Inc., of Rahway, New Jersey; and Harry Zimmerman of Los Angeles, California (collectively, "Complainants"). 83 FR 835-36 (Jan. 8, 2018). The amended complaint 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, and

the sale within the United States after importation of certain self-anchoring beverage containers by reason of infringement of certain claims of U.S. Patent Nos. 8,028,850 (“the ‘850 patent”) and 8,757,418 (“the ‘418 patent”), as well as U.S. Trademark Registration No. 4,191,803 (“the ‘803 trademark”). *Id.* The amended complaint further alleged that a domestic industry in the United States exists or is in the process of being established.

The notice of investigation named eight respondents: Telebrands, Corp. of Fairfield, New Jersey (“Telebrands”); HIRALIY of Guangzhou, Chin; Chekue, Shenzhen Chekue Trading Co. Ltd. of Shenzhen, China; Tapcet, Guangzhou Tinghui Trade Co., Ltd. of Guangzhou, China; OTELAS, MB of Klaipeda, Lithuania; and Artiart Limited of Taipei, Taiwan (collectively, the “Unserved Respondents”); and OUOH, Zhejiang OUOH Houseware Co., Ltd., of Wenzhou, China (“OUOH”), and DevBattles of Ternopil, Ukraine (“DevBattles”). *Id.* The notice of investigation also named the Office of Unfair Import Investigations (“OUII”) as a party to the investigation. *Id.* The Commission subsequently terminated the investigation with respect to Telebrands and the Unserved Respondents. *See* Order No. 8 (Feb. 16, 2018) (unreviewed Notice (Mar. 15, 2018)); Order No. 10 (Apr. 10, 2018) (unreviewed Notice (May 8, 2018)).

On May 3, 2018, the ALJ issued an ID (Order No. 11) finding in default the last two remaining respondents, OUOH and DevBattles (collectively, “the defaulting respondents”). The Commission determined not to review the ID. *Comm’n Notice* (June 1, 2018).

On May 25, 2018, Complainants filed a motion for summary determination that the defaulting respondents have sold for importation into the United States, imported into the United States, or sold after importation certain self-anchoring beverage containers that infringe certain claims of the ‘850 patent in violation of section 337. The motion also requested a recommendation for entry of a general exclusion order; the motion did not request cease and desist orders directed against either defaulting respondent.

On June 6, 2018, the ALJ issued an ID (Order No. 12), granting Complainants’ motion to withdraw all allegations based on the ‘803 trademark and the ‘418 patent. The Commission determined not to review the ID. *Comm’n Notice* (June 25, 2018).

On June 14, 2018, Complainants filed a supplement (“Supplement”) to their May 25, 2018, motion for summary determination. On the same day, OUII filed a response in support of Complainants’ motion.

On August 27, 2018, the ALJ issued the subject ID granting Complainants’ motion for summary determination. The ALJ found that the importation requirement is satisfied as to each defaulting respondent, that the accused products of each defaulting respondent infringe

claim 1 of the '850 patent, and that Complainants satisfied the domestic industry requirement. No petitions for review of the ID were filed. The ALJ recommended issuance of a general exclusion order and the imposition of a bond in the amount of 100% of the entered value of subject products during the period of Presidential review.

Having examined the record of this investigation, including the ID, the Commission has determined to review in part the ALJ's ID granting summary determination of a section 337 violation. Specifically, the Commission has determined to review the following findings: (1) the ID's findings on infringement to correct typographical errors, namely to modify a cross-reference "[f]or the foregoing reasons" at page 11 of the ID to "[f]or the following reasons" and to modify a citation to "Mot. Ex. 3 at Attachments 1 (OUOH) and 6 (DevBattles)" at page 11 of the ID to "Mot. Ex. 3 at Attachments 3 (OUOH) and 6 (DevBattles)", and to strike the sentence at page 11 of the ID that refers to claim charts attached to the Amended Complaint ("Complainants also attached claim charts to the Amended Complaint . . . of the patent. (Compl Exh. 38 at 13-15 (OUOH), 16-18 (DevBattles).)"); (2) the ID's findings on importation, and on review, (a) affirm the ID's finding on importation as to defaulting respondent OUOH on the modified ground that Complainants have established by substantial, reliable, and probative evidence that the importation requirement of section 337 is satisfied with respect to defaulting respondent OUOH and (b) take no position on whether Complainants have established by substantial, reliable, and probative evidence the importation requirement as to defaulting respondent DevBattles; and (3) the ID's findings on the economic prong of the domestic industry, and on review, affirm the ID's finding of the existence of a domestic industry under subsection 337(a)(3)(B), and to take no position on whether a domestic industry exists under subsections 337(a)(3)(A) or (C).

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue a cease and desist order that could result in the respondent 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 (December 1994). In addition, if a party seeks issuance of any cease and desist orders, the written submissions should address that request in the context of recent Commission opinions, including those in *Certain Arrowheads with Deploying Blades and*

Components Thereof and Packaging Therefor, Inv. No. 337-TA-977, Comm'n Op. (Apr. 28, 2017) and *Certain Electric Skin Care Devices, Brushes and Chargers Therefor, and Kits Containing the Same*, Inv. No. 337-TA-959, Comm'n Op. (Feb. 13, 2017). Specifically, if Complainants seek a cease and desist order against a defaulting respondent, the written submissions should respond to the following requests:

1. Please identify with citations to the record any information regarding commercially significant inventory in the United States as to each respondent against whom a cease and desist order is sought. If Complainants also rely on other significant domestic operations that could undercut the remedy provided by an exclusion order, please identify with citations to the record such information as to each respondent against whom a cease and desist order is sought.
2. In relation to the infringing products, please identify any information in the record, including allegations in the pleadings, that addresses the existence of any domestic inventory, any domestic operations, or any sales-related activity directed at the United States for each respondent against whom a cease and desist order is sought.

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 U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. 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.

Complainants and OUII are also requested to submit proposed remedial orders for the Commission's consideration. Complainants are also requested to state the date that the asserted patent expires, the HTSUS numbers 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 written submissions and proposed remedial orders must be filed no later than close of business on October 22, 2018. Reply submissions must be filed no later than the close of business on October 29, 2018. 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 and submit eight true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number (Inv. No. 337-TA-1092) in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, https://www.usitc.gov/secretary/documents/handbook_on_filing_procedures.pdf). Persons with questions regarding filing should contact the Secretary at (202) 205-2000.

Any person desiring to submit a document 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 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 personnel¹, solely for cybersecurity purposes. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

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.

¹ All contract personnel will sign appropriate nondisclosure agreements.

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: October 5, 2018