

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN PUMPING BRAS

Investigation No. 337-TA-988

**NOTICE OF COMMISSION DETERMINATION TO REVIEW IN-PART AN INITIAL
DETERMINATION GRANTING COMPLAINANT’S MOTION FOR SUMMARY
DETERMINATION OF SECTION 337 VIOLATION BY DEFAULTED RESPONDENTS**

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 an initial determination (“ID”) (Order No. 11) of the presiding administrative law judge (“ALJ”) granting Complainant’s motion for summary determination of section 337 violation by Respondents found in default. On review, the Commission has determined to modify the ID to set aside the expenses relating to Complainant’s patent and trademark prosecution and maintenance in the ID’s domestic industry analysis. The Commission has determined not to review the remainder of the ID. The Commission’s determination results in a determination of a violation of section 337. Accordingly, the Commission requests written submissions, under the schedule set forth below, on remedy, the public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708-4716. 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 SW., 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 Investigation No. 337-TA-988 on March 14, 2016, based on a complaint filed by Complainant Simple Wishes, LLC (“Simple Wishes”) of Sacramento, California. *See* 81 FR 13419-20 (Mar. 14, 2016). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), based upon the importation into the United States, the sale for importation, and/or the sale within the United States after importation of certain pumping bras by reason of infringement of certain claims of U.S. Patent No. 8,323,070 (“the ’070 patent”) and U.S. Patent No. 8,192,247 (“the ’247 patent”). *Id.* The notice of investigation identified TANZKY of Luohugu, China;

BabyPreg of Shenzhen Guangdong, China; Deal Perfect of Shenzhen Guangdong, China; and Buywish of Nanjing Jiangsu, China, as respondents in this investigation. *Id.* The Office of Unfair Import Investigations is also a party to this investigation. *Id.* Respondent Buywish was subsequently terminated from the investigation. *See Certain Pumping Bras*, USITC Inv. No. 337-TA-988, Comm'n Notice (Aug. 9, 2016). As a result, the '247 patent which was asserted against Respondent Buywish only, is no longer at issue in this investigation. *See ID* at 4 n.1.

On May 12, 2016, Complainant Simple Wishes filed a motion for an order to show cause and for entry of default against Respondents TANZKY, BabyPreg, and Deal Perfect (collectively, "the Defaulting Respondents") for failure to respond to the complaint and notice of investigation. On May 19, 2016, the Commission Investigative Attorney ("IA") filed a response in support of Complainant's motion. On June 22, 2016, the ALJ issued an initial determination granting Complainant's motion and finding TANZKY, BabyPreg, and Deal Perfect in default (Order No. 8). On July 8, 2016, the Commission determined not to review Order No. 8. *See Certain Pumping Bras*, USITC Inv. No. 337-TA-988, Comm'n Notice (July 8, 2016).

On August 30, 2016, Complainant Simple Wishes filed a motion for summary determination on domestic industry and violation of section 337 by the Defaulting Respondents. In addition, Complainant Simple Wishes requested a recommended determination for the Commission to issue a general exclusion order and to set a bond at 100 percent. On September 9, 2016, the IA filed a response in support of Complainant's motion and requested remedy.

On October 31, 2016, the ALJ issued the subject ID (Order No. 11) granting Complainant's motion for summary determination on domestic industry and violation of section 337 by the Defaulting Respondents and recommending that the Commission issue a general exclusion order and set a bond at 100 percent. *See Certain Pumping Bras*, USITC Inv. No. 337-TA-988, Order No. 11 (Oct. 31, 2016).

On November 7, 2016, the IA filed a petition for a limited review of the ID with respect to the ID's consideration of Complainant's expenses relating to patent and trademark prosecution and maintenance in its domestic industry analysis under 19 U.S.C. § 1337(a)(3)(C). Complainant did not file a response to the IA's petition.

The Commission has determined to review the ID and on review, to modify the ID in-part to set aside the expenses relating to Complainant's patent and trademark prosecution and maintenance in the domestic industry analysis. As recognized in *Certain Video Game Systems and Controllers*, patent prosecution activities rarely qualify as investments under section 337(a)(3)(C). *See Certain Video Game Systems and Controllers*, Inv. No. 337-TA-743, Comm'n Op., 2011 WL 1523774, *5 (Apr. 14, 2011). Rather, such activities are typically a step towards patent ownership and are insufficient to constitute exploitation of the patent under section 337(a)(3)(C). *See id.*; 19 U.S.C. § 1337(a)(3)(C). Complainant made no showing that its patent and trademark prosecution and maintenance expenses are related to engineering, research and development, or licensing, or that such expenses otherwise qualify under 19 U.S.C. § 1337(a)(3)(C).

The Commission has determined not to review the remainder of the ID.

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 one or more cease and desist orders that could result in the respondent(s) 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 (Dec. 1994) (Comm'n Op.).

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. Complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the HTSUS numbers under which the accused products are imported and the expiration date of the '070 patent. The Complainant is also requested to supply the names of all known importers of the products at issue in this investigation.

Written submissions must be filed no later than close of business on January 4, 2017. Reply submissions must be filed no later than the close of business on January 11, 2017. Such submissions should address the ALJ's recommended determinations on remedy and bonding which were made in Order No. 11. No further submissions on any of 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 (8) 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-988") in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, https://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel^[1], solely for cybersecurity purposes. All nonconfidential 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).

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: December 14, 2016

^[1] All contract personnel will sign appropriate nondisclosure agreements.