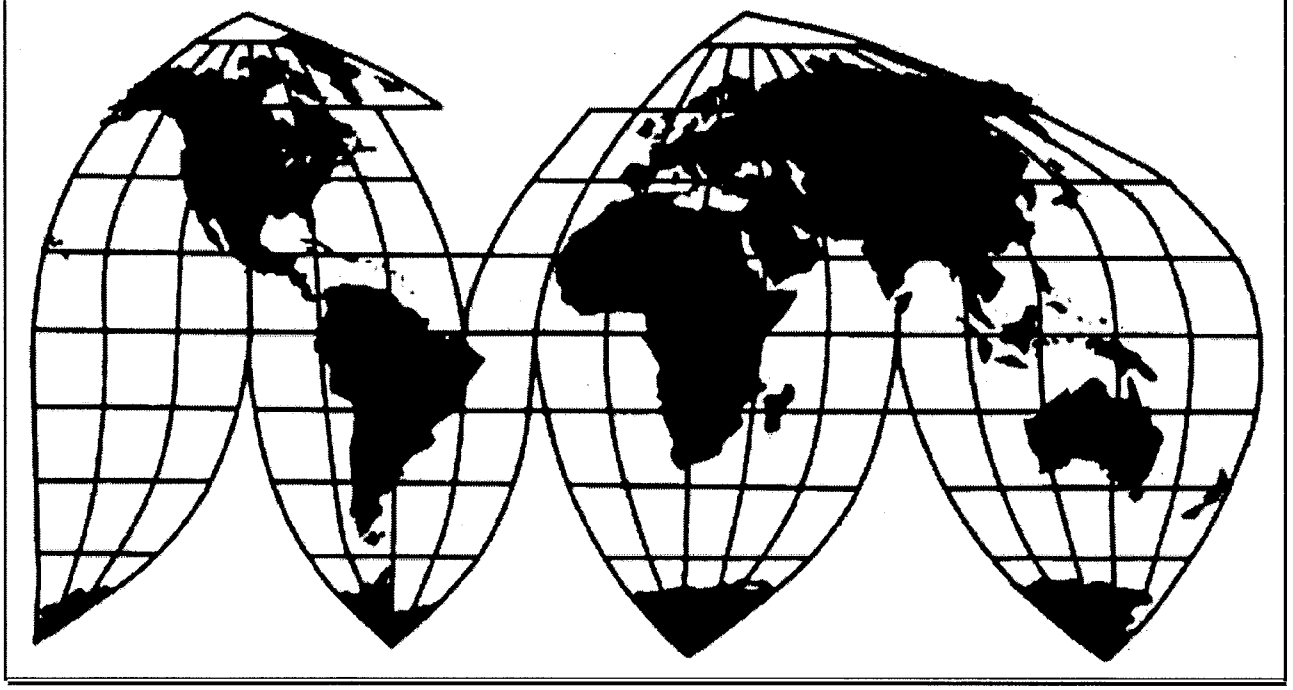
In the Matter of

CERTAIN ELECTRIC FIREPLACES, COMPONENTS, MANUALS, CERTAIN PROCESSES FOR MANUFACTURING

337-TA-791/826

Publication 4552 **August 2015**

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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Secretary to the Commission
United States International Trade Commission
Washington, DC 20436

U.S. International Trade Commission

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In the Matter of

CERTAIN ELECTRIC FIREPLACES, COMPONENTS, MANUALS, CERTAIN PROCESSES FOR MANUFACTURING

337-TA-791/826

Publication 4552

August 2015

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

In the Matter of	
CERTAIN ELECTRIC FIREPLACES, COMPONENTS THEREOF, MANUALS FOR SAME, CERTAIN PROCESSES FOR MANUFACTURING OR RELATING TO SAME AND CERTAIN PRODUCTS CONTAINING SAME	Investigation No. 337-TA-791/826 (Consolidated)

NOTICE OF COMMISSION DECISION TO MODIFY-IN-PART AND REVERSE-IN-PART A FINAL INITIAL DETERMINATION FINDING THE REMAINING RESPONDENTS IN DEFAULT AND IN VIOLATION OF SECTION 337 AND TO AFFIRM ORDER NO. 19; ISSUANCE OF A LIMITED EXCLUSION ORDER; AND TERMINATION OF THE INVESTIGATION

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to modify-in-part and reverse-in-part a final initial determination ("ID") (Order No. 20) of the presiding administrative law judge ("ALJ") finding the remaining respondents, Shenzhen Reliap Industrial Co. ("Reliap") and Yue Qiu Sheng ("Yue"), both of Shenzhen, China, in default and in violation of section 337. The Commission has also determined to affirm Order No. 19 denying Yue's motion for summary determination. The Commission has issued a limited exclusion order directed against covered products of Reliap and Yue.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2310. 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 *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 Investigation No. 337-TA-791 ("the 791 investigation") on July 20, 2011, based on a complaint filed by Twin-Star International, Inc. of Delray Beach, Florida and TS Investment Holding Corp. of Miami, Florida (collectively, "Twin-Star"). 76 *Fed. Reg.* 43345-46 (July 20, 2011). The Commission instituted

Investigation No. 337-TA-826 on January 19, 2012, based on another complaint filed by Twin-Star, and consolidated it with the 791 investigation. 77 *Fed. Reg.* 2757-58 (Jan. 19, 2012). The complaints allege a violation of section 337 of the Tariff Act of 1930, as amended, 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 certain electric fireplaces, components thereof, manuals for same, certain processes for manufacturing or relating to same and certain products containing same by reason of infringement of U.S. Copyright Nos. TX0007350474; TX0007350476; VA0001772660; and VA0001772661; and by reason of misappropriation of trade secrets, breach of contract, and tortious inference with contract, the threat or effect of which is to destroy or substantially injure an industry in the United States.

The Commission's notice of investigation named Reliap, Yue, and Whalen Furniture Manufacturing, Inc. ("Whalen") of San Diego, California as respondents. On July 3, 2012, the Commission issued notice of its determination not to review the ALJ's ID terminating the investigation as to Whalen based on a consent order and settlement agreement.

On June 20, 2012, Twin-Star moved for an ID finding the remaining respondents, Reliap and Yue, in default and in violation of section 337 pursuant to Commission Rule 210.17, 19 C.F.R. § 210.17. The Commission investigative attorney filed a response in support of the motion.

On July 13, 2012, the ALJ granted Twin-Star's motion and issued the final ID in this investigation finding the remaining respondents in default and in violation of section 337 pursuant to 19 C.F.R. § 210.17 for failure to participate in the investigation following withdrawal of their counsel on March 12, 2012. The ID also contained the ALJ's recommended determination on remedy. Specifically, the ALJ recommended issuance of a limited exclusion order with respect to the covered products of the defaulting respondents.

Also on July 13, 2012, the ALJ issued Order No. 19, denying a motion filed by Yue on December 11, 2011, for summary determination that Twin-Star's breach of contract claim is outside the scope of the investigation. On July 20, 2012, the Commission investigative attorney ("IA") petitioned for review of Order No. 19 and the ALJ's final ID. Twin-Star filed a response in opposition on July 30, 2012.

On September 14, 2012, the Commission determined to review Order No. 19 and to review-in-part the final ID to the extent that it finds a violation of section 337 based on the breach of contract allegation. The determinations made in the final ID that were not reviewed became final determinations of the Commission by operation of rule. *See* 19 U.S.C. § 210.42(h).

The Commission requested briefing from the parties and interested non-parties regarding a question concerning the issue under review and on the issues of remedy, the public interest, and bonding. 77 *Fed. Reg.* 58407-09 (Sept. 20, 2012).

On October 12, 2012, Twin-Star and the IA each filed a brief on the issues for which the Commission requested written submissions. The International Trade Commission Trial Lawyers Association filed a brief concerning the issue under review on the same date. The IA filed a reply brief on November 9, 2012.

Having reviewed the record in this investigation, including the final ID, Order No. 19, and the parties' written submissions, the Commission has determined to modify-in-part and reverse-in-part the final ID as follows: (1) vacating as moot the final ID to the extent that it finds a violation of section 337 based on the breach of contract and tortious interference with contract allegations with respect to the non-competition and non-solicitation provisions of the asserted contract; and (2) reversing the final ID to the extent it finds a violation based on the non-disclosure provision of the asserted contract. The Commission also affirms Order No. 19.

The Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined that the appropriate form of relief is a limited exclusion order prohibiting the unlicensed entry for consumption of electric fireplaces, components thereof, manuals for same, and products containing same that are manufactured abroad by or for, or imported by or for, Yue or Reliap, or any of their affiliated companies, parents, subsidiaries, licensees, contractors, or other related business entities, or successors or assigns: (1) using misappropriated trade secrets asserted in this investigation; and/or (2) that infringe one or more of U.S. Copyright Nos. TX0007350474, TX0007350476, VA0001772660, or VA0001772661.

The Commission determined that the public interest factors enumerated in section 337(d)(1) (19 U.S.C. § 1337(d)(1)) do not preclude issuance of the limited exclusion order. Finally, the Commission determined that a bond in the amount of 145 percent of the entered value of the covered products that are entered for consumption is required to permit temporary importation during the period of Presidential review (19 U.S.C. § 1337(j)). The Commission's order and opinion were delivered to the President and to the United States Trade Representative on the day of their issuance.

The Commission has terminated this investigation. 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 sections 210.17, 210.42, 210.45, and 210.50 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.17, 210.42, 210.45, 210.50).

By order of the Commission.

Lisa R. Barton
Acting Secretary to the Commission

Issued: May 1, 2013

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

In the Matter of

CERTAIN ELECTRIC FIREPLACES, COMPONENTS THEREOF, MANUALS FOR SAME, CERTAIN PROCESSES FOR MANUFACTURING OR RELATING TO SAME AND CERTAIN PRODUCTS CONTAINING SAME

Inv. No. 337-TA-791/826
(Consolidated)

LIMITED EXCLUSION ORDER

The Commission has previously found Mr. Yue Qiu Sheng ("Mr. Yue") and his company Shenzhen Reliap Industrial Co. ("Reliap") (collectively, "Respondents"), both of Shenzhen, China, in default under Commission Rule 210.17(d), 19 C.F.R. § 210.17(d). 77 *Fed. Reg.* 58147 (Sept. 19, 2012). The consolidated investigation was based on two complaints filed by Twin-Star International, Inc. of Delray Beach, Florida and TS Investment Holding Corp. of Miami, Florida (collectively, "Complainant" or "Twin-Star") that alleged a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) in the unlawful importation, sale for importation and sale after importation of electric fireplaces, components thereof, manuals for same, processes for manufacturing or relating to same, and products containing same (collectively, the "Accused Products"), that are manufactured abroad by or for, or imported by or for, Mr. Yue or Reliap, by reason of infringement of U.S. Copyright Nos. TX0007350474; TX0007350476; VA0001772660; and VA0001772661; and by reason of misappropriation of trade secrets, breach of contract, and tortious inference with contract, the threat or effect of which is to destroy or substantially injure an industry in the United States. The Commission found a violation based on: (1) the use of misappropriated trade secrets ("the Twin-Star Trade

Secrets") asserted in this investigation; and/or (2) infringement of one or more of U.S. Copyright Nos. TX0007350474, TX0007350476, VA0001772660, and VA0001772661 (the "Twin-Star Copyrights") asserted in this investigation.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined that the appropriate form of relief is a limited exclusion order prohibiting the entry of unlicensed Accused Products manufactured abroad by or on behalf of or imported by or on behalf of Mr. Yue or Reliap, or by any of their affiliated companies or other related business entities, or their successors or assigns, or by the parents or subsidiaries of Reliap or their successors or assigns, using the Twin-Star Trade Secrets and/or that infringe one or more of the Twin-Star Copyrights.

The Commission has further determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) do not preclude issuance of the limited exclusion order. Finally, the Commission has determined that the bond during the Presidential review period shall be in the amount of 145 percent of the entered value of the Accused Products.

Accordingly, the Commission hereby ORDERS that:

1. Electric fireplaces, components thereof, manuals for same, and products containing same that are manufactured abroad by or on behalf of or imported by or on behalf of Mr. Yue or Reliap, or by any of their affiliated companies or other related business entities, or their successors or assigns, or by the parents or subsidiaries of Reliap or their successors or assigns, using any of the Twin-Star Trade Secrets, are excluded from entry for consumption into the United States, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption for a period of five (5) years from the effective date of this order,

except under license of the owner of the Twin-Star Trade Secrets, or as provided by law.

2. Electric fireplaces, components thereof, manuals for same, and products containing same that infringe one or more of U.S. Copyright Nos. TX0007350474; TX0007350476; VA0001772660; and VA0001772661, and that are manufactured abroad by or on behalf of or imported by or on behalf of Mr. Yue or Reliap, or by any of their affiliated companies or other related business entities, or their successors or assigns, or by the parents or subsidiaries of Reliap or their successors or assigns, are excluded from entry for consumption into the United States, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption, for the remaining terms of the copyrights, except under license of the owner of the copyrights, or as provided by law.

3. Products that are excluded by one or more of paragraphs 1-2 of this Order are entitled to entry for consumption into the United States, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, under bond in the amount of 145 percent of the entered value of the product in question, from the day after this Order is received by the United States Trade Representative, 70 *Fed. Reg.* 43251 (July 21, 2005), until such time as the United States Trade Representative notifies the Commission that this action is approved or disapproved but, in any event, not later than sixty (60) days after the date of receipt of this action.

4. At the discretion of U.S. Customs and Border Protection ("CPB") and pursuant to procedures it establishes, persons seeking to import electric fireplaces, components thereof, manuals for same, and products containing same that are potentially subject to this Order may be required to certify that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the

products being imported are not excluded from entry under paragraphs 1-2 of this Order. At its discretion, CBP may require persons who have provided the certification described in this paragraph to furnish such records or analyses as are necessary to substantiate the certification.

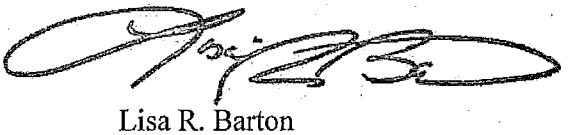
5. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to electric fireplaces, components thereof, manuals for same, and products containing same that are imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.

6. The Commission may modify this Order in accordance with the procedures described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

7. The Commission Secretary shall serve copies of this Order upon each party of record in this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and U.S. Customs and Border Protection.

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

By order of the Commission.



Lisa R. Barton
Acting Secretary to the Commission

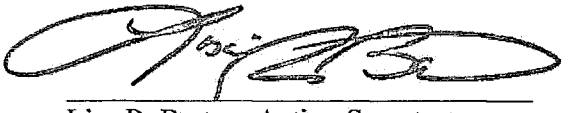
Issued: May 1, 2013

CERTAIN ELECTRIC FIREPLACES, COMPONENTS THEREOF, MANUALS FOR SAME, CERTAIN PROCESSES FOR MANUFACTURING OR RELATING TO SAME AND CERTAIN PRODUCTS CONTAINING SAME

337-TA-791; 337-TA-826 (Consolidated)

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, Anne Goalwin, Esq., and the following parties as indicated, on **May 1, 2013**



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

For Complainants:

Jay H. Reiziss, Esq.
BRINKS HOFER GILSON & LIONE
1850 K Street N.W.
Washington, D.C. 20006

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

Respondents

Shenzhen Reliap Industrial Co. Ltd.
No. 3 Chunagye Road, Third Industrial Zone
Shiyan Town, Baoan District
Shenzhen, China 518112

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

Yue Qiu Sheng
(aka Jason Yue)
room #507, Building 3
Band Dao Yuang, Bu Ji Town
Shenzhen City, China 518112

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN ELECTRIC FIREPLACES, COMPONENTS THEREOF, MANUALS FOR SAME, CERTAIN PROCESSES FOR MANUFACTURING OR RELATING TO SAME AND CERTAIN PRODUCTS CONTAINING SAME**	**Investigation No. 337-TA-791/826 (Consolidated)**

COMMISSION OPINION

I. INTRODUCTION

On July 13, 2012, the presiding administrative law judge ("ALJ") issued his final initial determination ("ID") (Order No. 20) finding remaining respondents Shenzhen Reliap Industrial Co. ("Reliap") and its owner, Yue Qiu Sheng (a.k.a. Jason Yue), both of Shenzhen, China, in default and in violation of section 337 pursuant to Commission rule 210.17, 19 C.F.R. § 210.17, for failure to participate in the investigation, including failure to appear at the pre-hearing conference. On September 14, 2012, the Commission determined to review-in-part Order No. 20 with respect to its finding of a violation under section 337(a)(1)(A), 19 U.S.C. § 1337(a)(1)(A), based on a breach of contract allegation, and Order No. 19 denying summary determination on the same allegation. 77 *Fed. Reg.* 58407-09 (Sept. 20, 2012). The investigation is before the Commission for final disposition.

II. BACKGROUND

A. Procedural Background

The Commission instituted Investigation No. 337-TA-791 ("the 791 investigation") on July 20, 2011, based on a complaint filed by Twin-Star International, Inc. of Delray Beach, Florida and TS Investment Holding Corp. of Miami, Florida (collectively, "Twin-Star"). 76 *Fed. Reg.* 43345-46 (July 20, 2011). The complaint alleged trade secret misappropriation and copyright infringement by Yue and Reliap, and breach of contract by Yue. Twin-Star Original Complaint ¶¶ 108-70 (June 17, 2011). The breach of contract allegation concerned Twin-Star's Subscription and Stockholders' Agreement ("SSA"). The SSA is a Twin-Star stockholder agreement that was entered into on June 7, 2007 between Twin-Star and Yue that imposes several obligations on Yue in return for the opportunity to purchase Twin-Star stock. *Id.* at Exhibit 3. The Notice of Investigation in the 791 investigation did not reference the breach of contract allegation. Specifically, it ordered:

> Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine:
>
> (a) Whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain electric fireplaces, components thereof, manuals for same, certain processes for manufacturing or relating to same and certain products containing same by reason of infringement of U.S. Copyright Nos. TX0007350474; TX0007350476; VA0001772660; and VA0001772661; and whether an industry in the United States exists as required by subsection (a)(2) of section 337; and

> (b) Whether there is a violation of subsection (a)(1)(A) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain electric fireplaces, components thereof, manuals for same, certain processes for manufacturing or relating to same and certain products containing same by reason of misappropriation of trade secrets or unfair competition, the threat or effect of which is to destroy or substantially injure an industry in the United States.

Id. The Commission's Notice of Investigation in the 791 investigation named Reliap and Yue as respondents.

On December 13, 2011, Yue filed a motion for summary determination that the scope of the 791 investigation did not include Twin-Star's breach of contract allegation, arguing that this allegation does not state a cognizable claim under section 337(a)(1)(A). *See* Respondent Jason Yue's Motion for Summary Determination that Complainants' "Breach of Stockholder Agreement" Claim Is Outside the Scope of the Investigation (Dec. 13, 2011). The Commission investigative attorney ("IA") supported the motion and Twin-Star opposed it.

On the same date that Yue filed his motion for summary determination, Twin-Star filed a second complaint which named as proposed respondents Yue, Reliap, and Reliap's customer, Whalen Furniture Manufacturing, Inc. ("Whalen") of San Diego, California. *See* Twin-Star Second Complaint (Dec. 13, 2011). The second complaint alleged trade secret misappropriation and copyright infringement by Yue, Reliap, and Whalen; tortious interference with contract by Reliap and Whalen; and breach of contract by Yue. *Id.* at ¶¶ 116-203.

The Commission instituted Investigation No. 337-TA-826 ("the 826 investigation") based on the second complaint filed by Twin-Star. 77 *Fed. Reg.* 2757-58 (Jan. 19, 2012). The Notice of Investigation in the 826 investigation did reference the breach of contract and tortious interference with contract allegations. Specifically, it ordered:

> Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine:
>
> (a) Whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain electric fireplaces, components thereof, manuals for same, certain processes for manufacturing or relating to same and certain products containing same that infringe U.S. Copyright Nos.TX0007350474; TX0007350476; VA0001772660; and VA0001772661, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;
>
> (b) whether there is a violation of subsection (a)(1)(A) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain electric fireplaces, components thereof, manuals for same, certain processes for manufacturing or relating to same and certain products containing same by reason of misappropriation of trade secrets, breach of contract, or tortious interference with contract, the threat or effect of which is to destroy or substantially injure an industry in the United States.

Id. The Notice of Investigation also consolidated the 826 investigation with the 791 investigation. *Id.* at 2758.

On July 3, 2012, the Commission issued notice of its determination not to review an ID terminating the investigation as to Whalen based on a consent order, settlement

agreement, and partial withdrawal of the complaint.[1] The investigation proceeded as to the remaining respondents, Yue and Reliap. Yue and Reliap filed responses to the complaints and participated in discovery through their counsel.

Counsel for Yue and Reliap withdrew their appearance on March 12, 2012. After that date, Yue and Reliap stopped all meaningful participation in the investigation. *See* Order No. 20 at 4. On May 25, 2013, the ALJ granted Twin-Star's motion to deem its Third Set of Requests for Admission to Yue and Reliap admitted, due to their failure to respond to this discovery. Order No. 16. The ALJ scheduled a hearing for May 24, 2012 to determine how best to proceed with the investigation. Order No. 20 at 4 (citing Order No. 15 (May 16, 2012)). Yue and Reliap failed to appear at the hearing. *Id.* On June 20, 2012, Twin-Star moved for an ID finding respondents Reliap and Yue in default and in violation of section 337, pursuant to 19 C.F.R. § 210.17, for failure to participate in the investigation. *Id.* at 1. The IA filed a response in support of the motion. *Id.*

On July 13, 2012, the ALJ issued Order No. 19, which denied Yue's motion (filed prior to Yue's counsel's withdrawal of appearance) for summary determination that Twin-Star's breach of contract claim was outside the scope of the investigation. On the same date, the ALJ issued Order No. 20, the final ID in this investigation. Order No. 20 granted Twin-Star's motion for a determination that Yue and Reliap were in default and in violation of section 337 pursuant to Commission rule 210.17. *Id.* at 5. Order No. 20

[1] *See* Notice of Commission Decision Not to Review an Initial Determination Terminating the Investigation as to Respondent Whalen Furniture Manufacturing, Inc. Based on a Consent Order Stipulation, Settlement Agreement, and Partial Withdrawal of the Complaint; Issuance of Consent Order, EDIS Doc. ID 484632 (July 3, 2012).

recommended issuance of a limited exclusion order ("LEO") directed to the covered products of the defaulting respondents. On July 20, 2012, the IA petitioned for review of Order Nos. 19 and 20. Twin-Star filed a response in opposition on July 30, 2012.

On September 14, 2012, the Commission determined to review Order No. 19 and to review-in-part Order No. 20 to the extent that it found a violation of section 337 based on the breach of contract allegation. 77 *Fed. Reg.* 58407-09 (Sept. 20, 2012). To the extent that Order No. 20 found a violation of section 337 based on trade secret misappropriation, copyright infringement, and tortious interference with contract, those findings became final determinations of the Commission as of September 14, 2012 given that they were not reviewed. *See* 19 C.F.R. § 210.42(h).

On review, the Commission requested the parties, interested government agencies, and other interested persons submit briefing on the issue under review:

> (1) Please explain whether a breach of contract claim can give rise to a violation of 19 U.S.C. § 1337(a)(1)(A), and discuss any relevant statutory language, legislative history, and legal precedent.

77 *Fed. Reg.* 58407-09. On October 12, 2012, Twin-Star, the IA, and the International Trade Commission Trial Lawyers Association ("ITCTLA") each filed a submission on the issue under review.[2] Twin-Star and the IA also filed submissions on the issues of remedy,

[2] The ITCTLA's submission takes no position on whether the specific breach of contract alleged here constitutes a violation of section 337(a)(1)(A). ITCTLA Sub. at 1. However, should the Commission determine to reach the broader question of whether *any* breach of contract claim can give rise to a violation, the ITCTLA submits that a breach of contract may, under appropriate circumstances, give rise to a violation of section 337(a)(1)(A). *Id.* at 1-2 (emphasis in original).

bonding, and the public interest. Twin-Star requested an LEO as a remedy and the IA agreed that an LEO is warranted. Each included a proposed LEO in their response. On November 9, 2012, the IA filed a reply submission. No other replies were filed.

B. Twin-Star's Claims Based on the SSA

Twin-Star's claims of a section 337 violation based on the SSA involve an alleged breach of, or tortious interference with, Yue's obligations under four provisions of the SSA, which prohibit Yue from the following: (1) disclosing Twin-Star Company Information under Section 9(a); (2) competing with Twin-Star in the United States during Yue's employment and for a period of two years after terminating employment (the "Restricted Period") under Section 9(d); (3) soliciting any of Twin-Star's customers during the Restricted Period under Section 9(f); and (4) soliciting any of Twin-Star's distributors, suppliers, vendors, and agents during the Restricted Period under Section 9(g). *See* SSA; Twin-Star Second Complaint ¶¶ 190-92, 201.

Notably, the first provision, the non-disclosure provision, has no identified term, while the other three provisions, the non-compete and non-solicitation provisions, are limited to a term of two years after Yue's termination of employment with Twin-Star. Twin-Star's original complaint alleges that Yue terminated his employment with Twin-Star on or about May 31, 2010. *See* Twin-Star Original Complaint at ¶ 32; *see also* Exh. 3. Yue and Reliap admit to this allegation in their answer. *See* Response of Reliap and Yue ¶ 32 (Aug. 16, 2011).

III. DISCUSSION

A. Default under 19 C.F.R. § 210.17 – Other Failures to Act

Commission rule 210.17 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.17, provides a basis for the Commission to find a party in default and in violation of section 337 for failures to act other than the statutory form of default under 19 U.S.C. § 1337(g). Specifically, under Commission rule 210.17, the ALJ or the Commission may draw adverse inferences and issue findings of fact, conclusions of law, determinations (including a violation of section 337), and orders that are adverse to the party who fails to take required actions in Commission investigations. 19 C.F.R. § 210.17. Such failures to act include, but are not limited to, the "[f]ailure to appear at a hearing before the [ALJ] after filing a written response to the complaint[.]" 19 C.F.R. § 210.17(d). Upon finding that a respondent has failed to take required actions under Commission rule 210.17, the ALJ or the Commission may find the party in default and in violation of section 337 under the rule. The Commission issues appropriate remedies against a party found in violation under Commission rule 210.17 after consideration of the effect of such remedies upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers. 19 U.S.C. § 1337(d).

As noted *supra*, the ALJ found that Yue and Reliap had committed such failures to act under Commission rule 210.17. Order No. 20. Accordingly, the ALJ found Yue and Reliap in default and in violation of section 337. *Id.* at 5.

B. The Commission's Determination on the Final ID (Order No. 20)

1. Mootness of Claims Related to Expired SSA Provisions

The IA petitioned for review of Order No. 20 with respect to its finding of violation based on Twin-Star's breach of contract claim, arguing that such a claim is not a cognizable unfair act under section 337(a)(1)(A). IA Petition at 1, 6-7. Twin-Star opposed review. *See* Twin-Star Response at 5-10. The Commission granted the IA's petition for review of Order No. 20 on September 14, 2012. *See* 77 *Fed. Reg.* 58407-09.

As mentioned above, according to the terms of the SSA, the three non-competition and non-solicitation provisions of the SSA (Sections 9(d), (f), and (g)), which form the primary basis for Twin-Star's breach of contract allegation, expire two years after Yue's termination of employment with Twin-Star. *See* Twin-Star Original Complaint ¶¶ 32, 157-59; Twin-Star's Submission at 7-9, 15-18. The record shows that Yue terminated his employment with Twin-Star on May 31, 2010, which means the three non-competition and non-solicitation provisions of the SSA expired on June 1, 2012.

Order No. 20 does not specify which unfair acts formed the basis for the finding of violation. Order No. 20 at 5. Because the Commission grants *prospective* relief only, however, it cannot find a violation of section 337 based on a breach of the three expired contract provisions. *See Certain Lighting Control Devices Including Dimmer Switches and Parts Thereof* ("*Lighting Control Devices (IV)*"), Inv. No. 337-TA-776, Comm'n Notice, 77 *Fed. Reg.* 43612-14 (July 25, 2012) (vacating in pertinent part an initial determination finding a section 337 violation based on infringement of a patent that expired during the course of the investigation); *see also Tessera, Inc. v. Int'l Trade*

Comm'n, 646 F.3d 1357, 1371 (Fed. Cir. 2011) (vacating as moot all Commission determinations relating to expired patents) (citing *Texas Instruments, Inc. v. Int'l Trade Comm'n*, 851 F.2d 342, 344 (Fed. Cir. 1988) (same)). Thus, the Commission vacates as moot Order No. 20's finding of violation to the extent it is based on the expired SSA provisions.[3]

Similarly, Twin-Star's tortious interference with contract claim based on the non-competition and non-solicitation provisions of the SSA is also moot to the extent it is based on these expired provisions of the SSA. Since the Commission did not review the ALJ's finding of violation based on tortious interference with contract by Reliap, it became the Commission's final determination. *See* 77 *Fed. Reg.* 58407-09; 19 C.F.R. § 210.42(h)(2). However, after careful consideration of the record, including the parties' submissions, the Commission has reconsidered its decision not to review Order No. 20's finding of violation based on tortious interference with contract. On reconsideration, the

[3] Twin-Star argued for the first time in its submission on the issue under review that any relief against Yue based on breach of the non-competition provision of the SSA should extend for two years. *See* Twin-Star Sub. at 18. This argument relied on an equitable extension doctrine, recognized in some states, which allows a court to extend the term of a contract when a contracting party has not received the benefit of the full duration of that contract. *Id.* To the extent that Twin-Star's argument is an attempt to establish a basis for finding a section 337 violation due to breach of the expired SSA provisions, we find that Twin-Star waived this argument by not raising it at the appropriate time. *See United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the *time appropriate* under its practice.") (emphasis added). Twin-Star's motion seeking a finding that Yue and Reliap were in default and in violation of section 337 was filed on June 20, 2012, after SSA Sections 9(d), (f), and (g) had expired. This motion makes no mention of the equitable extension doctrine.

Commission has determined to vacate Order No. 20 as moot to the extent it found a violation based on tortious interference with Sections 9(d), (f), and (g) of the SSA.[4]

2. Surviving Breach of Contract and Tortious Interference with Contract Claims

The only asserted SSA contract provision that has not expired is Section 9(a), which obligates [[ ]]. *See* SSA at Section 9(a). The SSA defines [[ ]]. *See* SSA, [[ ]]. The SSA defines [[ ]]. *Id.* The SSA defines [[ ]]. *Id.*

Twin-Star's two complaints each make only the following specific allegation concerning Yue's alleged breach of SSA Section 9(a): "Upon information and belief, Yue has breached and threatened to breach the SSA in that, among other things, he has used and/or disclosed Twin-Star's confidential business information concerning Twin-Star's

[4] Generally, an agency may decide to reopen or reconsider a decision "on its own motion." *See* 2 Charles Koch, *Administrative Law and Practice* § 5.71 (2010). *Cf. SKF USA, Inc. v. United States*, 254 F.3d 1022, 1028-29 (Fed. Cir. 2011) (an agency may seek voluntary remand of its determination on appeal based on intervening events outside of its control or to reconsider its position, and that the Court shall usually grant such remand requests).

firebox technology." Twin-Star Original Complaint ¶ 167, Twin-Star Second Complaint ¶ 179. However, the particular confidential information, which by definition [[ ]] is not specified in the record. *See* SSA, [[ ]]. Moreover, "firebox technology" is not defined or explained in either the complaint or in the SSA. *See* Twin-Star Original Complaint ¶ 167, Twin-Star Second Complaint ¶ 179; SSA. Twin-Star's tortious interference with contract claim against Reliap likewise omits any factual allegations concerning the particular confidential information that forms the basis of its claim under SSA Section 9(a). *See* Twin-Star Second Complaint ¶ 201.

The Commission therefore finds that the "confidential information" at issue under the non-disclosure provision is unclear, particularly in view of the [[ ]]. *See* SSA, [[ ]]. We further find that the breach of contract claim against Yue, as well as the tortious interference with contract claim against Reliap, with respect to SSA Section 9(a) allege no specific facts and contain an undefined term, *i.e.*, "firebox technology." Accordingly, the Commission declines to draw an adverse inference under Commission rule 210.17 that Yue breached SSA Section 9(a) or that Reliap tortiously interfered with Yue's contractual obligations under this provision. The Commission therefore has determined to reverse Order No. 20 to the extent it found a violation based on a breach of, or tortious interference with, SSA Section 9(a).

C. The Commission's Determination on Order No. 19

Commission rule 210.18(b) states in relevant part that "the determination sought by the moving party shall be rendered if pleadings and any depositions, answers to

interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law." 19 C.F.R. § 210.18(b); *see also Lighting Control Devices (IV)*, Final ID at 8 (June 7, 2012) (citing *DeMarini Sports Inc. v. Worth*, 239 F.3d 1314, 1322 (Fed. Cir. 2001)).

In Order No. 19, the ALJ denied Yue's motion for summary determination that Twin-Star's breach of contract claim is not a cognizable unfair act or method of competition under section 337(a)(1)(A). *See* Order No. 19. The ALJ found that it was unclear from the facts presented that the breach of contract alleged by Twin-Star could be shown to constitute, or to be part of, an act of unfair competition. Consequently, the ALJ held that Yue had not shown that the breach of the SSA provisions alleged by complainant could not constitute an unfair act cognizable under section 337 as a matter of law. *Id.* at 2.

The IA's petition for review argued that Order No. 19 should be reversed in view of *Certain Hollow-Fiber Artificial Kidneys* ("*Artificial Kidneys*"), Inv. No. 337-TA-81, Comm'n Op. (1980). IA Petition at 1-2, 6-7, 10. The procedural posture and substantive issues presented in the motion in *Artificial Kidneys* are distinguishable from Yue's summary determination motion at issue in Order 19. In *Artificial Kidneys*, the complainant sought to amend its complaint and the notice of investigation to add a claim alleging that respondents breached an agreement not to infringe the complainant's asserted patent. The Commission denied complainant's motion finding that the allegations presented therein could not be characterized as an independent unfair act under section 337. In contrast, Twin-Star's claims involved different breach of contract allegations, and

Yue's motion sought summary determination that these claims were beyond the scope of the investigation or should be dismissed as matter of law as non-cognizable under section 337. The ALJ reasonably denied Yue's motion on the grounds that the record was inadequately developed to make such a categorical ruling. We therefore affirm the ruling in Order No. 19.

Having determined to review the issue of whether Twin-Star's particular breach of contract claims may be cognizable under section 337, upon consideration of the record, including the additional briefing submitted on review, we find that the primary contract claims in this investigation have been mooted and the remaining claim is presented on a record that is inadequate to entitle Twin-Star to relief, separate and apart from the issue of whether that claim may constitute a cognizable unfair act or method of competition under section 337. In this posture, therefore, we also decline to rule on the broad question of whether any breach of contract claim could be cognizable under section 337 as an unfair act or unfair method of competition.

D. Conclusion on Violation

Based on the foregoing, the Commission has determined on review to modify-in-part and reverse-in-part Order No. 20 (the final ID) such that: (1) the ALJ's findings that respondents Reliap and Yue violated section 337 based on breach of contract and tortious interference with contract regarding Sections 9(d), (f), and (g) of the SSA are vacated as moot; and (2) the ALJ's findings concerning breach of contract and tortious interference with contract regarding Section 9(a) of the SSA are reversed. Accordingly, the Commission finds a violation of section 337 based on copyright infringement under

section 337(a)(1)(B)(1) and trade secret misappropriation under section 337(a)(1)(A) by respondents Yue and Reliap. In addition, Order No. 19 is affirmed.

IV. THE COMMISSION'S DETERMINATION OF THE APPROPRIATE REMEDY, THE PUBLIC INTEREST, AND BONDING

A. Limited Exclusion Order

The ALJ recommended that the Commission issue an LEO with respect to the covered products of the defaulting respondents Reliap and Yue. Order No. 20 at 6. Twin-Star agrees that an LEO directed to the covered products of Reliap and Yue is the proper remedy here. Twin-Star Sub. at 10 (citing *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340, 1356 (Fed. Cir. 2008) (finding that an LEO is "the default exclusion remedy" when there is a violation of section 337 and no countervailing negative impact on the public interest)). Twin-Star submits that the duration of the LEO with respect to trade secret misappropriation should be five years. *Id.* at 12-15, Exh. A (Proposed LEO). Twin-Star asserts that, without using its trade secrets, respondents would have taken at least five years to: (a) develop a competitive product in the electric fireplace market; (b) develop the necessary manufacturing and quality control processes necessary to manufacture consistent, high-quality products at high-volume; and (c) to reach the market position it obtained using Twin-Star's trade secrets. *Id.* at 12. Twin-Star asserts that it took from 2003 to 2010 to independently research, develop, and engineer the Twin-Star trade secrets. *Id.* at 12-14 (citing Twin-Star Original Complaint, Exh. B (Asofsky Decl.), Exh. C (Whalen Exh. 170)); *see also* Twin-Star Original Complaint at 9-15. Twin-Star also submits that the LEO, with respect to copyright infringement, should last for the remainder of the term of the asserted copyrights, *i.e.*, 95

years from the date of first publication for the asserted works of corporate authorship. *Id.* at 11 (citing 17 U.S.C. § 302(c)).

We have determined that the appropriate relief is an LEO covering electric fireplaces, components thereof, manuals for same, and products containing same that infringe the asserted copyrights or that are manufactured or sold using Twin-Star's asserted trade secrets. The LEO will be in effect for the remaining terms of the asserted copyrights and for a period of five years with respect to trade secret misappropriation. The record evidence supports the conclusion that a period of at least five years would be necessary to independently develop the trade secrets at issue. *See* Twin-Star Original Complaint at 9-15, Exh. B (Asofsky Decl.), Exh. C (Whalen Exh. 170). This period is consistent with Commission precedent establishing the duration of an LEO based on evidence of a "reasonable research and development period," or an "independent development time" where the violation of section 337 involved misappropriation of trade secrets. *See Certain Cast Steel Railway Wheels, Processes for Manufacturing or Relating to Same and Certain Products Containing Same*, Inv. No. 337-TA-655, Comm'n Op. at 7-9 (Feb. 16, 2010).

B. The Public Interest

When determining whether to issue a remedial order under section 337(d) upon a finding of violation, the Commission must weigh the effect of the order on the following statutory public interest factors: (1) the public health and welfare; (2) the competitive conditions in the U.S. economy; (3) the production of articles in the United States that are like or directly competitive with those subject to the investigation; and (4) U.S. consumers. *See* 19 U.S.C. § 1337(d)(1).

The evidence of record in this investigation indicates that issuance of an LEO here would have no adverse impact on the statutory public interest factors set forth in section 337(d)(1), 19 U.S.C. § 1337(d)(1). The electric fireplaces, components, manuals, and manufacturing processes at issue here relate to consumer furniture products marketed and sold to beautify and enhance living spaces. *See* Twin-Star Sub. at 20. No evidence indicates that exclusion of the accused products might raise concerns relating to public health and welfare of the United States, competitive conditions in the United States, the production of like or directly competitive articles in the United States, or United States consumers. Twin-Star presented evidence that there are several companies that sell electric fireplaces in the United States that compete with the accused products including Twin-Star, Heat Surge, LLC, Dimplex North America Limited, and Whalen Furniture Manufacturing, Inc. Twin-Star Sub. at 20-21. Thus, Twin-Star and third-parties are able to meet the U.S. demand for electric fireplaces within a commercially reasonable time and an ample supply of competing, comparable products will continue to be available on the market if an LEO is issued. *Id.* at 20. The IA agrees. IA Sub. at 19. Based on the foregoing, we have determined that issuance of an LEO would not be contrary to the public interest after consideration of the statutory factors.

C. Bond

Section 337(j) provides for entry of infringing articles during the sixty (60) day period of Presidential review upon payment of a bond and states that the bond is to be set at a level "sufficient to protect the complainant from any injury." 19 U.S.C. § 1337(j)(3); *see also* 19 C.F.R. § 210.50(a)(3). When reliable price information is available, the

Commission sets the bond in an amount that eliminates the differential between the prices of the domestic product and the imported unfairly traded product. *See Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Op. at 24 (1995).

Twin-Star requests the Commission to set a bond amount of 145 percent of the entered value of the covered products during the period of Presidential review. Twin-Star Sub. at 21-23. Twin-Star submits Table 1 (shown below) summarizing record evidence of the price differences between Twin-Star's and respondents' products. *Id.* at 22 (citing Twin-Star Original Complaint, Exh. 29 (Twin-Star data); Exh. G, SRI0000448 (Reliap data)).

Table 1

[[

]][5]

Twin-Star calculated its proposed 145 percent bond amount using the following equation:

[[ ]] = 145%.

---

[5] [[

]].

Based on the foregoing, the Commission has determined that a bond amount of 145 percent during the period of Presidential review is "sufficient to protect the complainant from any injury" and is necessary to "offset any competitive advantage resulting from the unfair act enjoyed by [respondents] benefitting from their importations." *See* 19 U.S.C. § 1337(j)(3); *Certain Dynamic Random Access Memories, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-242, USITC Pub. 2034, Comm'n Op. at 94 (Sept. 21, 1987).

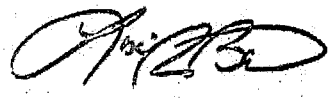
D. **Conclusion on Remedy, the Public Interest, and Bonding**

The Commission has considered the issues of remedy, the public interest, and bonding and has determined to issue an LEO directed against the covered products of Yue and Reliap. The LEO excludes from entry for consumption into the United States electric fireplaces, components thereof, manuals for same, and products containing same, which are manufactured abroad by or on behalf of, or imported by or on behalf of Yue or Reliap, or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns and that infringe U.S. Copyright Nos. TX0007350474; TX0007350476; VA0001772660; or VA0001772661 for the terms of the copyrights; or that are manufactured or sold using Twin-Star's asserted trade secrets for a period of five years. The Commission has determined that the LEO will not have an adverse impact on the public interest under section 337(d).

The Commission has also determined to set a bond in the amount of 145 percent of the entered value of Yue's or Reliap's covered products that are entered for consumption during the period of Presidential review.

PUBLIC VERSION

By order of the Commission.



Lisa R. Barton
Acting Secretary to the Commission

Issued: May 29, 2013

CERTAIN ELECTRIC FIREPLACES, COMPONENTS THEREOF, MANUALS FOR SAME, CERTAIN PROCESSES FOR MANUFACTURING OR RELATING TO SAME AND CERTAIN PRODUCTS CONTAINING SAME

337-TA-791; 337-TA-826 (Consolidated)

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, Anne Goalwin, Esq., and the following parties as indicated, on **May 30, 2013**

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

For Complainants:

Jay H. Reiziss, Esq.
BRINKS HOFER GILSON & LIONE
1850 K Street N.W.
Washington, D.C. 20006

( ) Via Hand Delivery
(✓) Via Overnight Mail
( ) Via First Class Mail
( ) Other: _____

Respondents

Shenzhen Reliap Industrial Co. Ltd.
No. 3 Chunagye Road, Third Industrial Zone
Shiyan Town, Baoan District
Shenzhen, China 518112

( ) Via Hand Delivery
(✓) Via Overnight Mail
( ) Via First Class Mail
( ) Other: _____

Yue Qiu Sheng
(aka Jason Yue)
room #507, Building 3
Band Dao Yuang, Bu Ji Town
Shenzhen City, China 518112

( ) Via Hand Delivery
(✓) Via Overnight Mail
( ) Via First Class Mail
( ) Other: _____

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN ELECTRIC FIREPLACES, COMPONENTS THEREOF, MANUALS FOR SAME, CERTAIN PROCESSES FOR MANUFACTURING OR RELATING TO SAME AND CERTAIN PRODUCTS CONTAINING SAME

Investigation No. 337-TA-791/826 (Consolidated)

[CORRECTED] NOTICE OF COMMISSION DECISION TO REVIEW-IN-PART AN INITIAL DETERMINATION FINDING THE REMAINING RESPONDENTS IN DEFAULT AND IN VIOLATION OF SECTION 337 AND TO REVIEW ORDER NO. 19; REQUEST FOR WRITTEN SUBMISSIONS ON THE ISSUE ON REVIEW AND ON REMEDY, THE PUBLIC INTEREST, AND BONDING

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review-in-part the final initial determination ("ID") (Order No. 20) of the presiding administrative law judge ("ALJ") finding the remaining respondents, Shenzhen Reliap Industrial Co. ("Reliap") and Yue Qiu Sheng ("Yue"), both of Shenzhen, China, in default and in violation of section 337. The Commission has also determined to review the ALJ's Order No. 19 denying respondents' motion for summary determination that complainants' breach of contract allegation is outside the scope of the investigation. The Commission is also requesting briefing on the issue on review and on remedy, the public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2310. 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 *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 Investigation No. 337-TA-791 ("the 791 investigation") on July 20, 2011, based on a complaint filed by Twin-Star International, Inc. of Delray Beach, Florida and TS Investment Holding Corp. of Miami, Florida (collectively, "Twin-Star"). 76 *Fed. Reg.* 43345-46 (July 20, 2011). The Commission instituted Investigation No. 337-TA-826 on January 19, 2012 based on another complaint filed by Twin-Star, and consolidated it with the 791 investigation. 77 *Fed. Reg.* 2757-58 (Jan. 19, 2012). The complaints allege a violation of section 337 of the Tariff Act of 1930, as amended, 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 certain electric fireplaces, components thereof, manuals for same, certain processes for manufacturing or relating to same and certain products containing same by reason of infringement of U.S. Copyright Nos. TX0007350474; TX0007350476; VA0001772660; and VA0001772661; and by reason of misappropriation of trade secrets, breach of contract, and tortious inference with contract, the threat or effect of which is to destroy or substantially injure an industry in the United States.

The Commission's notice of investigation named Reliap, Yue, and Whalen Furniture Manufacturing, Inc. ("Whalen") of San Diego, California as respondents. On July 3, 2012, the Commission issued notice of its determination not to review the ALJ's ID terminating the investigation as to Whalen based on a consent order and settlement agreement.

On June 20, 2012, Twin-Star moved for an ID finding the remaining respondents, Reliap and Yue, in default and in violation of section 337 pursuant to Commission Rule 210.17, 19 C.F.R. § 210.17. The Commission investigative attorney filed a response in support of the motion.

On July 13, 2012, the ALJ granted Twin-Star's motion and issued the final ID in this investigation finding the remaining respondents in default and in violation of section 337 pursuant to 19 C.F.R. § 210.17 because they did not participate in the investigation following withdrawal of their counsel on March 12, 2012. The ID also contained the ALJ's recommended determination on remedy. Specifically, the ALJ recommended issuance of a limited exclusion order with respect to the defaulting respondents.

Also on July 13, 2012, the ALJ issued Order No. 19, denying a motion filed by Yue on December 11, 2011, for summary determination that Twin-Star's breach of contract claim is outside the scope of the investigation. On July 20, 2012, the Commission investigative attorney petitioned for review of Order No. 19 and the ALJ's final ID. Twin-Star filed a response in opposition on July 30, 2012.

Having examined the record of this investigation, including the ALJ's ID, Order No. 19, and the parties' briefing, the Commission has determined to review Order No. 19 and to review the final ID in part to the extent that it finds a violation of section 337 based on the breach of contract allegations. The Commission has determined not to review the remainder of the ID.

On review, the parties, interested government agencies, and any other interested persons are requested to submit briefing on the issue under review and to address in particular the following:

(1) Please explain whether a breach of contract claim can give rise to a violation of 19 U.S.C. § 1337(a)(1)(A), and discuss any relevant statutory language, legislative history, and legal precedent.

In connection with the final disposition of this investigation, the Commission may issue an order that results in the exclusion of the subject articles from entry into the United States. *See* 19 U.S.C. § 1337(d). 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) (Commission Opinion).

When 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.

When 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 *Fed. Reg.* 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: 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. Complainant is requested to state the issue under review and the dates that the copyrights at issue expire and the HTSUS numbers under which the accused products are imported. The written submissions must be filed no later than close of business on October 12, 2012. Reply submissions must be filed no later than the close of business on November 9, 2012. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

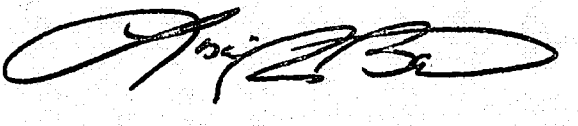
Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to Commission rule 210.4(f), 19 C.F.R. § 210.4(f). Submissions should refer to the investigation number ("Inv. No. 337-TA-791/826") in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures,

http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf).

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. § 210.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

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 sections 210.17, 42-43, 45-46 and 50 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.17, 210.42-43, 210.45-46, and 210.50).

By order of the Commission.



Lisa R. Barton
Acting Secretary to the Commission

Issued: September 14, 2012

CERTAIN ELECTRIC FIREPLACES, COMPONENTS THEREOF, MANUALS FOR SAME, CERTAIN PROCESSES FOR MANUFACTURING OR RELATING TO SAME AND CERTAIN PRODUCTS CONTAINING SAME

337-TA-791; 337-TA-826 (Consolidated)

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, Anne Goalwin, Esq., and the following parties as indicated, on September 17, 2012

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

For Complainants:

Jay H. Reiziss, Esq.
BRINKS HOFER GILSON & LIONE
1850 K Street N.W.
Washington, D.C. 20006

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

Respondents

Shenzhen Reliap Industrial Co. Ltd.
No. 3 Chunagye Road, Third Industrial Zone
Shiyan Town, Baoan District
Shenzhen, China 518112

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

Yue Qiu Sheng
(aka Jason Yue)
room #507, Building 3
Band Dao Yuang, Bu Ji Town
Shenzhen City, China 518112

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN ELECTRIC FIREPLACES, COMPONENTS THEREOF, MANUALS FOR SAME, CERTAIN PROCESSES FOR MANUFACTURING OR RELATING TO SAME AND CERTAIN PRODUCTS CONTAINING SAME**	**Inv. No. 337-TA-791** **Inv. No. 337-TA-826** **(Consolidated)**

Order No. 20: INITIAL DETERMINATION AND RECOMMENDED DETERMINATION

On June 20, 2012, complainants Twin-Star International Inc. and TS Investment Holdings, LLC (collectively, "Twin-Star") filed a motion requesting that the undersigned issue an initial determination finding respondents Shenzhen Reliap Industrial Co. ("Reliap") and Yue Qiu Sheng (aka Jason Yue, or "Yue") in default, and a finding that Reliap and Yue violated section 337 of the Tariff Act, as amended. Motion Docket No. 826-9.[1] The Commission investigative staff filed a response supporting Twin-Star's motion on June 29, 2012. Neither Reliap nor Yue filed a response to the motion.[2] The Commission Rules provide that a party that

[1] Twin-Star's motion is titled, "Twin-Star's Motion for Order to Show Cause Why Respondents Reliap and Yue Should Not Be Held in Default and for an Adverse Inference of Violation of Section 337." Notwithstanding the title of the motion, the motion seeks as relief an initial determination (1) finding Reliap and Yue in default, and (2) finding that Reliap and Yue violated section 337. Mot. at 4.

[2] 19 C.F.R. § 201.16(d) provides:

> Whenever a party . . . has the right or is required to perform some act or take some action within a prescribed period after the service of a document upon it and the document is served upon it by mail, . . . when mailing is to a person located in a foreign country, ten (10) calendar days shall be added to the prescribed period.

fails to respond to a motion may be deemed to have consented to the granting of the relief asked for in the motion. 19 C.F.R. § 210.15(c).

By publication of a notice in the *Federal Register* on July 20, 2011, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, the Commission instituted Investigation No. 337-TA-791 (the "791 investigation") to determine:

> Whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain electric fireplaces, components thereof, manuals for same, certain processes for manufacturing or relating to same and certain products containing same by reason of infringement of U.S. Copyright Registration Nos. TX0007350474; TX0007350476; VA0001772660; and VA0001772661, and whether an industry in the United States exists as required by subsection (a)(2) of section 337.
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> Whether there is a violation of subsection (a)(1)(A) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain electric fireplaces, components thereof, manuals for same, certain processes for manufacturing or relating to same and certain products containing same by reason of misappropriation of trade secrets or unfair competition, the threat or effect of which is to destroy or substantially injure an industry in the United States.

76 Fed. Reg. 43345 (July 20, 2011). Twin-Star was the complainant, and the named respondents were Reliap and Yue. *Id.* The Commission investigative staff ("Staff") was also a party to the investigation. *Id.*

Several months later, by publication of a notice in the *Federal Register* on January 19, 2012, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, the Commission instituted Investigation No. 337-TA-826 (the "826 investigation") to determine:

Both Reliap and Yue are located in Shenzhen, China, and both respondents have been allowed the additional ten days prescribed by the Commission Rules to respond to this motion.

> Whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain electric fireplaces, components thereof, manuals for same, certain processes for manufacturing or relating to same and certain products containing same that infringe U.S. Copyright Nos. TX0007350474; TX0007350476; VA0001772660; and VA0001772661, and whether an industry in the United States exists as required by subsection (a)(2) of section 337.
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> [W]hether there is a violation of subsection (a)(1)(A) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain electric fireplaces, components thereof, manuals for same, certain processes for manufacturing or relating to same and certain products containing same by reason of misappropriation of trade secrets, breach of contract, or tortious interference with contract, the threat or effect of which is to destroy or substantially injure an industry in the United States.

77 Fed. Reg. 2757 (Jan. 19, 2012). Twin-Star was again the complainant, and the named respondents were Reliap, Yue, and Whalen Furniture Manufacturing, Inc. ("Whalen"). *Id.* The Staff was also a party to the investigation. *Id.*

The Commission consolidated the 826 investigation with the 791 investigation. *Id.*

Pursuant to 19 C.F.R. § 210.21, Twin-Star and Whalen filed a joint motion to terminate this investigation as to Whalen based on a consent order, settlement agreement, and withdrawal of allegations. The undersigned granted the motion in an initial determination dated June 1, 2012. Order No. 18. The Commission declined to review the initial determination, and Whalen was terminated from this investigation. *See* Notice of Commission Decision Not to Review an Initial Determination Terminating the Investigation As to Respondent Whalen Furniture Manufacturing, Inc. Based on a Consent Order Stipulation, Settlement Agreement, and Partial Withdrawal of the Complaint; Issuance of Consent Order (July 3, 2012).

The two remaining respondents, Reliap and Yue, through their counsel Kenyon and Kenyon ("Kenyon"), responded to the complaints in the 791 and 826 investigations on August

16, 2011 and February 15, 2012, respectively. Reliap and Yue also participated in discovery through their counsel. On March 12, 2012, Kenyon filed a Notice of Withdrawal of Appearance of Kenyon & Kenyon on Behalf of Shenzhen Reliap Industrial Co. and Yue Qiu Sheng. EDIS Doc. No. 474428. No new counsel has appeared for Reliap and Yue, and neither Reliap nor Yue have participated in this investigation since Kenyon's withdrawal.

For example, Twin-Star propounded its Third Set of Requests for Admission ("RFAs") to Respondents Reliap and Yue on April 6, 2012. Mot. at 2. Reliap's and Yue's responses to the RFAs were due on April 30, 2012, but neither Reliap nor Yue provided any response. *Id.* On April 30, 2012, Twin-Star filed a motion to deem the RFAs admitted. Motion Docket No. 826-5. Reliap and Yue did not respond to the motion. The undersigned issued Order No. 16 on May 25, 2012, granting Motion No. 826-5, and deeming the RFAs admitted for failure to respond.[3]

On May 16, 2012, the undersigned issued Order No. 15, ordering that a "prehearing conference will be held at 11 a.m. on May 24, 2012 in Hearing Room A." Reliap and Yue failed to attend this hearing, and they did not provide an explanation for their absence. *See* Order No. 17.

Commission Rule 210.17 provides, in relevant part:

> Failures to act other than the defaults listed in § 210.16 may provide a basis for the presiding administrative law judge or the Commission to draw adverse inferences and to issue findings of fact, conclusions of law, determinations (including a determination on violation of section 337 of the Tariff Act of 1930), and orders that are adverse to the party who fails to act. Such failures include, but are not limited to:
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> * * *

[3] Reliap and Yue also failed to respond to Twin-Star's Motion to Compel Discovery from Respondents Reliap and Jason Yue, filed on May 7, 2012. Motion Docket No. 826-6.

> (d) Failure to appear at a hearing before the administrative law judge after filing a written response to the complaint or motion for temporary relief, or failure to appear at a hearing before the Commission.
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> * * *
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> The presiding administrative law judge or the Commission may take action under this rule sua sponte or in response to the motion of a party.

19 C.F.R. § 210.17.

Inasmuch as Reliap and Yue failed to appear at a hearing ordered by the undersigned, and inasmuch as Reliap and Yue have not participated in this investigation following the withdrawal of their counsel in March 2012, it is the INITIAL DETERMINATION of the undersigned that respondents Reliap and Yue are in default pursuant to 19 C.F.R. § 210.17, and that a violation of section 337 (19 U.S.C. § 1337) has occurred.[4] No respondents remain in this investigation.

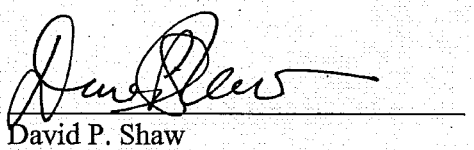
This Initial Determination is hereby certified to the Commission.

Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review of the initial determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders on its own motion a review of the Initial Determination or certain issues contained herein.

The Commission Rules provide that, within 14 days after issuance of the initial determination on violation of section 337 of the Tariff Act, the administrative law judge shall issue a recommended determination concerning the appropriate remedy in the event a violation of section 337 is found. *See* 19 C.F.R. § 210.42(a)(1)(ii). A limited exclusion order is the usual remedy when a violation of section 337 is found. *See, e.g., Certain Laser Bar Code Scanners*

[4] In the interest of conserving judicial and party resources, the undersigned hereby stays all deadlines in the procedural schedule (Order No. 13) for Twin-Star and the Commission investigative staff pending a final determination by the Commission as to whether Reliap and Yue should be held in default.

and Scan Engines, Components Thereof and Products Containing Same, Inv. No. 337-TA-551, Comm'n Op. at 22 (June 14, 2007). It is therefore the RECOMMENDED DETERMINATION of the undersigned that, in the event a violation of section 337 is found, the Commission should issue a limited exclusion order against respondents Reliap and Yue.



David P. Shaw
Administrative Law Judge

Issued: July 13, 2012

CERTAIN ELECTRIC FIREPLACES, COMPONENTS THEREOF, MANUALS FOR SAME, CERTAIN PROCESSES FOR MANUFACTURING OR RELATING TO SAME, AND CERTAIN PRODUCTS CONTAINING SAME

Inv. No. 337-TA-791
Inv. No. 337-TA-826
(Consolidated)

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER NO. 20** has been served by hand upon the Commission Investigative Attorney, **Anne Goalwin, Esq.**, and the following parties as indicated on July 16, 2012.

Lisa R. Barton, Acting Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112A
Washington, D.C. 20436

ON BEHALF OF COMPLAINANTS TWIN-STAR INTERNATIONAL, INC., AND TS INVESTMENT HOLDING CORPORATION:

Jay H. Reiziss, Esq.
BRINKS HOFER GILSON & LIONE
1850 K Street NW
Washington, DC 20006

( ) Via Hand Delivery
(X) Via Overnight Mail
( ) Via First Class Mail
( ) Other: _____

ON BEHALF OF RESPONDENT WHALEN FURNITURE MANUFACTURING, INC. :

Randall S. Waier, Esq.
LAW OFFICES OF RANDALL S. WAIER
20241 Birch St., Suite 103
Newport Beach, CA 92660

( ) Via Hand Delivery
(X) Via Overnight Mail
( ) Via First Class Mail
( ) Other: _____

CERTAIN ELECTRIC FIREPLACES, COMPONENTS THEREOF, MANUALS FOR SAME, CERTAIN PROCESSES FOR MANUFACTURING OR RELATING TO SAME, AND CERTAIN PRODUCTS CONTAINING SAME

Inv. No. 337-TA-791
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(Consolidated)

RESPONDENT:

SHENZHEN RELIAP INDUSTRIAL CO.:
No. 3 Chuangye Road
The Third Industrial Zone
Shiyan Town, Baoan District
Shenzhen, China

( ) Via Hand Delivery
( ) Via Overnight Mail
( ) Via First Class Mail
(X) Other: 1st H.

RESPONDENT:

YUE QIU SHENG (A.K.A. JASON YUE):
Room #507, Building 3
Bang Dao Yuang, Bu Ji Town
Shenzhen City, China 518112

( ) Via Hand Delivery
( ) Via Overnight Mail
( ) Via First Class Mail
(X) Other: 1st H.

PUBLIC MAILING LIST

Heather Hall
LEXIS - NEXIS
9443 Springboro Pike
Miamisburg, OH 45342

( ) Via Hand Delivery
( ) Via Overnight Mail
(X) Via First Class Mail
( ) Other: _____

Kenneth Clair
THOMSON WEST
1100 13th Street, NW, Suite 200
Washington, DC 20005

( ) Via Hand Delivery
( ) Via Overnight Mail
(X) Via First Class Mail
( ) Other: _____