

In the Matter of

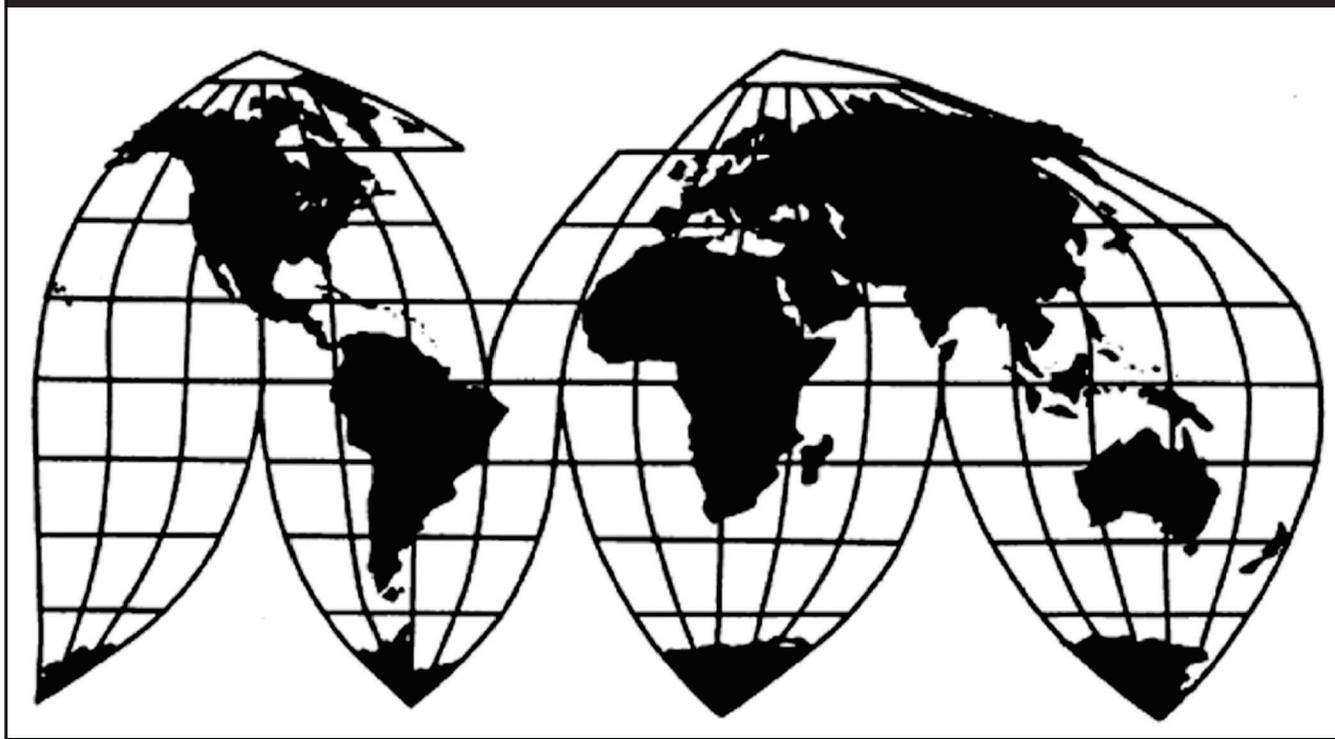
**CERTAIN SELF-ANCHORING BEVERAGE
CONTAINERS**

Investigation No. 337-TA-1092

Publication 4984

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U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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Washington, DC 20436
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In the Matter of

CERTAIN SELF-ANCHORING BEVERAGE CONTAINERS

Investigation No. 337-TA-1092



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 FINAL DETERMINATION OF VIOLATION OF
SECTION 337; ISSUANCE OF A GENERAL EXCLUSION ORDER; TERMINATION
OF INVESTIGATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined that there is a violation of section 337 of the Tariff Act of 1930, as amended, in the above-captioned investigation. The Commission has issued a general exclusion order (“GEO”) barring entry of certain self-anchoring beverage containers that infringe the patent asserted in this investigation. The Commission has terminated this investigation.

FOR FURTHER INFORMATION CONTACT: Robert Needham, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-5468. 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, Shenzen 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 initial determination (“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 GEO; but 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 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 an ID (Order No. 15) 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 GEO and the imposition of a bond in the amount of 100 percent of the entered value of subject products during

the period of Presidential review.

On October 5, 2018, the Commission determined to review in part the ID granting summary determination of a section 337 violation. 83 FR 51703 (Oct. 12, 2018) (“Notice”). Specifically, the Commission determined to review: (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). Accordingly, the Commission found a violation of section 337 as to defaulting respondent OUOH by substantial, reliable, and probative evidence.

In its Notice, the Commission requested written submissions on the issues of remedy, the public interest, and bonding. 83 FR 51703 (Oct. 12, 2018). Complainants and OUII timely filed initial written submissions, and OUII also filed a reply to Complainants’ submission. No other submissions were filed in response to the Commission Notice.

Having reviewed the submissions filed in response to the Commission Notice and the evidentiary record, the Commission has determined that the appropriate form of relief in this investigation is a GEO prohibiting the unlicensed importation of certain self-anchoring beverage containers that infringe claim 1 of the asserted patent. The Commission has further determined that the public interest factors enumerated in section 337(d) (19 U.S.C. 1337(d)) do not preclude issuance of the GEO. Finally, the Commission has determined that a bond in the amount of one hundred (100) percent of the entered value is required to permit temporary importation of the articles in question during the period of Presidential review (19 U.S.C. 1337(j)). The investigation is terminated.

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 also notified the Secretary of the Treasury and Customs and Border Protection of the order.

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.

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: December 18, 2018

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, **Monisha Deka, Esq.**, and the following parties as indicated, on **December 18, 2018**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainants Alfay Designs, Inc., Mighty Mug, Inc., and Harry Zimmerman:

Donald R. Dinan, Esq.
GOETZ FITZPATRICK LLP
One Penn Plaza, 31st Floor
New York, NY 10119

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC**

In the Matter of

**SELF-ANCHORING BEVERAGE
CONTAINERS**

Investigation No. 337-TA-1092

GENERAL EXCLUSION ORDER

The Commission has determined that there is a violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the unlawful importation, sale for importation, or sale within the United States after importation of certain self-anchoring beverage containers that infringe claim 1 of United States Patent No. 8,028,850 (“the ‘850 patent”).

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has made its determinations on the issues of remedy, the public interest, and bonding. The Commission has determined that a general exclusion from entry for consumption is necessary to prevent circumvention of an exclusion order limited to products of named persons and because there is a pattern of violation of section 337 and it is difficult to identify the source of infringing products. Accordingly, the Commission has determined to issue a general exclusion order prohibiting the unlicensed importation of infringing self-anchoring beverage containers (“covered products”).

The Commission has also determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) do not preclude issuance of a general exclusion order and that the bond during the Presidential review period shall be in the amount of one hundred (100) percent of the entered value for all covered products in question.

Accordingly, the Commission hereby **ORDERS** that:

1. Self-anchoring beverage containers that infringe claim 1 of the '850 patent (“covered articles”) are excluded from entry into the United States for consumption, entry for consumption from a foreign-trade zone, and withdrawal from a warehouse for consumption for the remaining term of the patent, except under license from, or with the permission of, the patent owner or as provided by law.

2. Notwithstanding paragraph 1 of this Order, the aforesaid covered articles are entitled to entry into the United States for consumption, entry for consumption from a foreign-trade zone, and withdrawal from a warehouse for consumption, under bond in the amount of one hundred (100) percent of the entered value of the products pursuant to subsection (j) of Section 337 (19 U.S.C. § 1337(j)), and the Presidential Memorandum for the United States Trade Representative of July 21, 2005 (70 *Fed Reg.* 43251), from the day after this Order is received by the United States Trade Representative and until such time as the United States Trade Representative notifies the Commission that this Order is approved or disapproved but, in any event, not later than sixty (60) days after the date of receipt of this Order. All entries of covered articles made pursuant to this paragraph are to be reported to U.S. Customs and Border Protection (“CBP”), in advance of the date of the entry, pursuant to procedures CBP establishes.

3. At the discretion of CBP and pursuant to procedures it establishes, persons seeking to import self-anchoring beverage containers 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 paragraph 1 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.

4. In accordance with 19 U.S.C. § 1337(1), the provisions of this Order shall not apply to covered articles 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.

5. 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).

6. The Commission Secretary shall serve copies of this Order upon each party of record in this investigation and upon CBP.

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

By order of the Commission.

A handwritten signature in black ink, appearing to read "Lisa R. Barton". The signature is stylized and cursive.

Lisa R. Barton
Secretary to the Commission

Issued: December 18, 2018

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **GENERAL EXCLUSION ORDER** has been served by hand upon the Commission Investigative Attorney, **Monisha Deka, Esq.**, and the following parties as indicated, on **December 19, 2018**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainants Alfay Designs, Inc., Mighty Mug, Inc., and Harry Zimmerman:

Donald R. Dinan, Esq.
GOETZ FITZPATRICK LLP
One Penn Plaza, 31st Floor
New York, NY 10119

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Respondents:

OUOH
Zhejiang OUOH Houseware Co., Ltd.
No. 1278-1308 Wanxiang Road
Wanquan Town
Wenzhou
Zhejiang Province, 325204 China

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

DevBattles
3rd Floor,
Street Cardinala Josepha Slipogo, 7
Ternopil, Ukraine, 46000

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

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**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC**

In the Matter of

**CERTAIN SELF-ANCHORING
BEVERAGE CONTAINERS**

Investigation No. 337-TA-1092

COMMISSION OPINION

On August 27, 2018, the presiding administrative law judge (“ALJ”) issued an initial determination (“ID”) (Order No. 15) granting summary determination that two respondents that were found in default have violated section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337. The Commission determined to review the ID in part. 83 *Fed. Reg.* 51703 (Oct. 12, 2018). Specifically, the Commission determined to review: (1) the ID’s findings on infringement to correct typographical errors and to strike a sentence; (2) the ID’s findings on importation, and on review, affirm, on modified grounds, the ID’s finding on importation as to one of the defaulting respondents and take no position as to the second defaulting respondent; 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). 83 *Fed. Reg.* at 51704. Accordingly, the Commission found a violation of section 337 as to one defaulting respondent, but not as to the second defaulting respondent. The Commission requested briefing on the issues of remedy, the public interest, and bonding.

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Having considered the record of this investigation, including the ID and the various submissions, the Commission has determined to issue a general exclusion order.

I. BACKGROUND

A. Procedural History

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 *Fed. Reg.* 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, Shenzen 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

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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 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 of violation of section 337.¹ The motion also requested a recommendation for entry of a general exclusion order.

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 an ID (Order No. 15) granting Complainants’ motion for summary determination. The ALJ found the importation requirement to be satisfied as to each defaulting respondent, found that the accused products of each defaulting respondent infringe claim 1 of the ’850 patent, and found 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.

¹ Complainants’ Motion for Summary Determination Under Section 337 of the Tariff Act of 1930, as Amended; Memorandum of Law in Support of Complainants’ Motion for Summary Determination Under Section 337 of the Tariff Act of 1930, as Amended.

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On October 5, 2018, the Commission determined to review in part the ID granting summary determination of a section 337 violation. 83 *Fed. Reg.* at 51704. Specifically, the Commission determined to review: (1) the ID's findings on infringement to correct typographical errors and to strike the sentence at page 11 of the ID that refers to claim charts attached to the Amended Complaint; (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 that respondent 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 take no position on whether a domestic industry exists under subsections 337(a)(3)(A) or (C). *Id.* Accordingly, the Commission found a violation of section 337 as to defaulting respondent OUOH by substantial, reliable, and probative evidence.²

The Commission invited the parties to the investigation, interested government agencies, and any other interested parties to file written submissions on the issues of remedy, the public interest, and bonding.

² Although the Commission does not find a violation of section 337 as to defaulting respondent DevBattles by substantial, reliable, and probative evidence, it nonetheless finds a violation of section 337 as to DevBattles based on the presumption that the facts alleged in the complaint are true. *See* 19 U.S.C. § 1337(g)(1) (“[T]he Commission shall presume the facts alleged in the complaint to be true.”).

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On October 22, 2018, Complainants and OUII each filed initial written submissions in response to the Commission's notice.³ On October 26, 2018, OUII filed a reply to Complainants' submission.⁴

B. The Asserted Patent

The '850 patent, "Self-Anchoring Beverage Container with Directional Release and Attachment Capability," issued on October 4, 2011. The '850 patent generally relates to beverage containers for holding liquids or semi-liquid contents. '850 patent at 1:8-9. More particularly, "the invention concerns the prevention of beverage container tipping and consequent content spillage." *Id.* at 1:10-11. In the "Background of the Invention" section, the patent states that while it is known to use a suction device to secure a container to a surface and stabilize the container against tipping, such devices require the user to take steps to engage the device. *See Id.* at 1:32-39. The invention is directed to an improved beverage container that resists tipping, and preferably "does not require a user to perform any step or operation apart from normal manipulation of the container. . . . [T]he anti-tipping feature should preferably operate in 'stealth mode' such that the user is not even aware that such feature is present when the container is used in normal fashion." *Id.* at 1:40-50.

Complainants allege that the defaulting respondents' accused products infringe claim 1 of the '850 patent. Independent claim 1 reads as follows:

³ Complainants' Submission on Remedy, Public Interest and Bonding ("Complainants' Br."); Response of the Office of Unfair Import Investigations to the Commission's Request for Written Submissions Regarding Remedy, Bonding, and the Public Interest ("OUII Br.").

⁴ Reply of the Office of Unfair Import Investigations to the Responses to the Commission's Request for Written Submissions Regarding Remedy, Bonding, and the Public Interest ("OUII Reply").

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1. A self-anchoring beverage container with directional release and attachment capability, comprising:

a flexible nonporous base member;

said base member having a lower surface that is configured to engage an external reference surface and form a substantially airtight peripheral seal therewith that defines a controlled pressure zone, said controlled pressure zone being a region located between said base member and said reference surface that is surrounded by said peripheral seal;

a receptacle assembly mounted to said base member;

said receptacle assembly comprising a beverage holding chamber having a closed bottom, a sidewall portion, and a top;

said receptacle assembly further comprising a communication channel arranged to provide air communication between said controlled pressure zone and an area of ambient air pressure;

said receptacle assembly further comprising a pressure control device, said pressure control device having a closed position wherein said pressure control device blocks and closes said communication channel to seal said controlled pressure zone and an open position wherein said pressure control device separates from and opens said communication channel to vent said controlled pressure zone to ambient pressure;

said receptacle assembly further comprising a grasping portion that is arranged to be grasped by a user during normal lifting of said beverage container from said reference surface;

said pressure control device and said grasping portion being part of a common rigid structure so that said grasping portion cannot move without causing simultaneous movement of said pressure control device, said rigid structure producing simultaneous actuation of said pressure control device from said closed position to open said communication channel when a user grasps said grasping portion and initiates said normal lifting of said beverage container from said reference surface;

whereby said beverage container is self-biased to remain affixed to said reference surface when said communication channel is closed due to said controlled pressure zone generating a partial vacuum when an attempt is made to move said beverage container without actuating said pressure control device; and

whereby said self-biasing will be released surreptitiously and said beverage container will lift away from said reference surface without discernible resistance when said pressure control device is

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actuated to vent said controlled pressure zone due to a user grasping said grasping portion during normal lifting of said beverage container.

II. STANDARD ON REVIEW

Once the Commission determines to review an ID, its review is conducted *de novo*. *Certain Polyethylene Terephthalate Yarn and Products Containing Same*, Inv. No. 337-TA-457, USITC Pub. No. 3550 (Oct. 2002), Comm'n Op. at 9 (June 18, 2002). Upon review, "the Commission has 'all the powers which it would have in making the initial determination,' except where the issues are limited on notice or by rule." *Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046 (July 1997), Comm'n Op. at 9-10 (quoting *Certain Acid-Washed Denim Garments and Accessories*, Inv. No. 337-TA-324, USITC Pub. No. 2576 (Nov. 1992), Comm'n Op. at 5 (Aug. 28, 1992)). Commission practice in this regard is consistent with the Administrative Procedure Act. *See* 5 U.S.C. § 557(b).

Upon review, "the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge." 19 C.F.R. § 210.45(c). "The Commission also may make any findings or conclusions that in its judgment are proper based on the record in the proceeding." *Id.* This rule reflects the fact that the Commission is not an appellate court, but is the body responsible for making the final agency decision.

III. DISCUSSION

A. Issues Under Review

1. Infringement

The ID found that Complainants established by substantial, reliable, and probative evidence that the accused products of the defaulting respondents infringe claim 1 of the '850 patent. ID at 11-12. The ID's infringement findings were supported by the infringement claim

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charts and accompanying element-by-element analysis (Mot. Ex. 3 at Attachments 3 (claim chart for OUOH) and 6 (claim chart for DevBattles); Marcin Decl.). However, the ID appeared to have inadvertently cross-referenced the wrong portion of its infringement discussion and cited the domestic industry analysis of Complainants' expert (Marcin) instead of the expert's infringement analysis for OUOH. *See* ID at 11 (referencing "foregoing reasons" and citing Mot. Ex. 3 at Attachment 1 (OUOH)). The ID also referenced certain claim charts, attached to Complainants' amended complaint, which were inconsistent with the more detailed claim charts included with Complainants' motion for summary determination. ID at 11 ("Complainants also attached claim charts to the Amended Complaint . . . of the patent.").

Accordingly, the Commission determined to review 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).)"). The Commission affirmed the ID's infringement findings, as modified.

2. Importation

The ID found that Complainants met the importation requirement with respect to each defaulting respondent. ID at 8-9. However, the ID does not specifically address whether or not importation has been established by substantial, reliable, and probative evidence with respect to one or more defaulting respondents. The ID states that –

[i]n the [c]omplaint, Complainants identified specific instances of importation by each of the [d]efaulting [r]espondents. (*See Am.*

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Compl. at ¶ 48, *Compl. Ex.* 35 (OUOH); ¶ 49, *Compl. Ex.* 36 (DevBattles); *see also* *Mot. Supp.* at 1-2; *Supp. Ex.* 9; *Mot. Ex.* 4 at *Attachments* 16 (OUOH), 17 (DevBattles.) Because the Commission presumes the facts alleged in the complaint to be true, Complainants have satisfied their burden of demonstrating importation. Additionally, the undersigned is not aware of any evidence to the contrary with respect to importation by the [d]efaulting [r]espondents.

ID at 8-9.

The record evidence on importation includes shipping documentation for purchases of an accused product from each defaulting respondent and photographs of the received accused products and packaging. *See Am. Compl.* ¶¶ 48, 49; *Compl. Exs.* 35 (OUOH), 36 (DevBattles); *see also* *Mot. Supp.* at 1-2; *Supp. Ex.* 9; *Mot. Ex.* 4, *Atts.* 16 (OUOH), 17 (DevBattles). The Commission found the evidence of importation by defaulting respondent OUOH substantial, reliable, and probative. However, as to defaulting respondent DevBattles, Complainants concede that the packaging in which DevBattles' accused product was shipped to Complainants was not marked with a country of origin. *Mot. Supp.* at 1.

Accordingly, the Commission determined to review the ID's findings on importation, and on review, (1) affirmed 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 (2) took no position on whether Complainants had established by substantial, reliable, and probative evidence the importation requirement as to defaulting respondent DevBattles. 83 *Fed. Reg.* at 51704.

3. Economic Prong of the Domestic Industry

The ID found that Complainants met the economic prong of the domestic industry requirement under 19 U.S.C. § 1337(a)(3)(A) and (B) (*viz.*, significant investment in plant and

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equipment and significant employment of labor or capital, respectively), and that they presented substantial, reliable, and probative evidence supporting that finding. ID at 20-23. The ID further found it unnecessary to decide whether Complainants met the economic prong under section 337(a)(3)(C) (*viz.*, substantial investment in its exploitation including engineering, research and development, or licensing) or whether they are in the process of establishing a domestic industry. ID at 23 n.14.

As to investments in plant and equipment, the ID found that Complainants maintain a plant in Rahway, New Jersey, at a cost of \$10,000 per month, and invested \$212,000 in equipment housed in that plant, which equipment is used in the research and development, design, and manufacturing of prototypes of Complainants' Mighty Mug products. ID at 21 (citing Mot Ex. 6 ("Smaldone Decl.") ¶¶ 7-9; Mot Ex. 7 ("2nd Smaldone Decl.") ¶¶ 7-9); Mot. Suppl. at 3; Supp. Ex. 10 ¶ 5). The ID found that, given that the facility is also used in the distribution and sale of other products, Complainants reasonably allocated these plant and equipment amounts to the Mighty Mug products on the basis of percentage of sales (70 percent to Mighty Mug and 30 percent to other products). ID at 21 n.4 (citing Mot. Suppl. at 2; Supp. Ex. 10 at ¶ 3). The ID found that Complainants had invested an additional \$5200 in certain 3D printing equipment dedicated solely to products covered by the '850 patent. ID at 21 (citing Mot. Suppl. at 3; Supp. Ex. 10 at ¶ 5).

Additionally, the ID made the following findings regarding the activities at the Rahway plant:

- [A]ll activity concerning the design, development, finishing, manufacture, and distribution of the Mighty Mug products occurs at the Rahway facility." ID at 21 (citing Mot. Suppl. at 4; Supp. Ex. 10 ¶ 7). "The only activity done overseas is the plastic molding of the mug." ID at 21 n.5 (citing Mot. Suppl. at 4; Supp. Ex. 10 at ¶ 7).

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- [A]ll repackaging, applying of shipping bar codes, graphic designs, customer service requirements, and warranty work for the Mighty Mug products are performed at the Rahway facility.” ID at 21 (citing Smaldone Decl. ¶ 12; 2nd Smaldone Decl. ¶ 12).
- Complainants also ‘price tickets’ [*i.e.*, applies retail price stickers] for certain customers, as well as handle all shipping, paperwork, bills of lading, present the combination for retail customers, and screen engrave logos on the self-anchoring beverage containers at the Rahway facility.” ID at 21-22 & n.6 (citing Smaldone Decl. ¶ 13; 2nd Smaldone Decl. ¶ 13).
- [A]ll distribution of catalogs, samples, sales brochures, advertising in trade publications, website and internet marketing, and sales of the self-anchoring beverage containers are performed at the Rahway facility.” ID at 22 (citing Mot. Memo at 14; Complainants’ proposed FF in support of Mot. ¶ 33).

As to employment of labor and capital, the ID notes that Complainants’ investment of approximately \$10,000 a month in rent for the Rahway plant and at least \$212,000 in equipment “constitute a significant employment of capital” as well as investment in plant and equipment. ID at 22 n. 8 (citing Smaldone Decl ¶ 8; 2nd Smaldone Decl. ¶ 8; Supp. Ex. 10 ¶ 5). The ID includes a summary table of Complainants’ investments in the design, development, finishing and customer support of the Mighty Mug products, omitting investments in a new facility purchased by Complainants since the filing of the complaint. ID at 22-23 & n.9. The ID found it unnecessary to consider investments in the new facility because “the investments in the existing facility are sufficient to show that the domestic industry requirement is satisfied.” *Id.* The ID’s summary table allocates 70 percent of the rent (\$7,000 (monthly)) and equipment (\$148,400) to practice of the ’850 patent (based on sales, as discussed above). The ID’s summary table allocates the entire \$5200 investment in 3D printing R&D equipment to the ’850 patent (as discussed above). The ID’s summary table includes \$350,000 identified as R&D salaries, of

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which 70 percent (\$245,000) is allocated to practice of the '850 patent. ID at 23. The amount for R&D salaries is based on a salary of \$35,000 for each of 10 employees, who spend 70% of their working time on the Mighty Mug products.⁵ ID at 22-23 (citing Smaldone Decl. at ¶¶ 18-20; 2nd Smaldone Decl. at ¶¶ 18-20). The R&D salaries estimate is conservative because it uses an employee salary of \$35,000, which is the lowest salary in the applicable salary range of \$35,000 to \$100,000. ID at 22 (citing Smaldone Decl. at ¶ 20; 2nd Smaldone Decl. at ¶ 20); 23 n.11.

The Commission found the record evidence supported the ID's findings on the amounts of investments in employment of labor and capital allocated to the '850 patent. Although the ID finds such amounts to be significant, it does not detail its reasoning on this point.⁶ Having reviewed the record, the Commission found such investments to be significant. As set forth above, "[a]ll activity concerning the design, development, finishing, manufacture, and distribution of the Mighty Mug products occurs at the Rahway facility." ID at 21 (citing Mot. Suppl. at 4; Supp. Ex. 10 ¶ 7). "The only activity done overseas is the plastic molding of the mug." ID at 21 n.5 (citing Mot. Suppl. at 4; Supp. Ex. 10 at ¶ 7). The evidence of record

⁵ The ID notes that "Complainants are not relying solely on marketing and sales expenditures to satisfy the economic prong. Complainants have provided evidence of significant expenditures in its employment of labor in other qualifying activities, such as research, product development, and customer service, as well as capital expenditures in equipment used for the design of the Mighty Mug products." ID at 22 n.7.

⁶ See, e.g., "Complainants have made significant investments in plant and equipment" (ID at 21), "[t]hese . . . investments constitute a significant employment of capital" (ID at 22 n. 8), "there is a significant employment of labor and capital" (ID at 22). The concluding paragraph of the economic prong analysis evaluates the allocated amounts credited toward the '850 patent using the "substantial investment" standard applicable to 337(a)(3)(C). ID at 23 (citing *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm'n Op. at 25-26 May 16, 2008) ("[T]he requirement for showing the existence of a domestic industry will depend on the industry in question, and the complainant's relative size.")).

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indicates value added in the United States is at least 60 percent. *See* Mot Ex. 6 (“Smaldone Decl.”) ¶ 7.

Furthermore, the evidence of record demonstrates that the amounts of investments in labor and capital are about 9 percent of the annual sales of the domestic industry product. In this regard, as to the employment of labor and capital, the ID allocated \$245,000 (R&D salaries) to the '850 patent, and recognized the \$237,600 (specifically, \$84,000 (annual facility rent), \$148,400 (equipment), and \$5,200 (3D printing R&D equipment)) as employment of capital. With regard to sales of the domestic industry product, the President of Mighty Mug, Inc. attests that “[a]nnual sales of the Mighty Mug were slightly in excess of \$5,000,000.00 per year” and “have since declined to below \$2,000,000.00 per year.” Suppl. Ex. 10 ¶ 8. In the supplement to their motion, complainants assert that “[s]ales in the industry, as defined by the '850 Patent, are approximately \$5,000,000-\$6,000,000 per year.” Mot. Suppl. at 6. Using the mid-point of the annual sales range (*i.e.*, \$5.5 million per year), the Commission estimates the labor and capital investment to be about 9 percent of the annual sales of the domestic industry product ($((\$245,000 + \$237,600)/\$5,500,000)$).

Accordingly, the Commission determined to review the ID’s findings on the economic prong of the domestic industry, and on review, affirmed the ID’s finding of the existence of a domestic industry under subsection 337(a)(3)(B), and took no position on whether a domestic industry exists under subsections 337(a)(3)(A) or (C).

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B. Remedy⁷

The ALJ recommended that a general exclusion order issue in the event that the Commission finds a violation of section 337. ID at 24-27. The ID found that any limited exclusion order would likely be subject to immediate evasion. ID at 25-26. The ID also found evidence of a widespread pattern of violation and that identifying the source of the infringing products is difficult. ID at 26. Complainants and OUII agree with the ALJ's recommendation to issue a general exclusion order. Complainants' Br. at 2-4; OUII Br. at 4-9; OUII Reply at 1.

Section 337(g)(2) provides:

In addition to the authority of the Commission to issue a general exclusion from entry of articles when a respondent appears to contest an investigation concerning a violation of the provisions of this section, a general exclusion from entry of articles, regardless of the source or importer of the articles, may be issued if—

- (A) no person appears to contest an investigation concerning a violation of the provisions of this section,
- (B) such a violation is established by substantial, reliable, and probative evidence, and
- (C) the requirements of subsection (d)(2) of this section are met.

19 U.S.C. § 1337(g)(2). Section 337(d)(2) further provides:

The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that—

⁷ In the review notice, the Commission requested briefing on the issuance of cease and desist orders to the extent Complainants sought such orders against the defaulting respondents. 83 Fed. Reg. at 51704-05. In their submission, Complainants state that they do not request cease and desist orders. Complainants' Br. at 1 n.1.

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(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or

(B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19 U.S.C. § 1337(d)(2).

Respondent Telebrands appeared and was terminated from this investigation based on a settlement agreement. *See* Order No. 8 (Feb. 16, 2018) (unreviewed Notice (Mar. 15, 2018)). In cases like this one, where a respondent appears and was terminated based on a settlement agreement, section 337(g)(2) does not apply; however, when a violation is established based on reliable, probative, and substantial evidence, the Commission may issue a general exclusion order under section 337(d)(2). *See, e.g., Certain Sildenafil or Any Pharmaceutically Acceptable Salt Thereof, Such as Sildenafil Citrate, and Products Containing Same*, Inv. No. 337-TA-489, Comm’n Op. at 3-5 (Feb. 6, 2004). In this case, the Commission found a violation of section 337 as to defaulting respondent OUOH supported by reliable, probative, and substantial evidence.

The Commission concludes that the record evidence supports the ID’s findings and demonstrates that a general exclusion order is necessary to prevent circumvention of a limited exclusion order. ID at 25-26. In this regard, site visits to the addresses for certain respondents revealed no evidence of the companies at the listed addresses. ID at 25 (citing Mot. Ex. 8). Evidence of record also demonstrates that the accused products “are shipped into the country under false and misleading labels—*i.e.*, basically anonymous sales through online portals.” *Id.* (citing Mot. Ex. 4; *Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm’n Op. at 13 (June 26, 2015) (“[A] large number of anonymous

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infringing sales on the Internet [] supports a likelihood of circumvention under subparagraph (A) and also supports a determination that it is difficult to identify the source of infringing products under subparagraph (B).”)

The record evidence also supports the ID’s findings as to a widespread pattern of violation and the difficulty of identifying the source of the infringing products. ID at 26. In this regard, the ID found that “in addition to the [d]efaulting [r]espondents, numerous other sources of infringing self-anchoring beverage containers are available for purchase online.” *Id.* (citing Mot. Exs. 4 & 6; *Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm’n Op. at 14 (June 26, 2015) (“The Commission has found in other investigations that numerous online sales of infringing imported goods can constitute a pattern of violation of section 337.”). As to the difficulty of identifying the source of the infringing products, the ID noted evidence showing that the products were often sold under different names and anonymously through online portals. ID at 25-26 (citing Mot. Exs. 4 & 8; *Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm’n Op. at 13 (June 26, 2015)).

Accordingly, the Commission has determined to adopt the ID’s findings as to circumvention of a limited exclusion order and widespread pattern of unauthorized use (ID at 25-26) and to issue a general exclusion order with respect to articles covered by claim 1 of the ‘850 patent.

C. The Public Interest

Sections 337(d) and (g) of the Tariff Act of 1930, as amended, direct the Commission to consider certain public interest factors before issuing a remedy. These public interest factors include the effect of any remedial order on the “public health and welfare, competitive

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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), (g).

Complainants and OUII argue that issuance of a general exclusion order would not be contrary to the public interest. Complainants’ Br. at 4-6; OUII Br. at 11-12; OUII Reply at 1-2. The Commission did not receive any comments from the public on this issue in response to its notice of review.

The Commission finds no evidence in the record indicating that a general exclusion order would have an adverse impact on the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers. The record in this investigation contains no evidence that the products at issue, self-anchoring beverage containers for consumers to avoid spilling liquids, raise public health and welfare concerns. Other types of competing beverage containers are available, and there is evidence in the record showing that Complainants are in the process of expanding their production facilities. *See* Mot. Exs. 5 & 7; ID at 22 n.9. Further, the record indicates that consumers would benefit from the removal of confusing counterfeit products from the marketplace. *See* ID at 26; Mot. Exs. 4 & 6, ¶ 3, Att. 2.

Accordingly, the Commission finds that the statutory public interest factors do not preclude issuance of a general exclusion order.

D. Bonding

If the Commission enters an exclusion order, a respondent may continue to import and sell its products during the 60-day period of Presidential review under bond in an amount determined by the Commission to be “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). Ordinarily, the Commission sets the

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bond during the period of Presidential review based on the price differential between the domestic and the infringing products or based on a reasonable royalty. *Certain Ink Cartridges and Components Thereof*, Inv. No. 337-TA-946, Comm'n Op. at 18 (June 29, 2016). Where the available pricing or royalty information is insufficient, the Commission has set a 100 percent bond. *Id.*

The ALJ recommended imposition of a bond of 100 percent during the Presidential review period. ID at 27-28 (citing *Certain Digital Photo Frames and Image Display Devices and Components Thereof*, Inv. No. 337-TA-807, USITC Pub. No. 4549 (July 2015), Comm'n Op. at 17 (Mar. 27, 2013) ("The Commission finds that there is little or no evidence in the record of this investigation as to pricing of the defaulting respondents' products. . . . The Commission has traditionally set a bond of 100 percent of the entered value of the products under these circumstances.")).

Complainants and OUII agree with the ALJ that the bond should be set at 100 percent. Complainants' Br. at 6; OUII Br. at 9-11; OUII Reply at 1.

The Commission finds that the defaulting respondents' failure to appear and participate in the investigation prevents the Commission from determining a price differential or a reasonable royalty. Accordingly, the Commission has determined to set the bond during the period of Presidential review at 100 percent of the entered value of the infringing products.

IV. CONCLUSION

The Commission has determined to affirm, on modified grounds, the ID's finding of a section 337 violation and to issue a general exclusion order prohibiting the unlicensed importation of certain self-anchoring beverage containers that infringe claim 1 of the '850 patent.

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The Commission adopts all findings and conclusions in the ID that are not inconsistent with this opinion.

By order of the Commission.

A handwritten signature in black ink, appearing to read "Lisa R. Barton". The signature is stylized and cursive.

Lisa R. Barton
Secretary to the Commission

Issued: July 24, 2019

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, **Monisha Deka, Esq.**, and the following parties as indicated, on **July 25, 2019**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainants Alfay Designs, Inc., Mighty Mug, Inc., and Harry Zimmerman:

Donald R. Dinan, Esq.
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- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

Respondents:

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Wanquan Town
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Zhejiang Province, 325204 China

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

DevBattles
3rd Floor,
Street Cardinala Josepha Slipogo, 7
Ternopil, Ukraine, 46000

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

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", enclosed within a large, loopy circular flourish.

Lisa R. Barton
Secretary to the Commission

Issued: October 5, 2018

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, **Monisha Deka, Esq.**, and the following parties as indicated, on **October 5, 2018**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

On Behalf of Complainants Alfay Designs, Inc., Mighty Mug, Inc., and Harry Zimmerman:

Donald R. Dinan, Esq.
GOETZ FITZPATRICK LLP
One Penn Plaza, 31st Floor
New York, NY 10119

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN SELF-ANCHORING
BEVERAGE CONTAINERS**

Inv. No. 337-TA-1092

**ORDER NO. 15: INITIAL DETERMINATION GRANTING COMPLAINANTS'
MOTION FOR SUMMARY DETERMINATION UNDER SECTION
337 OF THE TARIFF ACT OF 1930**

(August 27, 2018)

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PUBLIC VERSION

I. INTRODUCTION

On May 25, 2018, Complainants Alfay Design, Inc., Mighty Mug, Inc., and Harry Zimmerman (collectively, “Complainants”) filed (1092-008) a motion for summary determination, seeking a finding of a violation of section 337 and requesting entry of a general exclusion order (“GEO”). On June 14, 2018, Complainants filed a supplement (“Supplement”) to their motion. The Commission Investigative Staff (“Staff”) filed a response in support of the motion.

A. Procedural History

On October 31, 2017, Complainants filed a Complaint alleging a violation of section 337 of the Tariff Act of 1930. 83 Fed. Reg. 835-836 (Jan. 8, 2018). An Amended Complaint was filed on December 1, 2017. *Id.* Supplements to the Amended Complaint were filed on December 4, 8, 19, and 22, 2017. *Id.* The Amended Complaint alleges violations of section 337 in the importation and sale 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”), and U.S. Trademark Registration No. 4,191,803 (the “’803 trademark”).¹ *Id.*

On January 8, 2018, the Commission determined to institute this Investigation. *Id.* Specifically, the Commission instituted this 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 self-anchoring beverage containers by reason of infringement of one or more of claim 1 of the ’850 patent and claim 1 of the ’418 patent; and whether an industry in the United States exists or is in the process of being established as required by subsection (a)(2) of section 337; and

¹ Complainants withdrew their claims related to the ’803 trademark and the ’418 patent. (See Order No. 12 (June 6, 2018); see also Notice of Comm’n Determination Not to Review an Initial Determination Granting Complainants’ Mot. to Withdraw all Claims Related to U.S. Trademark No. 4,191,803 and U.S. Patent No. 8,757,418 (June 25, 2018).)

[W]hether there is a violation of subsection (a)(1)(C) 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 self-anchoring beverage containers by reason of infringement of the '803 trademark; and whether an industry in the United States exists or is in the process of being established as required by subsection (a)(2) of section 337.

Id.

The Notice of Investigation named eight respondents: Telebrands, Corp.; HIRALIY; Chekue; Tapcet; OUOH; DevBattles; OTELAS; and Artiart Limited. *Id.* The Office of Unfair Import Investigations was also named as a party to the Investigation. *Id.*

During the course of this Investigation, Complainants settled with Respondent Telebrands, Corp. and withdrew the Amended Complaint as to Respondents HIRALIY, Chekue, Tapcet, OTELAS, and Artiart. (*See* Order Nos. 8 and 10; *see also* Notice of a Comm'n Determination Granting a Joint Mot. to Terminate the Investigation as to Respondent Telebrands Corp. Based on a Settlement Agreement (Mar. 16, 2018); Notice of Comm'n Determination Not to Review an Initial Determination Granting a Mot. to Withdraw the Compl. as to Certain Unserved Respondents (May 8, 2018).) The last two remaining Respondents – DevBattles and OUOH (collectively, the “Defaulting Respondents”) – were found in default on May 3, 2018. (*See* Order No. 11; *see also* Notice of Comm'n Determination Not to Review an Initial Determination Granting a Mot. to Find the Last Remaining Respondents in Default (June 1, 2018).) None of the Defaulting Respondents have contested Complainants' allegations that they have violated and continue to violate section 337.

B. The Private Parties

1. Complainants

a) Alfay Designs, Inc.

Complainant Alfay Designs, Inc. (“Alfay”) is the exclusive licensee of the ’850 patent through an exclusive license between Harry Zimmerman (“Zimmerman”), managing member of JO-EL Wire Company, LLC and Alfay. (Am. Compl. at ¶ 9; *see also* Compl. Ex. 4; Mot. Ex. 4 at Attachment 1.) Harry Zimmerman licensed the right to Alfay to manufacture, market, and sell the self-anchoring beverage containers covered by the ’850 patent. (*Id.*; *see also* ¶ 20.)

b) Mighty Mug, Inc.

Complainant Mighty Mug, Inc. (“Mighty Mug”) is an affiliate of Alfay. Mighty Mug has its principal place of business at 665 Martin Street, Rahway, New Jersey. (Am. Compl. at ¶ 8.) Mighty Mug manufactures, licenses for sale, sells, and markets self-anchoring beverage containers under the trademark “Mighty Mug.” (*Id.*)

c) Harry Zimmerman

Harry Zimmerman is the inventor of the ’850 patent. (Mem. at 9; Am. Compl. at ¶¶ 4, 6, 19; Compl. Ex. 1.)

2. The Defaulting Respondents

a) DevBattles

Respondent DevBattles is a corporation with its principal place of business at 3rd Floor, Street Cardinala Josepha Slipogo, 7, Ternopil, Ukraine, 46000. (Am. Compl. at ¶ 15.) DevBattles imports, markets, and sells the accused products. (*Id.*; *see also* Mem. at 11.)

b) OUOH

Respondent OUOH is a corporation with its principal place of business at Zhejiang OUOH Houseware Co., Ltd., No.1278-1308 Wanxiang Road, Wanquan Town, Wenzhou, Zhejiang Province, 325204 China. (*Id.* at ¶ 14.) OUOH imports, markets, and sells the accused products. (*Id.*; *see also* Mem. at 11.)

C. The Asserted Patent – U.S. Patent No. 8,028,850

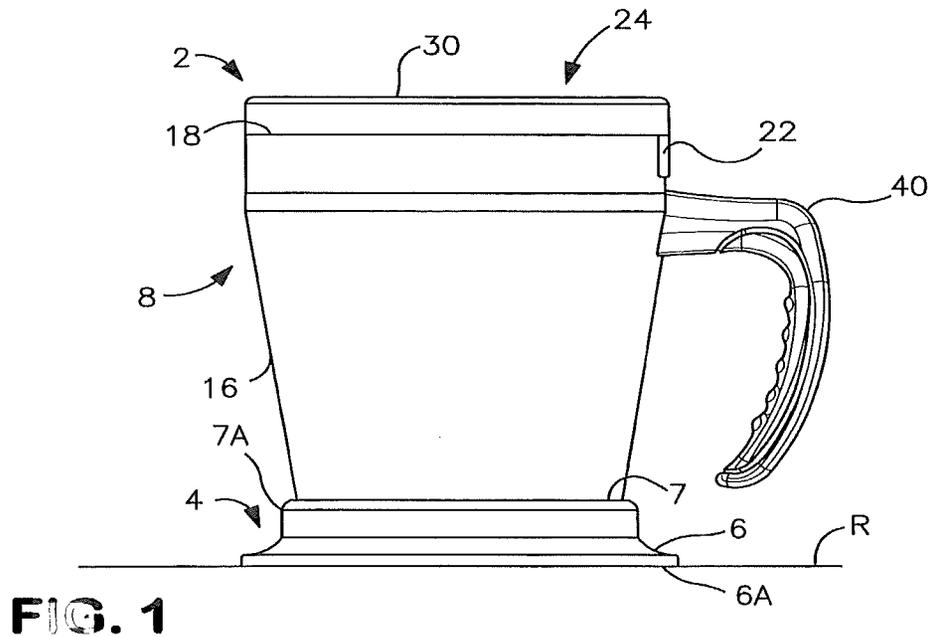
The '850 patent, entitled "Self-Anchoring Beverage Container with Directional Release and Attachment Capability," issued on October 4, 2011 to Israel Harry Zimmerman. The '850 patent generally relates to beverage containers for holding liquids or semi-liquid contents. ('850 patent at 1:8-9; *see also* Am. Compl. at ¶ 22.) In particular, "the invention concerns the prevention of beverage container tipping and consequent content spillage." (*Id.* at 1:10-11.)

The '850 patent has 28 claims. Only claim 1 is at issue in this Investigation. The asserted claim reads as follows:

1. An anchoring device having directional release and attachment capability, and further including a feature that prevents inadvertent release, comprising: a lower base member; an upper movable member that is wholly or partially nested within said base member by virtue of said base member having a sidewall portion that surrounds at least part of a sidewall portion of said movable member but leaves a top surface portion of said movable member exposed; said movable member being movable relative to said base member; said movable member including a gripping region that is not covered by said base member and which is provided for intentional manipulation and lifting of said movable member; a seal member on said base member, said seal member being configured to engage an external reference surface and form a substantially airtight seal therewith that defines a periphery of a controlled pressure zone between said seal member and said reference surface; a communication port that can be opened and closed via actuation of said movable member to selectively vent or isolate said controlled pressure zone; and a protective member covering one or more areas of said exposed top surface portion of said movable member that are not covered by said base member and not part of said intended gripping region, but which are prone to being manipulated either intentionally or unintentionally to actuate said movable member in an unwanted manner; said protective member preventing unwanted venting of said communication port due to a user interacting with said one or more areas of said exposed top surface portion of said movable member instead of said intended gripping region.

D. The Products at Issue

The products at issue in this Investigation are self-anchoring beverage containers with directional release and attachment capability. (Am. Compl. at ¶¶ 22, 26.) An example of a self-anchoring beverage container with directional release and attachment capability is shown below:



(Fig. 1 of the '850 patent (side elevation view).)

II. LEGAL STANDARDS

A. Summary Determination

Summary determination is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to a determination as a matter of law. *See* 19 C.F.R. § 210.18(b). In determining whether there is a genuine issue of material fact, “the evidence must be viewed in the light most favorable to the party opposing the motion with doubts resolved in favor of the non-movant.” *Crown Operations Int’l, Ltd. v. Solutia, Inc.*, 289 F.3d 1367, 1375 (Fed. Cir. 2002) (citations omitted); *see also Paragon Podiatry Lab., Inc. v. KLM Labs, Inc.*, 984 F.2d 1182, 1185 (Fed. Cir. 1993) (“In other words, ‘[s]ummary judgement is authorized when it

is quite clear what the truth is, and the law requires judgment in favor of the movant based upon facts not in genuine dispute.”) (citations omitted).

B. Default

Commission Rule 210.16(b)(4) states: “A party found in default shall be deemed to have waived its right to appear, to be served with documents, and to contest the allegations at issue in the investigation.” 19 C.F.R. § 210.16(b)(4). Commission Rule 210.16(c) further provides that “[t]he facts alleged in the complaint will be presumed to be true with respect to the defaulting respondent.” 19 C.F.R. § 210.16(b)(4).

C. Infringement

Literal infringement is a question of fact. *Finisar Corp. v. DirecTV Grp., Inc.*, 523 F.3d 1323, 1332 (Fed. Cir. 2008). “An infringement analysis entails two steps. The first step is determining the meaning and scope of the patent claims asserted to be infringed. The second step is comparing the properly construed claims to the device accused of infringing.” *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995) (*en banc*), *aff’d*, 517 U.S. 370 (1996) (citation omitted).

Literal infringement requires the patentee to prove that the accused device contains each limitation of the asserted claim(s). If any claim limitation is absent, there is no literal infringement of that claim as a matter of law. *Bayer AG v. Elan Pharm. Research Corp.*, 212 F.3d 1241, 1247 (Fed. Cir. 2000).

D. Domestic Industry

In a patent-based complaint, a violation of section 337 can be found “only if an industry in the United States, relating to the articles protected by the patent . . . concerned, exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2). Under Commission precedent, this “domestic industry requirement” of section 337 consists of an economic prong and a technical

prong. *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm'n Op. at 12-14, 2009 WL 5134139 (U.S.I.T.C. Dec. 2009). The complainant bears the burden of establishing that the domestic industry requirement is satisfied. See *Certain Set-Top Boxes and Components Thereof*, Inv. No. 337-TA-454, Final Initial Determination at 294, 2002 WL 31556392 (U.S.I.T.C. June 21, 2002) (unreviewed by Commission in relevant part).

1. Economic Prong

Section 337(a)(3) sets forth the following economic criteria for determining the existence of a domestic industry in such investigations:

(3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned –

- (A) significant investment in plant and equipment;
- (B) significant employment of labor or capital; or
- (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

Given that these criteria are listed in the disjunctive, satisfaction of any one of them will be sufficient to meet the economic prong of the domestic industry requirement. *Certain Integrated Circuit Chipsets and Prods. Containing Same*, Inv. No. 337-TA-428, Order No. 10, Initial Determination (unreviewed) (May 4, 2000).

2. Technical Prong

The technical prong of the domestic industry requirement is satisfied when the complainant in a patent-based section 337 investigation establishes that it is practicing or exploiting the patents at issue. See 19 U.S.C. § 1337(a)(2) and (3); *Certain Microsphere Adhesives, Process for Making Same and Prods. Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Op. at 8, 1996 WL 1056095 (U.S.I.T.C. Jan. 16, 1996). “The test for

satisfying the ‘technical prong’ of the industry requirement is essentially [the] same as that for infringement, i.e., a comparison of domestic products to the asserted claims.” *Alloc, Inc. v. Int’l Trade Comm’n*, 342 F.3d 1361, 1375 (Fed. Cir. 2003). To prevail, the patentee must establish by a preponderance of the evidence that the domestic product practices one or more claims of the patent, either literally or under the doctrine of equivalents. *Bayer*, 212 F.3d at 1247. It is sufficient to show that the products practice any claim of that patent, not necessarily an asserted claim of that patent. *Certain Microsphere Adhesives*, Comm’n Op. at 7-16.

III. IMPORTATION

Section 337(a)(1) prohibits, *inter alia*, “[t]he importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that . . . infringe a valid and enforceable United States patent . . . or are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent.” 19 U.S.C. § 1337(a)(1). A complainant need only prove importation of a single accused product to satisfy the importation element. *Certain Purple Protective Gloves*, Inv. No. 337-TA-500, Order No. 17 (Sept. 23, 2004) (unreviewed).

Complainants assert that the Defaulting Respondents import, market and sell self-anchoring beverage containers “which infringe Exemplary Claim 1 of the ‘850, and which are imported from China into the United States.” (Mem. at 11; *see also* Mot. Supp. at 1-2.) They explain that the Defaulting Respondents’ accused products “are primarily sold through the Internet and/or major retailers in the United States.” (*Id.*) Staff believes that the importation requirement is satisfied as to the Defaulting Respondents. (Staff Resp. at 15-16.)

The undersigned finds that Complainants have established that the importation requirement of section 337 is satisfied with respect to the Defaulting Respondents. In the Complaint, Complainants identified specific instances of importation by each of the Defaulting

Respondents. (See Am. Compl. at ¶ 48, Compl. Ex. 35 (OUOH); ¶ 49, Compl. Ex. 36 (DevBattles); see also Mot. Supp. at 1-2; Supp. Ex. 9; Mot. Ex. 4 at Attachments 16 (OUOH), 17 (DevBattles).) Because the Commission presumes the facts alleged in the complaint to be true, Complainants have satisfied their burden of demonstrating importation. Additionally, the undersigned is not aware of any evidence to the contrary with respect to importation by the Defaulting Respondents.

IV. JURISDICTION

A. Subject Matter Jurisdiction

Section 337 confers subject matter jurisdiction on the Commission to investigate, and if appropriate, to provide a remedy for, unfair acts and unfair methods of competition in the importation, the sale for importation, or the sale after importation of articles into the United States. See 19 U.S.C. §§ 1337(a)(1)(B) and (a)(2). Complainants filed a complaint alleging a violation of this subsection. Accordingly, the Commission has subject matter jurisdiction over this Investigation under section 337 of the Tariff Act of 1930. *Amgen, Inc. v. U.S. Int'l Trade Comm'n*, 902 F.2d 1532, 1536 (Fed. Cir. 1990).

B. Personal Jurisdiction

Personal jurisdiction is not required so long as the products are being imported. See *Sealed Air Corp. v. U.S. Int'l Trade Comm'n*, 645 F.2d 976, 985-89 (C.C.P.A. 1981). The undersigned has determined hereinabove that the accused products have indeed been imported into the United States. See Section III. Furthermore, by defaulting, the Defaulting Respondents have waived their right to contest that *in personam* jurisdiction exists. See *Certain Protective Cases and Components Thereof*, Inv. No. 337-TA-780, Initial Determination at 46 (June 29, 2012).

C. In Rem Jurisdiction

The Commission has *in rem* jurisdiction by virtue of the fact that accused self-anchoring beverage containers have been imported into the United States. *See Sealed Air Corp. v. U. S. Int'l Trade Comm'n*, 645 F.2d 976, 985 (C.C.P.A. 1981).

V. VALIDITY

A patent is presumed valid. 35 U.S.C. § 282; *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2242 (2011). In the instant matter, no party has challenged the validity of the asserted patent. The Commission is therefore prohibited from making a determination on validity since no defense of invalidity has been raised. *Lannom Mfg. Co., Inc. v. U.S. Int'l Trade Comm'n*, 799 F.2d 1572, 1580 (Fed. Cir. 1986.) (“We conclude, therefore, that Congress did not authorize the Commission to redetermine patent validity when no defense of invalidity has been raised.”) Accordingly, there is no issue of material fact as to the validity of the '850 patent.

VI. U.S. PATENT NO. 8,028,850

A. Claim Construction

Complainants do not address the issue of claim construction in their motion or their Supplement. In Staff's view, the claims can be given their plain and ordinary meanings. (Staff Resp. at 16 (noting that it is “not aware of any evidence indicating that any of the limitations require a special construction.”).) Given the absence of any dispute, the undersigned agrees with Staff that the terms of the asserted claim should be construed according to their plain and ordinary meaning. *See O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co., Ltd.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008) (“district courts are not (and should not be) required to construe *every* limitation present in a patent's asserted claims,” but rather only “[w]hen the parties present a fundamental dispute regarding the scope of a claim term.” (emphasis added)); *see also Hakim v. Cannon Avent Group, PLC*, 479 F.3d 1313, 1318-19 (Fed. Cir. 2007) (“Claim construction is

directed to claims or claim terms whose meaning is disputed as applied to the patentee's invention in the context of the accused device. When there is no dispute as to the meaning of a term that could affect the disputed issues of the litigation, 'construction' may not be necessary.")

B. Infringement

Complainants contend that the accused products from DevBattles and OUOH infringe claim 1 of the '850 patent. (Mem. at 10-11.) Staff supports a finding of infringement. In Staff's view, "the photographs of the Accused Products and related analysis provided in the expert declaration depict or describe each of the claimed elements of the asserted claims in relation to the Accused Products of the Defaulting Respondents." (Staff Resp. at 17.)

For the foregoing reasons, the undersigned finds that Complainants have established that the Defaulting Respondents' accused products infringe the '850 patent. In the Amended Complaint, Complainants asserted that each of the Defaulting Respondents and their products infringe claim 1. (Am. Compl. at ¶ 48 (OUOH), ¶ 49 (DevBattles).) Complainants also attached claim charts to the Amended Complaint demonstrating how each of the Defaulting Respondents' products infringe the asserted claim of the patent. (Compl. Ex. 38 at 13-15 (OUOH), 16-18 (DevBattles).) In addition, Complainants submitted a declaration from their expert, Michael J. Marcin.² (See Mot. Ex. 2 ("Marcin Decl.")). Mr. Marcin examined the Defaulting Respondents' accused products and compared those products (element-by-element) to the asserted claims of the '850 patent. (Mot. Ex. 3 at Attachments 1 (OUOH) and 6 (DevBattles).) Based upon his examination, Mr. Marcin concluded that OUOH's Camera Lens Magic Suction Mug product and DevBattles's Mug infringe claim 1 of the '850 patent. (*Id.*; see also Marcin Decl. at ¶ 27.) The

² Mr. Marcin is registered to practice in front of the U.S. Patent and Trademark Office. (Marcin Decl. at ¶ 2.) He also has advised clients on the issue of infringement. (*Id.* at ¶ 3.) Staff submits that "[b]ecause technical knowledge is required for registration to practice in front of the PTO and the subject matter of the asserted patents is not unusually complex," "Mr. Marcin appears to have sufficient technical knowledge to opine on whether the claims of the asserted patent[] are practiced by the Accused Product and the domestic Mighty Mugs." (Staff Resp. at 16-17 n.7.) The undersigned agrees.

undersigned is not aware of any evidence to the contrary with respect to infringement of the '850 patent by the Defaulting Respondents.

Accordingly, the undersigned finds that Complainants have established by substantial, reliable, and probative evidence that the Defaulting Respondents' accused products infringe claim 1 of the '850 patent.

C. Technical Prong

Complainants assert that the Mighty Mug product is covered by the '850 patent. (Mem. at 13.) Complainants attached a claim chart to the Amended Complaint demonstrating how an exemplary Mighty Mug product practices claim 1 of the '850 patent.³ (Compl. Ex. 25.) In addition, Complainants submitted a declaration from their expert, Mr. Marcin. (Mot. Ex. 2.) Mr. Marcin compared the exemplary Mighty Mug product to the asserted claim. (Marcin Decl at ¶ 29, Mot. Ex. 3 at Attachment 1.) Through this analysis, Mr. Marcin determined that the Mighty Mug products read on claim 1 of the '850 patent. (Marcin Decl. at ¶¶ 27, 29; Mot. Ex. 3 at Attachment 1.)

Staff believes that Complainants satisfy the technical prong of the domestic industry requirement. (Staff Resp. at 20-21.) Staff states:

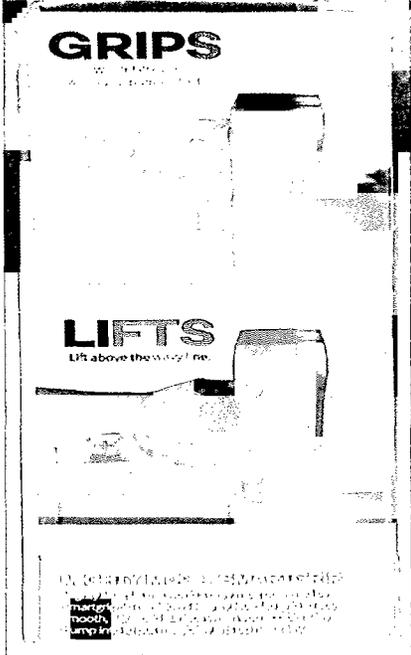
[A] comparison of an exemplary Mighty Mug (Complaint, Physical Exhibit) with the analysis provided by Complainants regarding the practicing of the limitations of independent Claim 1 of the asserted patent shows that the Mighty Mug products practice Claim 1 of the Asserted Patent. *See* Memo at 11; Exhibit 3 at Attachment 1 (claim chart). In the Staff's view, the physical sample of the Mighty Mug substantially matches the description and analysis by Complainants' expert, Mr. Marcin. *See* Memo at 11 ("Mr. Marcin then compared the products of Mighty Mug to his claim interpretation of Exemplary Claim 1 of the '850 Patent."). The analysis provided by Mr. Marcin in relation to the Mighty Mug is substantially similar to the infringement analysis presented for the Accused

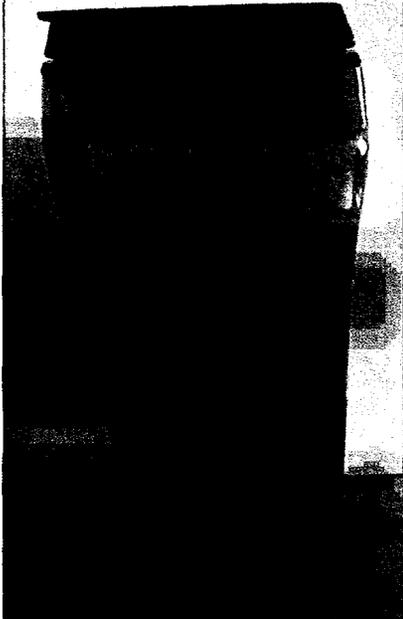
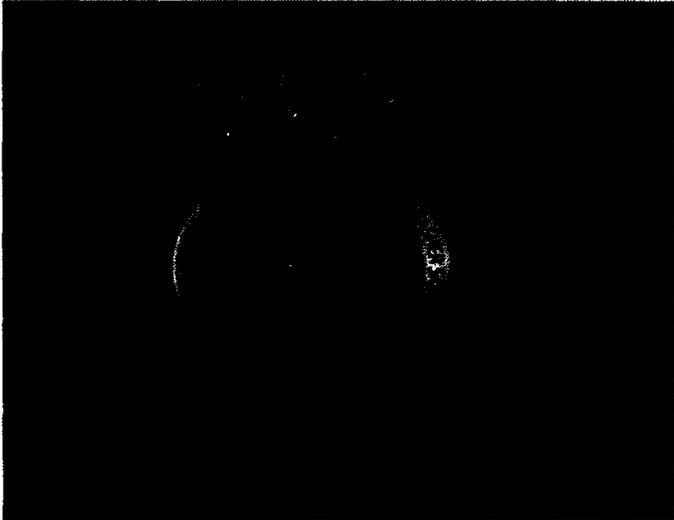
³ While Mighty Mug sells other products (*e.g.*, wine glasses, cocktail glasses, and beer ware) covered by the asserted patent, claim charts were not prepared for these products "because they operate on the exact same principle of the Mighty Mug." (Mot. Supp. at 3; *see also* Supp. Ex. 10 at ¶ 4.)

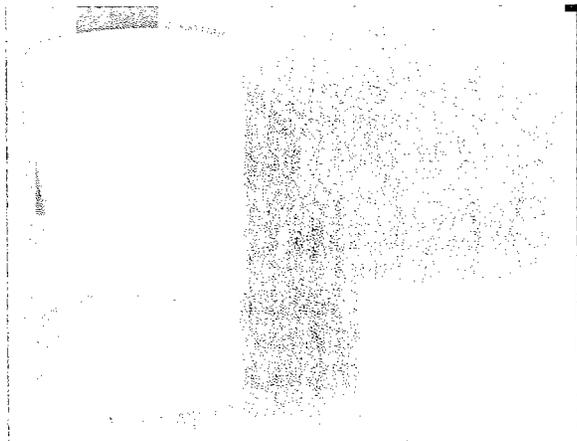
Products. Accordingly, the evidence shows that the technical prong of the domestic industry requirement is satisfied by the Mighty Mug products.

(Id.)

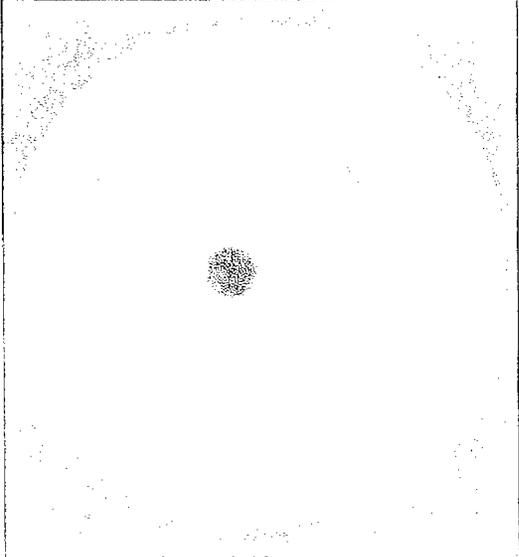
The following claim chart demonstrates how an exemplary Mighty Mug product practices claim 1 of the '850 patent.

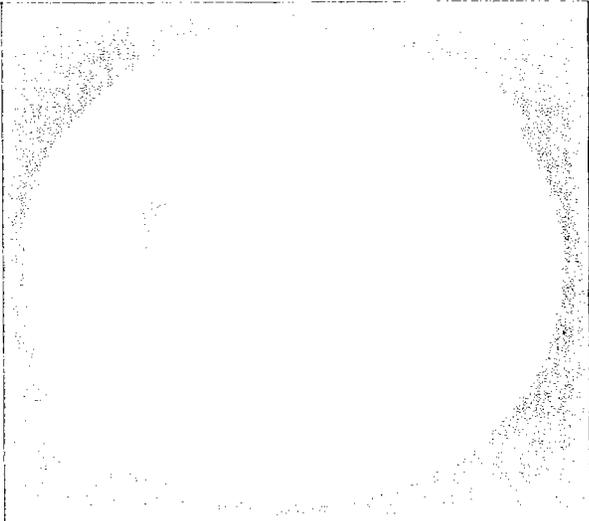
CLAIM LANGUAGE – CLAIM 1	COMPLAINANTS' MIGHTY MUG PRODUCT
<p>A self-anchoring beverage container with directional release and attachment capability, comprising:</p>	<p>Photo 1 shows the Mighty Mug Packaging that states the Mighty Mug “Won’t fall over when you bump into it,” but “magically lifts up naturally.”</p>  <p>Photo 2 shows an actual Mighty Mug Product that is sitting on a reference surface (a table).</p>

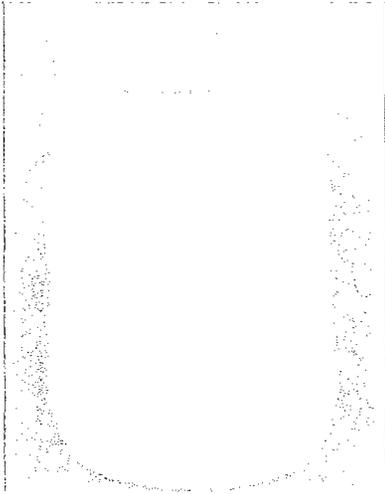
CLAIM LANGUAGE – CLAIM 1	COMPLAINANTS' MIGHTY MUG PRODUCT
	
<p>a flexible nonporous base member;</p>	<p>Photo 3 shows a bottom view of the Mighty Mug. The outer ring is a flexible polymer ring. Compare Photo 3 to Fig. 3 of the '850 Patent. The outer flexible polymer ring of Photo 3 is similar to the lower peripheral skirt 6 with lower surface 6A of Fig. 3.</p> 
<p>said base member having a lower surface that is configured to engage an external reference surface and form a substantially airtight peripheral seal therewith that defines a controlled pressure zone, said controlled pressure zone being a region</p>	<p>Photo 3 shows the lower surface of the base member that is configured to engage a reference surface. Photo 2 shows the Mighty Mug on a reference surface (e.g., a table). When the Mighty Mug is on the reference surface and the air path to the bottom of the mug is sealed, the ring that is shown in Photo 3 forms an air tight seal and</p>

CLAIM LANGUAGE – CLAIM 1	COMPLAINANTS' MIGHTY MUG PRODUCT
located between said base member and said reference surface that is surrounded by said peripheral seal;	creates a controlled pressure zone between the ring and the reference surface.
a receptacle assembly mounted to said base member;	<p>Photo 4 shows the Mighty Mug disassembled. The Mighty Mug is similar to the embodiment shown in Figs. 28-30 of the '850 Patent. Specifically, the Mighty Mug includes a receptacle assembly that does not have a handle. The outer cup of the receptacle assembly is shown on the right and the inner cup is shown on the left of Photo 4, respectively. The base member is mounted to the outer cup of the receptacle assembly.</p> 

CLAIM LANGUAGE – CLAIM 1	COMPLAINANTS' MIGHTY MUG PRODUCT
<p>said receptacle assembly comprising a beverage holding chamber having a closed bottom, a sidewall portion, and a top;</p>	<p>Photo 5 shows a perspective view of the receptacle assembly of the Mighty Mug without a lid. Photo 5 shows the Mighty Mug receptacle assembly includes a beverage holding chamber having a closed bottom, a sidewall and a top.</p> 

CLAIM LANGUAGE – CLAIM 1	COMPLAINANTS' MIGHTY MUG PRODUCT
<p>said receptacle assembly further comprising a communication channel arranged to provide air communication between said controlled pressure zone and an area of ambient air pressure;</p>	<p>Photo 6 shows an inside view of the outer cup of the receptacle assembly of the Mighty Mug. The hole in the middle is a communication channel that provides air communication between the controlled pressure zone (See Photo 3) and an area of ambient air pressure. When the outer cup is joined to the inner cup, there is an area of ambient air between the inner cup and outer cup. Compare Photo 6 to the outer cup of Fig. 5 of the '850 Patent that shows the communication channel 32.</p> 

CLAIM LANGUAGE – CLAIM 1	COMPLAINANTS' MIGHTY MUG PRODUCT
<p>said receptacle assembly further comprising a pressure control device</p>	<p>Photo 7 shows a bottom view of the inner cup of the receptacle assembly of the Mighty Mug. The pressure control device is the blanket seal shown in the middle of the bottom of the inner cup. Compare Photo 7 to the inner cup of Fig. 6 of the '850 Patent that shows the blanket seal 38.</p> 
<p>said pressure control device having a closed position wherein said pressure control device blocks and closes said communication channel to seal said controlled pressure zone</p>	<p>When the Mighty Mug is placed on the reference surface (See Photo 2), the inner cup slides down in relation to the outer cup. This sliding downward causes the pressure control device (e.g., blanket seal) of the inner cup to sit on top of the communication channel (e.g., the hole in the bottom of the outer cup). As shown above, the hole in the bottom of the outer cup leads to the controlled pressure zone under the Mighty Mug when on the reference surface. Thus, the blanket seal sits on the hole and seals the communication channel such that there is no air flow through the channel causing the Mighty Mug to grip the reference surface.</p>
<p>and an open position wherein said pressure control device separates from and opens said communication channel to vent said controlled pressure zone to ambient pressure;</p>	<p>When the Mighty Mug is lifted, the inner cup slides up in relation to the outer cup. This sliding upward causes the pressure control device (e.g., blanket seal) of the inner cup to unseat from the communication channel (e.g., the hole in the bottom of the outer cup). This unseating of the blanket seal unseals the communication channel, thereby allowing air to flow from the controlled pressure zone, which releases the Mighty Mug from the reference surface.</p>

CLAIM LANGUAGE – CLAIM 1	COMPLAINANTS’ MIGHTY MUG PRODUCT
<p>said receptacle assembly further comprising a grasping portion that is arranged to be grasped by a user during normal lifting of said beverage container from said reference surface;</p>	<p>As described above, the Mighty Mug is similar to the embodiments shown in Fig. 28-30 of the ‘850 Patent. In this embodiment, “the upper portion 162 of the inner cup 148 that would normally be grasped by a user in order to lift a glass provides a grasping portion of the receptacle assembly.” <i>Id.</i> at col. 15, lines 62-65; Fig. 28. Thus, the upper portion of the inner cup of the Mighty Mug is that grasping portion. <i>See</i> Photo 2.</p>
<p>said pressure control device and said grasping portion being part of a common rigid structure so that said grasping portion cannot move without causing simultaneous movement of said pressure control device,</p>	<p>Photo 8 shows a perspective view of the inner cup of the Mighty Mug showing both the grasping portion (<i>e.g.</i>, the upper portion of the inner cup) and the pressure control device (<i>e.g.</i> blanket seal) that are part of the same common rigid structure. As described above, when the Mighty Mug is lifted, the inner cup slides up in relation to the outer cup causing the pressure control device to also move upward, <i>e.g.</i>, movement of the side of the inner cup also causes a corresponding movement of the pressure control device.</p> 
<p>said rigid structure producing simultaneous actuation of said pressure control device from said closed position to open said communication channel when a user grasps said grasping portion and initiates said normal lifting of said beverage container from said reference surface;</p>	<p>As detailed above, when a user lifts the Mighty Mug from the upper portion of the inner cup, the pressure control device unseats from the hole of the outer cup and unseals the communication channel.</p>
<p>whereby said beverage container is self-biased to remain affixed to said reference surface when said communication channel is closed due to said controlled pressure zone generating a partial vacuum when an attempt is made to move said beverage container without actuating said pressure control device;</p>	<p>When the Mighty Mug is on the reference surface and the seal formed, the only manner of releasing the Mighty Mug is by actuating the pressure control device to the open position by lifting the Mighty Mug straight up. Pushing on the side of the Mighty Mug does not release the Mighty Mug from the reference surface because the pressure control device is not unseated from the communication channel.</p>

CLAIM LANGUAGE – CLAIM 1	COMPLAINANTS’ MIGHTY MUG PRODUCT
and whereby said self-biasing will be released surreptitiously and said beverage container will lift away from said reference surface without discernible resistance when said pressure control device is actuated to vent said controlled pressure zone due to a user grasping said grasping portion during normal lifting of said beverage container.	Again, the only way to release the Mighty Mug is to lift straight up and actuate the pressure control device to the open position

(Mot Ex. 3 at Attachment 1; *see also* Compl. Ex. 25.)

As detailed in the above claim chart, Complainants’ exemplary Mighty Mug product includes all of the elements of claim 1 of the ’850 patent. (*Compare* ’850 patent (claim 1), *with* Mot. Ex. 3 at Attachment 1.) In addition, there is no evidence of record to contradict Complainants’ assertion that the exemplary Mighty Mug product practices the ’850 patent. The undersigned therefore finds that Complainants have presented substantial, reliable, and probative evidence that the technical prong of the domestic industry requirement is satisfied with respect to the ’850 patent.

VII. DOMESTIC INDUSTRY – ECONOMIC PRONG

Complainants assert that they have satisfied the economic prong of the domestic industry requirement under 19 U.S.C. §1337(a)(3)(A), (B), and (C). (Mem. at 14-16.) They state that while the mugs themselves are manufactured overseas, “[a]ll other activities, including partial finishing manufacture take place in the United States.” (*Id.* at 14.) Complainants explain that “[o]nce in the United States, the mugs have to be repackaged, coded, and have graphic designs applied.” (*Id.*) All of this work is performed at Complainants’ Rahway, New Jersey facility. (*Id.*) In Staff’s view, “the evidence regarding investments in product finishing (i.e. repackaging, applying of shipping bar codes, and application of graphic designs) shows that at least prongs (a) and (b) of the domestic industry requirement are satisfied.” (Staff Resp. at 21.)

The record demonstrates that Complainants have made significant investments in plant and equipment. They maintain a plant that is approximately 12,000 square feet in Rahway, New Jersey at a cost of \$10,000 a month. (Mot. Ex. 6 (“Smaldone Decl.”) at ¶¶ 7-8; Mot. Ex. 7 (“2nd Smaldone Decl.”) at ¶¶ 7-8.) Approximately 70% of the Rahway facility is dedicated to Complainants’ Mighty Mug products. (Mot. Supp. at 2; Supp. Ex. 10 at ¶ 3; Smaldone Decl. at ¶ 17; 2nd Smaldone Decl. at ¶ 17.)⁴ The plant houses valuable equipment used in the research and development, design, and manufacturing of prototypes of Complainants’ Mighty Mug products. (Smaldone Decl. at ¶ 9; 2nd Smaldone Decl. at ¶ 9.) Specifically, Complainants attest that they have invested \$212,000 in the following equipment: “fork lift, racking systems, truck bays and unloading systems, computers, software, including design software, and computer generated modeling equipment for the design and improvement of products.” (Mot. Suppl. at 3; Supp. Ex. 10 at ¶ 5.) Complainants have also invested \$5,200 in “3D form labs with 3D printer and materials, and a CNC machine which is used for the design and improvement of the Mighty Mug products and is dedicated solely to the products covered by the ‘850 patent.” (*Id.*) All activity concerning the design, development, finishing, manufacture, and distribution of the Mighty Mug products occurs at the Rahway facility.⁵ (Mot. Supp. at 4; Supp. Ex. 10 at ¶ 7.) For example, all repackaging, applying of shipping bar codes, graphic designs, customer service requirements, and warranty work for the Mighty Mug products are performed at the Rahway facility. (Smaldone Decl. at ¶ 12; 2nd Smaldone Decl. at ¶ 12.) Complainants also “price tickets” for

⁴ Complainants explain: “The owners of Mighty Mug own another company, Alfay, Inc., which operates at the same facility. The primary business of Alfay is the distribution and sale of Faberware tea kettles. Allocation of the factors of production of plant, equipment and labor is done by percentage of sales. Mighty Mug represents approximately 70 percent of sales with Faberware tea kettle comprising the rest.” (Mot. Supp. at 2; Supp. Ex. 10 at ¶ 3.) In Staff’s view, Complainants have reasonably allocated its domestic investments to the self-anchoring beverage containers that embody the asserted patent. (Staff Resp. at 22.) Based on Complainants’ explanation, the undersigned agrees with Staff that their allocation is proper.

⁵ The only activity done overseas is the plastic molding of the mug. (Mot. Supp. at 4; Supp. Ex. 10 at ¶ 7.)

certain customers⁶, as well as handle all shipping, paperwork, bills of lading, present the combination for retail customers, and screen engrave logos on the self-anchoring beverage containers at the Rahway facility. (*Id.* at ¶ 13.) In addition, all distribution of catalogs, samples, sales brochures, advertising in trade publications, website and internet marketing, and sales of the self-anchoring beverage containers are performed at the Rahway facility.⁷ (Mem. at 14; Findings of Fact at ¶ 33.)

The record also demonstrates that there is a significant employment of labor and capital.⁸ Complainants employ 14 people, of which 10 are involved in the research and development of Complainants' Mighty Mug products. (Smaldone Decl. at ¶¶ 18-20; 2nd Smaldone Decl. at ¶¶ 18-20.) These 10 full-time salaried employees spend 70% of their working time on the Mighty Mug products, with the remaining time devoted to business functions. (Smaldone Decl. at ¶ 20; 2nd Smaldone Decl. at ¶ 20.) The salaries of Complainants' 14 employees range from \$35,000 to \$100,000. (*Id.* at ¶ 21.)

Staff prepared a summary of Complainants' investments in the design, development, finishing, and customer support of the Mighty Mug products:⁹

⁶ "Pricing tickets" refers to the application of retail price stickers. (Smaldone Decl. at ¶ 13; 2nd Smaldone Decl. at ¶ 13.)

⁷ Complainants are not relying solely on marketing and sales expenditures to satisfy the economic prong. Complainants have provided evidence of significant expenditures in its employment of labor in other qualifying activities, such as research, product development, and customer service, as well as capital expenditures in equipment used for the design of the Mighty Mug products. *See Certain Collapsible Sockets for Mobile Electronic Devices and Components Thereof*, Inv. No. 337-TA-1056, Comm'n Op. at 19-20 (July 9, 2018).

⁸ As discussed above, Complainants have invested approximately \$10,000 a month in rent for the Rahway plant and at least \$212,000 in equipment. (Smaldone Decl. at ¶ 8; 2nd Smaldone Decl. at ¶ 8; Supp. Ex. 10 at ¶ 5.) These same investments constitute a significant employment of capital.

⁹ Since the filing of the Complaint, Mighty Mug purchased another facility next to the Rahway plant. (Mot. Ex. 5 at ¶¶ 3-5.) Staff's chart included Complainants' investments in this new facility. (Staff Resp. at 26.) Because the undersigned finds that the investments in the existing facility are sufficient to show that the domestic industry requirement is satisfied, the undersigned need not consider Complainants' investments in the new facility. For this reason, those investments have not been included in the chart.

Investments or Costs	Investment Amounts	Conservative Total of Investments Allocable Practice of the '850 Patent (i.e. Reduced by 30% where applicable)
Original Facility	\$10,000 (monthly) ¹⁰	\$7,000 (monthly)
R&D Salaries	> \$350,000 ¹¹ (annually)	> \$245,000 (annually) ¹²
Equipment	\$212,000	\$148,400 ¹³
3D printing R&D Equipment	\$5,200	\$5200

(Staff Resp. at 26.) The undersigned is not aware of any evidence to the contrary.

Here, the allocated values credited towards the '850 patent should be considered substantial in the context of Complainants' overall operations. *See Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm'n Op. at 25-26 (May 16, 2008) (“[T]he requirement for showing the existence of a domestic industry will depend on the industry in question, and the complainant’s relative size.”.) The undersigned therefore finds that Complainants have adduced substantial, reliable, and probative evidence to support a finding that it satisfies the economic prong of the domestic industry requirement under § 337(a)(3)(A) and (B)¹⁴.

¹⁰ Staff notes that the Rahway facility was purchased by an affiliate of Complainants. (Staff Resp. at 26 n.11.) Thus, according to Staff, the operative value is the monthly lease payments for use of the facility by the Complainants. (*Id.*) The undersigned agrees.

¹¹ Staff applied the lowest salary of \$35,000 for each of the 10 employees identified as working on the research and development of the Mighty Mug products. (*Id.* at n.12.)

¹² Although Complainants stated that their total annual payroll allocated to the products is \$520,000, there is no specific information about the roles of the employees in the “total annual payroll” amount. (*Id.* at n.13.) Staff therefore only relied on the salary information attributable to employees performing research and development work related to the Mighty Mug products. (*Id.*)

¹³ Because Complainants did not expressly state that this equipment is fully allocated to the Mighty Mug products, Staff applied a sales based allocation of 70%. (*Id.* at n.14.)

¹⁴ The undersigned has already determined that Complainants have met the economic prong under sections 337(a)(3)(A) and (B.) Accordingly, the undersigned need not decide whether Complainants meet the economic prong under section 337(a)(3)(C) or whether Complainants are in the process of establishing a domestic industry.

VIII. REMEDY AND BONDING¹⁵

A. General Exclusion Order

Section 337(d)(2) provides that a general exclusion order (“GEO”) may issue in cases where (a) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named respondents; or (b) there is a widespread pattern of violation of Section 337 and it is difficult to identify the source of infringing products. 19 U.S.C. § 1337(d)(2). The statute essentially codifies Commission practice under *Certain Airless Paint Spray Pumps and Components Thereof*, Inv. No. 337-TA-90, Comm’n Op. at 18-19, USITC Pub. 119 (Nov. 1981) (“*Spray Pumps*”). See *Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing the Same*, Inv. No. 337-TA-372 (“*Magnets*”), Comm’n Op. on Remedy, the Public Interest and Bonding at 5 (USITC Pub. 2964 (1996)) (statutory standards “do not differ significantly” from the standards set forth in *Spray Pumps*). In *Magnets*, the Commission confirmed that there are two requirements for a general exclusion order: [1] a “widespread pattern of unauthorized use;” and [2] “certain business conditions from which one might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles.” *Id.* The focus now is primarily on the statutory language itself and not an analysis of the *Spray Pump* factors. *Ground Fault Circuit Interrupters and Prods. Containing Same*, Inv. No. 337-TA-615, Comm’n Op. at 25 (Mar. 9, 2009).

Complainants assert that a GEO should issue because there is a widespread pattern of infringement of the asserted patent, that the relevant business conditions makes it difficult to

¹⁵ Complainants did not request cease and desist orders against the Defaulting Respondents. (See generally Mem. at 18-20.)

identify the source of infringing products, and an limited exclusion order would be easy to circumvent. (Mem. at 18-20.) Staff concurs. (Staff Resp. at 29-36.)

1. Circumvention of a Limited Exclusion Order

The evidence shows that any limited exclusion order issued in this Investigation would likely be subject to immediate evasion because it is difficult to gain information about the entities selling infringing self-anchoring beverage containers. Many of the companies selling these products use false or non-existent addresses, making them difficult or impossible to find. (See, e.g., Mot. Ex. 8 (“Krogness Affidavit”) at ¶¶ 6, 7, 9, 10, 11-23.) For example, site visits to the addresses for Respondents Chekue, Hiraliy, Otelas, and Artiart revealed no evidence of these companies at the listed location(s). (*Id.* at ¶¶ 7, 9, 17, 22.) In fact, the address for Otelas was in a residential block in Lithuania.¹⁶ (*Id.* at ¶¶ 17-18.) Other entities operate out of or list addresses that actually belong to companies that are not associated with them and/or have no knowledge of the infringing entities.¹⁷ (*Id.* at ¶¶ 6, 7, 9, 10, 11-22.) Complainants have also provided evidence that the accused products are shipped into the country under false and misleading labels – *i.e.*, basically anonymous sales through online portals such as Amazon and eBay.¹⁸ (Mot. Ex. 4; *see also* Staff Resp. at 35 (“[I]t appears as though the named ‘seller’ on the internet listings does not correlate to the source of the infringing product.”).) Moreover, the fact that the Defaulting Respondents have ignored proceedings in this Investigation (which resulted in them being found

¹⁶ According to Complainants, many Chinese companies are shifting their sourcing of infringing self-anchoring beverage containers to countries in Eastern Europe such as Lithuania or the Ukraine. (Mem. at 19; Krogness Affidavit at ¶¶ 4, 19.)

¹⁷ At many of the locations these companies listed as their address, the person answering the phone either did not know of the company, was evasive, or hung up. (Krogness Affidavit at ¶¶ 8, 10, 19.)

¹⁸ *See Certain Loom Kits for Creating Linked Articles (“Loom Kits”)*, Inv. No. 337-TA-923, Comm’n Op. at 13 (June 26, 2015) (“[A] large number of anonymous infringing sales on the Internet [] supports a likelihood of circumvention under subparagraph (A) and also supports a determination that it is difficult to identify the source of infringing products under subparagraph (B).”).)

in default) suggests that they would not abide by the terms of any limited exclusion order the Commission may impose.

2. Widespread Pattern of Unauthorized Use

The undersigned finds that Complainants have presented evidence of a widespread pattern of violation. In particular, the evidence shows that, in addition to the Defaulting Respondents, numerous other sources of infringing self-anchoring beverage containers are available for purchase online.¹⁹ (Mem. at 11-12, 18-20; Mot. Ex. 4 at ¶ 4, Attachment 2 (Calvert Retail, Inc.); ¶ 5, Attachment 3 (Artful Home, Inc.); ¶ 6, Attachment 4 (4AllPromos, Inc.); ¶ 7, Attachment 5 (Hirsch Gift, Inc.); ¶ 8, Attachment 6 (Sunrise Gifts and Souvenirs, Inc.); ¶ 9, Attachment 7 (Motivators, Inc.); ¶ 10, Attachment 8 (AnyPromo.com, Inc.); ¶ 11, Attachment 9 (Quality Logo Products, Inc.); ¶ 12, Attachment 10 (Shenzen Smartop Industrial Co., Ltd.); ¶ 13, Attachment 11 (U.S. Imprints, Inc.); ¶ 14, Attachment 12 (RushKing Promotions, Inc.); ¶ 15, Attachment 13 (GoImprints, Inc.); ¶ 16, Attachment 14 (Swag Brokers, LLC); ¶ 17, Attachment 15 (Sunrise Gifts, Inc.); ¶ 18, Attachment 16 (OUCH); ¶ 19, Attachment 17 (DevBattles); ¶ 20, Attachment 18 (Hiraliy); ¶ 21, Attachment 19 (Chekue); ¶ 22; Attachment 20 (Otelas); ¶ 23, Attachment 21 (Tapcet); ¶ 24, Attachment 22 (Enjoydeal 99); *see also* Mot. Ex. 6 at Attachment 2 (photographs of unauthorized “Mighty Mugs” returned by consumers to Complainants).) And, as discussed above, it is difficult to identify the source of the infringing products. (*See* Section XI.A.1, *supra*.) The infringing products are often sold under “a plethora of different names.” (Mem. at 20; Mot. Ex. 4 at Attachments 18-20.) Furthermore, the difficulty in serving some respondents (with some being unlocatable) confirms that it is nearly impossible to identify the sources of these products. (*See, e.g.*, Mot. Ex. 8.)

¹⁹ “The Commission has found in other investigations that numerous online sales of infringing imported goods can constitute a pattern of violation of section 337.” *Loom Kits*” at 14 (*citing Cases for Portable Devices*, Comm’n Op. at 10).

3. Conclusion

For the foregoing reasons, the undersigned recommends that in the event the Commission finds a violation of section 337, the appropriate remedy is a GEO that encompasses the infringing products. The undersigned also finds that the additional requirements of section 337(g)(2) have been satisfied in this Investigation.

B. Bonding

Pursuant to section 337(j)(3), the Administrative Law Judge and the Commission must determine the amount of bond to be required of a respondent during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to issue a remedy. 19 U.S.C. § 1337(j)(3). The purpose of the bond is to protect the complainant from any injury. 19 C.F.R. § 210.42(a)(1)(ii), § 210.50(a)(3).

When reliable price information is available, the Commission has often set the bond by eliminating the differential between the domestic product and the imported, infringing product. *See Microsphere Adhesives, Processes for Making Same, and Prods. Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. 2949, Comm'n Op. at 24 (Dec. 8, 1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *See, e.g., Certain Integrated Circuit Telecomm. Chips and Prods. Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm'n Op. at 41, 1993 WL 13033517, at *24 (U.S.I.T.C. June 22, 1993). A 100 percent bond has been required when no effective alternative existed. *See, e.g., Certain Flash Memory Circuits and Prods. Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 26-27 (July 1997) (imposing a 100% bond when price comparison was not practical because the parties sold products at different levels of commerce, and the proposed royalty rate appeared to be *de minimus* and without adequate support in the record).

Complainants request that the bond be set at 100% for all infringing imports during the Presidential Review Period. (Mem. at 20.) Staff also believes that a bond of 100% is appropriate. (Staff Resp. at 36-37 (“Given the evidentiary record, and the fact that all Respondents have defaulted without having appeared, let alone providing discovery, the Staff agrees that Complainants’ request for a bond of 100 percent of the entered value of infringing self-anchoring beverage containers is appropriate.”).) The undersigned agrees with Complainants and Staff that the Commission should set the bond value at 100%. *See Certain Digital Photo Frames and Image Display Devices and Components Thereof*, Inv. No. 337-TA-807, Comm’n Op. at 17, U.S.I.T.C. 4549 (July 2015) (“The Commission finds that there is little or no evidence in the record of this investigation as to pricing of the defaulting respondents’ products. . . . The Commission has traditionally set a bond of 100 percent of the entered value of the products under these circumstances.”).

IX. INITIAL DETERMINATION

For the foregoing reasons, it is the INITIAL DETERMINATION of the undersigned that Complainants have shown by reliable, probative, and substantial evidence that a domestic industry exists and a violation of section 337 has occurred. Accordingly, Complainants’ motion for summary determination of violation (1092-008) is hereby granted.

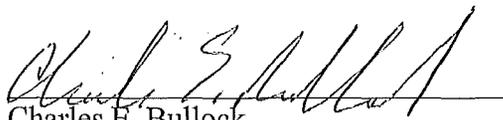
In addition, the undersigned recommends that the Commission issue a general exclusion order, and that 100 percent bond be imposed during the Presidential review period.

The Secretary shall serve the confidential version of this Initial Determination upon counsel who are signatories to the Protective Order (Order No. 1) issued in this Investigation. A public version will be served at a later date upon all parties of record.

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 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 therein.

Within ten days of the date of this document, the parties shall submit to the Office of Administrative Law Judges a joint statement regarding whether or not they seek to have any portion of this document deleted from the public version. The parties' submission shall be made by hard copy and must include a copy of this Initial Determination with red brackets indicating any portion asserted to contain confidential business information to be deleted from the public version. The parties' submission shall include an index identifying the pages of this document where proposed redactions are located. The parties' submission concerning the public version of this document need not be filed with the Commission Secretary.

SO ORDERED.


Charles E. Bullock
Chief Administrative Law Judge

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC VERSION ORDER NO. 15** has been served by hand upon the Commission Investigative Attorney, **Monisha Deka, Esq.**, and the following parties as indicated, on **September 7, 2018**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
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Washington, DC 20436

On Behalf of Complainants Alfay Designs, Inc.; Mighty Mug, Inc.; and Harry Zimmerman:

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