

*In the Matter of*

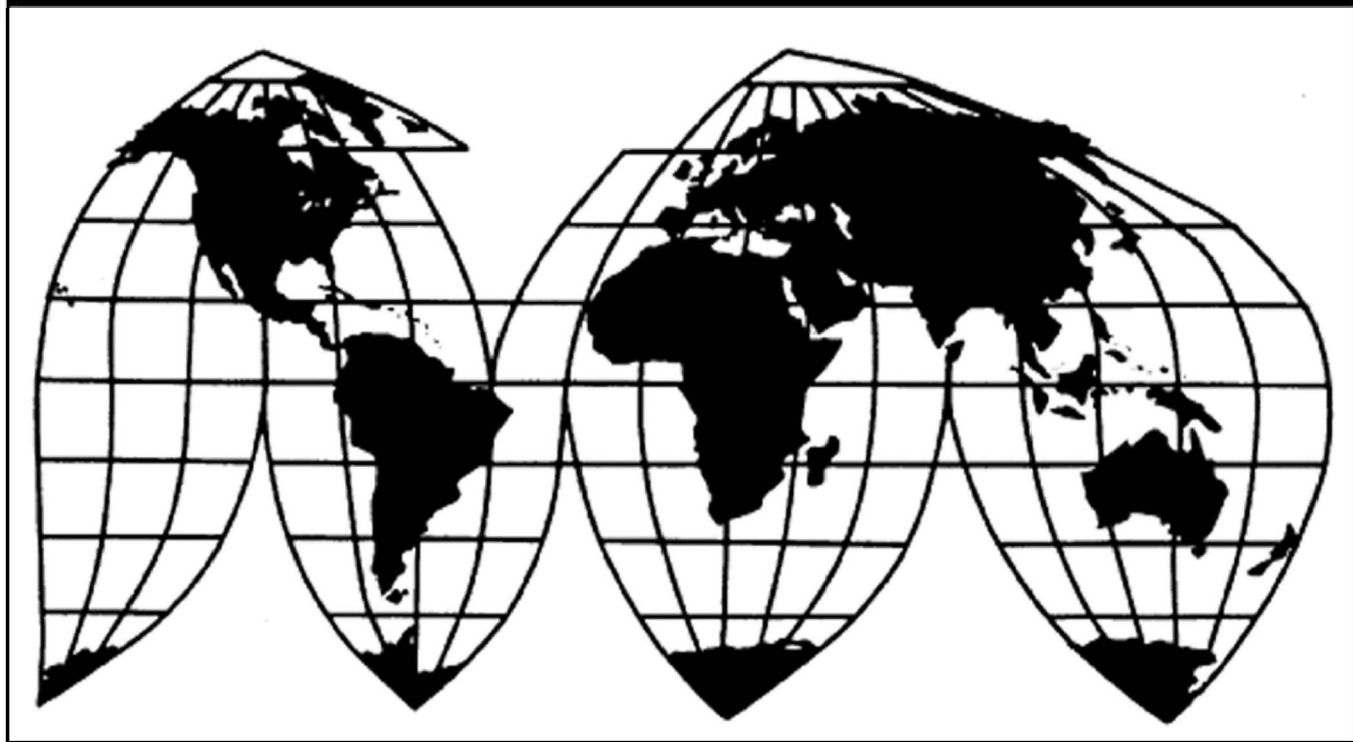
**CERTAIN FISH-HANDLING PLIERS AND  
PACKAGING THEREOF**

Investigation No. 337-TA-1169

**Publication 5290**

**March 2022**

**U.S. International Trade Commission**



Washington, DC 20436

# **U.S. International Trade Commission**

## **COMMISSIONERS**

**Jason E. Kearns, Chair**  
**Randolph J. Stayin, Vice Chair**  
**David S. Johanson, Commissioner**  
**Rhonda K. Schmittlein, Commissioner**  
**Amy A. Karpel, Commissioner**

**Address all communications to**  
**Secretary to the Commission**  
**United States International Trade Commission**  
**Washington, DC 20436**

# **U.S. International Trade Commission**

Washington, DC 20436

*www.usitc.gov*

***In the Matter of***

## **CERTAIN FISH-HANDLING PLIERS AND PACKAGING THEREOF**

Investigation No. 337-TA-1169



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

**In the Matter of**

**CERTAIN FISH-HANDLING PLIERS  
AND PACKAGING THEREOF**

**Investigation No. 337-TA-1169**

**ISSUANCE OF A CORRECTED GENERAL EXCLUSION ORDER**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to issue a corrected general exclusion order (“GEO”) in the above-captioned investigation.

**FOR FURTHER INFORMATION CONTACT:** Robert Needham, Esq., 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 may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email [EDIS3Help@usitc.gov](mailto:EDIS3Help@usitc.gov). General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.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 July 29, 2019, based on a complaint filed by complainant United Plastic Molders, Inc. of Jackson, Mississippi (“UPM”). 84 FR 36620-21 (July 29, 2019). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain fish-handling pliers and packaging thereof by reason of infringement of claims 1-11 of U.S. Patent No. 6,256,923 and U.S. Trademark Registration Nos. 4,980,923 (“the ’923 mark”) and 5,435,944 (“the ’944 mark”). *Id.* The complaint further alleged that a domestic industry exists. *Id.* The Commission’s notice of investigation named as respondents Yixing Five Union Industry & Trade Co., Ltd. of Yixing City, China; NOEBY Fishing Tackle Co., Ltd. of Weihai, China (“NOEBY”); Weihai iLure Fishing Tackle Co., Ltd. of Weihai,

China; SamsFX of Yangzhou City, China (“SamsFX”); and Weihai Lotus Outdoor Co., Ltd. of Weihai, China. *Id.* The Office of Unfair Import Investigations is participating in the investigation. *Id.*

On August 10, 2020, the Commission determined that UPM has shown a violation of section 337(a)(1)(C), 19 U.S.C. 1337(a)(1)(C), by NOEBY and SamsFX with respect to the ’923 and ’944 marks, and determined to issue a GEO with respect to those trademarks. That GEO, however, inadvertently contained language referring to the duration of a patent. The Commission has determined to issue a corrected GEO that removes that language.

The Commission vote for these determinations took place on September 16, 2020.

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).

While temporary remote operating procedures are in place in response to COVID-19, the Office of the Secretary is not able to serve parties that have not retained counsel or otherwise provided a point of contact for electronic service. Accordingly, pursuant to Commission Rules 201.16(a) and 210.7(a)(1) (19 CFR 201.16(a), 210.7(a)(1)), the Commission orders that the Complainant(s) complete service for any party/parties without a method of electronic service noted on the attached Certificate of Service and shall file proof of service on the Electronic Document Information System (EDIS).

By order of the Commission.

A handwritten signature in black ink, appearing to read "Lisa R. Barton".

Lisa R. Barton  
Secretary to the Commission

Issued: September 17, 2020

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served via EDIS upon the Commission Investigative Attorney, **Thomas C. Chen, Esq.**, and the following parties as indicated, on **September 17, 2020**.



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

**On Behalf of Complainant United Plastic Molders:**

Rett Snotherly, Esq.  
**LEVI & SNOTHERLY, PLLC**  
1101 Connecticut Ave., NW, Suite 450  
Washington, DC 20036  
Email: rsnotherly@levisnotherly.com

- ☐ Via Hand Delivery
- ☐ Via Express Delivery
- ☐ Via First Class Mail
- ☒ Other: Email Notification of Availability for Download

**Respondents:**

Yixing Five Union Industry & Trade Co., Ltd.  
Building A1, Innovation Park of Yixing City  
Jiangsu Province  
China

- ☐ Via Hand Delivery
- ☐ Via Express Delivery
- ☐ Via First Class Mail
- ☒ Other: Service to Be Completed by Complainants

NOEBY Fishing Tackle Co., Ltd.  
No. 81 Bohai Road, Eco-zone  
Weihai, Shandong  
China

- ☐ Via Hand Delivery
- ☐ Via Express Delivery
- ☐ Via First Class Mail
- ☒ Other: Service to Be Completed by Complainants

Weihai ILure Fishing Tackle Co., Ltd.  
No. 01 ZhouNing Road,  
LinGang District,  
Weihai, Shandong  
China

- ☐ Via Hand Delivery
- ☐ Via Express Delivery
- ☐ Via First Class Mail
- ☒ Other: Service to Be Completed by Complainants

**CERTAIN FISH-HANDLING PLIERS AND PACKAGING  
THEREOF**

**Inv. No. 337-TA-1169**

Certificate of Service – Page 2

SamsFX  
No. 11, Shikefa Road, Yangzhou City, 225000  
Jiangsu Province  
China

☐ Via Hand Delivery  
☐ Via Express Delivery  
☐ Via First Class Mail  
☒ Other: Service to Be  
Completed by Complainants

Wehai Lotus Outdoor Co., Ltd.  
Zhang CunTown, Weihai City  
Shandong Pro.  
China

☐ Via Hand Delivery  
☐ Via Express Delivery  
☐ Via First Class Mail  
☒ Other: Service to Be  
Completed by Complainants

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

**In the Matter of**

**CERTAIN FISH-HANDLING  
PLIERS AND PACKAGING  
THEREOF**

**Investigation No. 337-TA-1169**

**CORRECTED 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 fish-handling pliers (*i.e.*, pliers that aid in the landing, weighing, and handling of fish by securely gripping the lip of a fish while the hook is removed) and packaging thereof that infringe one or more of United States Trademark Reg. Nos. 4,980,923 (“the ’923 mark”) and 5,435,944 (“the ’944 mark”).

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 pursuant to 19 U.S.C § 1337(d), that a general exclusion from entry for consumption is necessary (1) to prevent circumvention of an exclusion order limited to products of named persons and (2) because there is a pattern of violation of section 337 and it is difficult to identify the source of the infringing products. Accordingly, the Commission has determined to issue a general exclusion order prohibiting the unlicensed importation of infringing fish-handling pliers and packaging thereof.

The Commission has also determined that the public interest factors enumerated in 19 U.S.C. § 1337(d)(1) 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. Fish-handling pliers and packaging thereof that infringe the '923 and '944 marks ("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, except under license from, or with the permission of, the trademark owner or as provided by law until such date as the trademarks have been abandoned, canceled, or rendered invalid or unenforceable.

2. For the purpose of assisting U.S. Customs and Border Protection ("CBP") in the enforcement of this Order, and without in any way limiting the scope of the Order, the Commission has attached to this Order copies of the relevant trademark registrations as Exhibit 1.

3. 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. Note, however, this provision does not exempt infringing articles from seizures under trademark laws enforced by Customs and Border Protection, most notably 19 U.S.C § 1526(e) and 19 U.S.C § 1595a(c)(2)(C) in connection with 15 U.S.C § 1124.

4. At the discretion of CBP and pursuant to procedures it establishes, persons seeking to import articles 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.

5. Complainant United Plastic Molders, Inc. (“UPM”) shall file a written statement with the Commission, made under oath, each year on the anniversary of the issuance of this Order stating whether UPM continues to use each of the aforesaid trademarks in commerce in the United States in connection with fish-handling pliers and packaging thereof, whether any of the aforesaid trademarks has been abandoned, canceled, or rendered invalid or unenforceable, and whether UPM continues to satisfy the domestic industry requirements of Section 337(a)(2) and (3).

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

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

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

By order of the Commission.

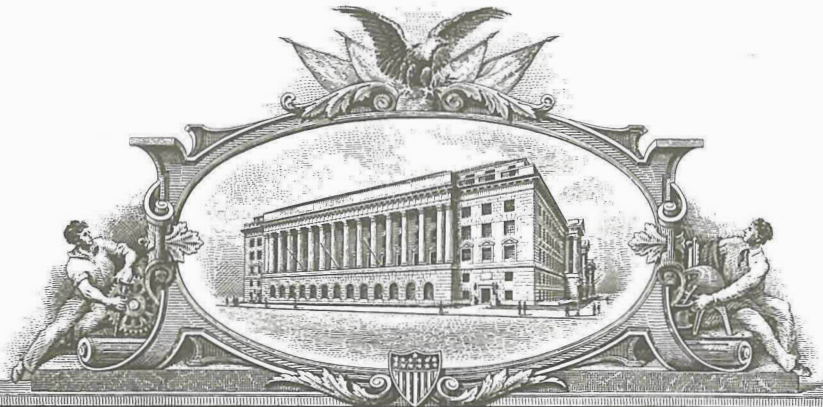
A handwritten signature in black ink, appearing to read 'LRB' with a stylized flourish.

Lisa R. Barton  
Secretary to the Commission

Issued: September 17, 2020

# Exhibit 1

2042781



# THE UNITED STATES OF AMERICA

**TO ALL TO WHOM THESE PRESENTS SHALL COME:**

**UNITED STATES DEPARTMENT OF COMMERCE**

**United States Patent and Trademark Office**

April 11, 2019

THE ATTACHED U.S. TRADEMARK REGISTRATION 4,980,923 IS  
CERTIFIED TO BE A TRUE COPY OF THE REGISTRATION ISSUED BY  
THE UNITED STATES PATENT AND TRADEMARK OFFICE WHICH  
REGISTRATION IS IN FULL FORCE AND EFFECT.

REGISTERED FOR A TERM OF 10 YEARS FROM *June 21, 2016*  
SAID RECORDS SHOW TITLE TO BE IN: *Registrant*

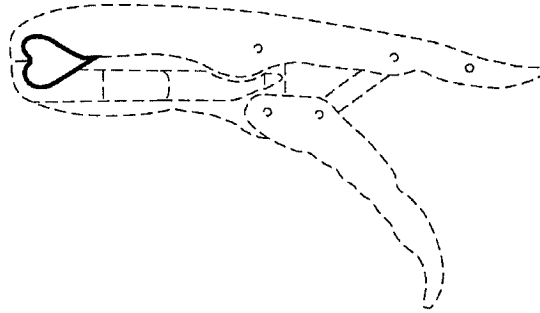
By Authority of the  
Under Secretary of Commerce for Intellectual Property  
and Director of the United States Patent and Trademark Office



*W. Montgomery*  
**W. MONTGOMERY**  
Certifying Officer

# United States of America

United States Patent and Trademark Office



**Reg. No. 4,980,923**

**Registered June 21, 2016**

**Int. Cl.: 28**

**TRADEMARK**

**PRINCIPAL REGISTER**

UNITED PLASTIC MOLDERS, INC. (MISSISSIPPI CORPORATION)  
105 E. RANKIN STREET  
JACKSON, MS 39201

FOR: SPORT FISHING ACCESSORY, NAMELY, A DEVICE WHICH HOLDS THE LIP OF A FISH CAUGHT BY AN ANGLER FOR EASE OF LANDING, WEIGHING AND RELEASE, IN CLASS 28 (U.S. CLS. 22, 23, 38 AND 50).

FIRST USE 4-1-2001; IN COMMERCE 4-1-2001.

THE MARK CONSISTS OF A HEART SHAPED OPENING IN THE THREE-DIMENSIONAL CONFIGURATION OF THE SPORT FISHING DEVICE. THE BROKEN LINES ARE INTENDED TO SHOW THE POSITION OF THE MARK BUT ARE NOT PART OF THE MARK.

SEC. 2(F).

SER. NO. 86-607,682, FILED 4-23-2015.

JOHN MUCHA, EXAMINING ATTORNEY



*Michelle K. Lee*

Director of the United States  
Patent and Trademark Office

**REQUIREMENTS TO MAINTAIN YOUR FEDERAL  
TRADEMARK REGISTRATION**

**WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE  
DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.**

**Requirements in the First Ten Years\***  
**What and When to File:**

***First Filing Deadline:*** You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. See 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.

***Second Filing Deadline:*** You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between the 9th and 10th years after the registration date.\*  
See 15 U.S.C. §1059.

**Requirements in Successive Ten-Year Periods\***  
**What and When to File:**

You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.\*

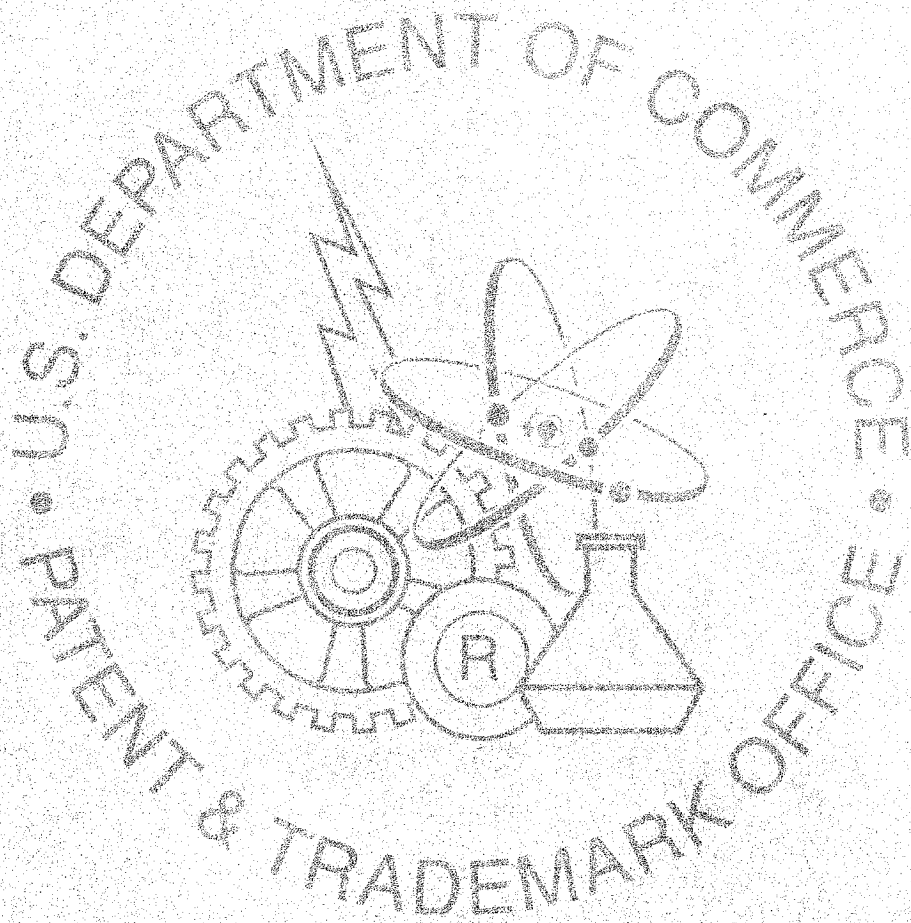
**Grace Period Filings\***

The above documents will be accepted as timely if filed within six months after the deadlines listed above with the payment of an additional fee.

**\*ATTENTION MADRID PROTOCOL REGISTRANTS:** The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the United States Patent and Trademark Office (USPTO). The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. See 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration. See 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see <http://www.wipo.int/madrid/en/>.

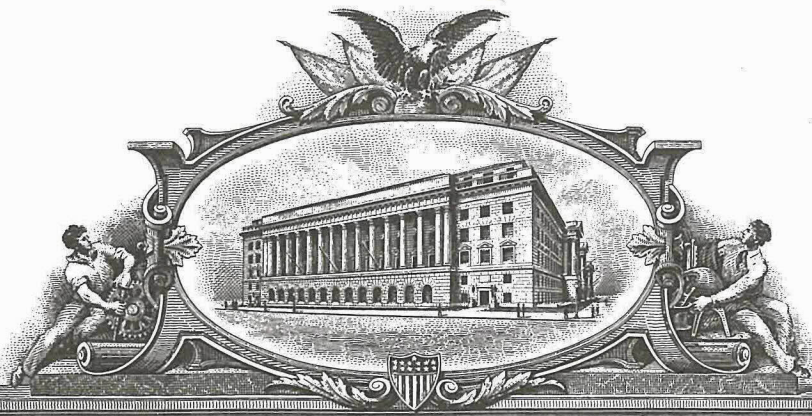
**NOTE:** Fees and requirements for maintaining registrations are subject to change. Please check the USPTO website for further information. With the exception of renewal applications for registered extensions of protection, you can file the registration maintenance documents referenced above online at <http://www.uspto.gov>.

**NOTE:** A courtesy e-mail reminder of USPTO maintenance filing deadlines will be sent to trademark owners/holders who authorize e-mail communication and maintain a current e-mail address with the USPTO. To ensure that e-mail is authorized and your address is current, please use the Trademark Electronic Application System (TEAS) Correspondence Address and Change of Owner Address Forms available at <http://www.uspto.gov>.





2042781



# THE UNITED STATES OF AMERICA

**TO ALL TO WHOM THESE PRESENTS SHALL COME:**

UNITED STATES DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

April 09, 2019

THE ATTACHED U.S. TRADEMARK REGISTRATION 5,435,944 IS  
CERTIFIED TO BE A TRUE COPY OF THE REGISTRATION ISSUED BY  
THE UNITED STATES PATENT AND TRADEMARK OFFICE WHICH  
REGISTRATION IS IN FULL FORCE AND EFFECT.

REGISTERED FOR A TERM OF 10 YEARS FROM *April 03, 2018*  
SAID RECORDS SHOW TITLE TO BE IN: *Registrant*

By Authority of the

Under Secretary of Commerce for Intellectual Property  
and Director of the United States Patent and Trademark Office

*T. Wallace*  
T. WALLACE

Certifying Officer



# United States of America

United States Patent and Trademark Office



**Reg. No. 5,435,944**

**Registered Apr. 03, 2018**

**Int. Cl.: 28**

**Trademark**

**Principal Register**

UNITED PLASTIC MOLDERS, INC. (MISSISSIPPI CORPORATION)  
105 E. Rankin St.  
Jackson, MISSISSIPPI 39201

CLASS 28: Sport fishing accessory, namely, a feature of a sport fishing device which holds the lip of a fish caught by an angler for ease of landing, weighing and release

FIRST USE 12-00-2002; IN COMMERCE 12-00-2002

The mark consists of a stylized gripper with heart-shaped opening.

SER. NO. 87-139,494, FILED 08-16-2016



*Andrei Iancu*

Director of the United States  
Patent and Trademark Office

## **REQUIREMENTS TO MAINTAIN YOUR FEDERAL TRADEMARK REGISTRATION**

**WARNING: YOUR REGISTRATION WILL BE CANCELLED IF YOU DO NOT FILE THE DOCUMENTS BELOW DURING THE SPECIFIED TIME PERIODS.**

### **Requirements in the First Ten Years\***

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- **First Filing Deadline:** You must file a Declaration of Use (or Excusable Nonuse) between the 5th and 6th years after the registration date. See 15 U.S.C. §§1058, 1141k. If the declaration is accepted, the registration will continue in force for the remainder of the ten-year period, calculated from the registration date, unless cancelled by an order of the Commissioner for Trademarks or a federal court.
- **Second Filing Deadline:** You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between the 9th and 10th years after the registration date.\* See 15 U.S.C. §1059.

### **Requirements in Successive Ten-Year Periods\***

#### **What and When to File:**

- You must file a Declaration of Use (or Excusable Nonuse) and an Application for Renewal between every 9th and 10th-year period, calculated from the registration date.\*

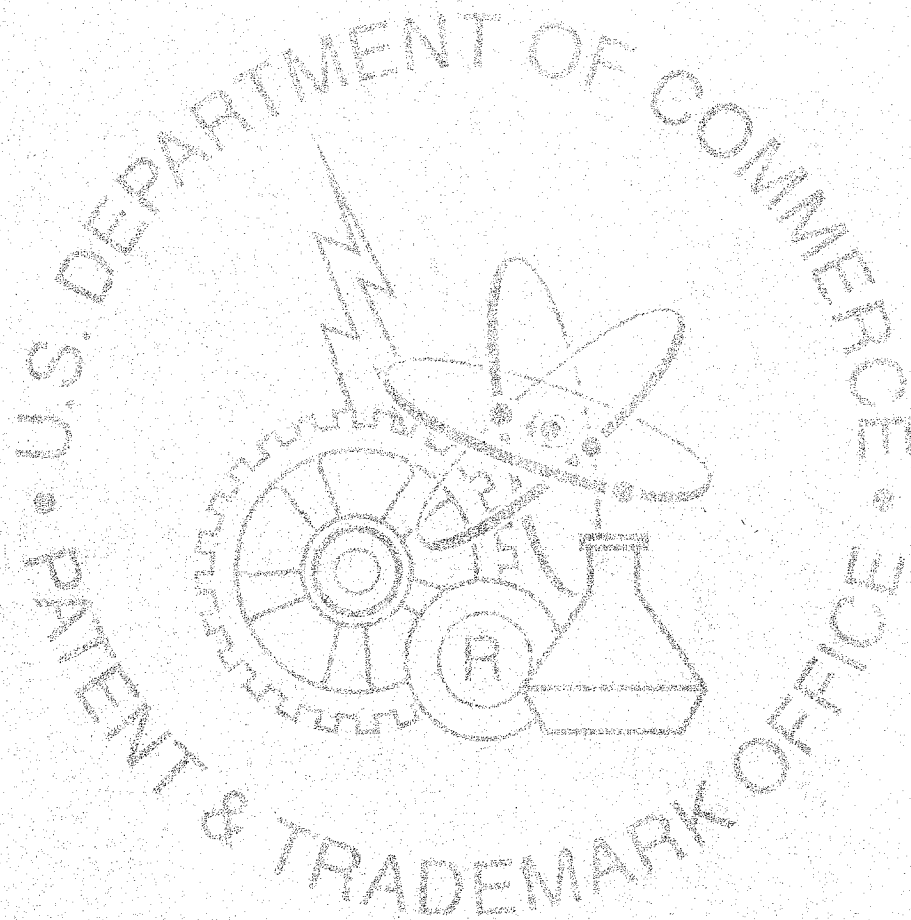
### **Grace Period Filings\***

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**\*ATTENTION MADRID PROTOCOL REGISTRANTS:** The holder of an international registration with an extension of protection to the United States under the Madrid Protocol must timely file the Declarations of Use (or Excusable Nonuse) referenced above directly with the United States Patent and Trademark Office (USPTO). The time periods for filing are based on the U.S. registration date (not the international registration date). The deadlines and grace periods for the Declarations of Use (or Excusable Nonuse) are identical to those for nationally issued registrations. See 15 U.S.C. §§1058, 1141k. However, owners of international registrations do not file renewal applications at the USPTO. Instead, the holder must file a renewal of the underlying international registration at the International Bureau of the World Intellectual Property Organization, under Article 7 of the Madrid Protocol, before the expiration of each ten-year term of protection, calculated from the date of the international registration. See 15 U.S.C. §1141j. For more information and renewal forms for the international registration, see <http://www.wipo.int/madrid/en/>.

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**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served via EDIS upon the Commission Investigative Attorney, **Thomas C. Chen, Esq.**, and the following parties as indicated, on **September 17, 2020**.



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

**On Behalf of Complainant United Plastic Molders:**

Rett Snotherly, Esq.  
**LEVI & SNOTHERLY, PLLC**  
1101 Connecticut Ave., NW, Suite 450  
Washington, DC 20036  
Email: [rsnotherly@levisnotherly.com](mailto:rsnotherly@levisnotherly.com)

- ☐ Via Hand Delivery
- ☐ Via Express Delivery
- ☐ Via First Class Mail
- ☒ Other: Email Notification of Availability for Download

**Respondents:**

Yixing Five Union Industry & Trade Co., Ltd.  
Building A1, Innovation Park of Yixing City  
Jiangsu Province  
China

- ☐ Via Hand Delivery
- ☐ Via Express Delivery
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- ☒ Other: Service to Be Completed by Complainants

NOEBY Fishing Tackle Co., Ltd.  
No. 81 Bohai Road, Eco-zone  
Weihai, Shandong  
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- ☐ Via Hand Delivery
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Weihai ILure Fishing Tackle Co., Ltd.  
No. 01 ZhouNing Road,  
LinGang District,  
Weihai, Shandong  
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**CERTAIN FISH-HANDLING PLIERS AND PACKAGING  
THEREOF**

**Inv. No. 337-TA-1169**

Certificate of Service – Page 2

SamsFX  
No. 11, Shikefa Road, Yangzhou City, 225000  
Jiangsu Province  
China

☐ Via Hand Delivery  
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Wehai Lotus Outdoor Co., Ltd.  
Zhang CunTown, Weihai City  
Shandong Pro.  
China

☐ Via Hand Delivery  
☐ Via Express Delivery  
☐ Via First Class Mail  
☒ Other: Service to Be  
Completed by Complainants

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

**In the Matter of**

**CERTAIN FISH-HANDLING PLIERS  
AND PACKAGING THEREOF**

**Investigation No. 337-TA-1169**

**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 fish-handling pliers and packaging thereof that infringe the two trademarks asserted in this investigation. The investigation is terminated.

**FOR FURTHER INFORMATION CONTACT:** Robert Needham, Esq., 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 may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email [EDIS3Help@usitc.gov](mailto:EDIS3Help@usitc.gov). General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.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 July 29, 2019, based on a complaint filed by complainant United Plastic Molders, Inc. of Jackson, Mississippi (“UPM”). 84 FR 36620-21 (July 29, 2019). The complaint, as supplemented, alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain fish-handling pliers and packaging thereof by reason of infringement of claims 1-11 of U.S. Patent No. 6,256,923 (“the ’923 patent”) and U.S. Trademark Registration

Nos. 4,980,923 (“the ’923 mark”) and 5,435,944 (“the ’944 mark”). *Id.* The complaint further alleges that a domestic industry exists. *Id.* The Commission’s notice of investigation named as respondents Yixing Five Union Industry & Trade Co., Ltd. of Yixing City, China (“Five Union”); NOEBY Fishing Tackle Co., Ltd. of Weihai, China (“NOEBY”); Weihai iLure Fishing Tackle Co., Ltd. of Weihai, China (“iLure”); SamsFX of Yangzhou City, China (“SamsFX”); and Weihai Lotus Outdoor Co., Ltd. of Weihai, China (“Lotus”) (collectively, “Respondents”). *Id.* The Office of Unfair Import Investigations (“OUII”) is participating in the investigation. *Id.*

All five Respondents defaulted. On December 18, 2019, the Commission found NOEBY, iLure, Weihai Lotus, and Five Union in default for failing to respond to the complaint and notice of investigation. Order No. 11 (Nov. 19, 2019), *not reviewed*, Notice (Dec. 18, 2019). Also on December 18, 2019, the Commission found SamsFX in default for failing to respond to the complaint and notice of investigation. Order No. 12 (Nov. 25, 2019), *not reviewed*, Notice (Dec. 18, 2019).

On December 5, 2019, UPM moved for a summary determination of violation and for a recommendation for the issuance of a general exclusion order (“GEO”). In its motion, UPM dropped its allegations with respect to claims 2-6 and 8-11 of the ’923 patent, but continued to assert claims 1 and 7 of the ’923 patent. On January 3, 2020, OUII filed a motion that largely supported UPM’s motion.

On April 10, 2020, the ALJ issued the subject ID, Order No. 14, granting in part UPM’s motion. Specifically, the ALJ issued a summary of determination of violation finding that SamsFX, Lotus, and NOEBY violated section 337 with respect to claims 1 and 7 of the ’923 patent, as well as the ’923 and ’944 marks; that iLure violated section 337 with respect to claims 1 and 7 of the ’923 patent; and that Five Union violated section 337 with respect to the ’923 mark. The ALJ also found that UPM failed to show that iLure violated section 337 with respect to the ’923 and ’944 marks, as the only evidence of importation predates the registration of those marks. No petitions for review of the ID were filed.

On May 27, 2020, the Commission determined to review in part the ID granting summary determination of a section 337 violation. 85 FR 33705-07 (Jun. 2, 2020). Specifically, the Commission determined to review the ID’s finding of violation with respect to the ’923 patent, the ID’s finding that UPM satisfied the economic prong of the domestic industry requirement, and the ID’s finding of violation with respect to Lotus and Five Union.

The Commission also requested written submissions on certain questions and the issues of remedy, the public interest, and bonding. 83 FR 51706 (Oct. 12, 2018). UPM and OUII filed initial written submissions, and OUII also filed a reply to UPM’s submission. No other submissions were filed in response to the Commission notice.



Having reviewed the written submissions and the evidentiary record, the Commission has determined to: (1) vacate the ID's finding of violation with respect to the '923 patent, as well as all other findings related solely to the '923 patent, based on that patent's expiration; (2) affirm the ALJ's findings on the economic prong of the domestic industry requirement; and (3) reverse the ID's findings of violation with respect to Five Union and Lotus based on UPM's failure to provide substantial, reliable, and probative evidence that those entities manufacture the accused SamsFX products. Based on the findings in the ID as modified above, the Commission has determined that UPM has shown a violation of section 337(a)(1)(C), 19 U.S.C. 1337(a)(1)(C), by NOEBY and SamsFX with respect to the '923 and '944 marks. The Commission finds that UPM failed to show a violation by the remaining defaulted respondents.

The Commission has determined that the appropriate remedy in this investigation is a GEO prohibiting the unlicensed importation of certain fish-handling pliers and packaging thereof that infringe the '923 and '944 marks. 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 of the imported articles that are subject to the GEO 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 hereby terminated in its entirety.

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 Commission vote for these determinations took place on August 10, 2020.

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).

While temporary remote operating procedures are in place in response to COVID-19, the Office of the Secretary is not able to serve parties that have not retained counsel or otherwise provided a point of contact for electronic service. Accordingly, pursuant to Commission Rules 201.16(a) and 210.7(a)(1) (19 CFR 201.16(a), 210.7(a)(1)), the Commission orders that the Complainant(s) complete service for any party/parties without a method of electronic service noted on the attached Certificate of Service and shall file proof of service on the Electronic Document Information System (EDIS).

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton'.

Lisa R. Barton  
Secretary to the Commission

Issued: August 10, 2020

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served via EDIS upon the Commission Investigative Attorney, **Thomas C. Chen, Esq.**, and the following parties as indicated, on **August 10, 2020**.



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

**On Behalf of Complainant United Plastic Molders:**

Rett Snotherly, Esq.  
**LEVI & SNOTHERLY, PLLC**  
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Email: rsnotherly@levisnotherly.com

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- ☐ Via Express Delivery
- ☐ Via First Class Mail
- ☒ Other: Email Notification of Availability for Download

**Respondents:**

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Building A1, Innovation Park of Yixing City  
Jiangsu Province  
China

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- ☐ Via Express Delivery
- ☐ Via First Class Mail
- ☒ Other: Service to Be Completed by Complainants

NOEBY Fishing Tackle Co., Ltd.  
No. 81 Bohai Road, Eco-zone  
Weihai, Shandong  
China

- ☐ Via Hand Delivery
- ☐ Via Express Delivery
- ☐ Via First Class Mail
- ☒ Other: Service to Be Completed by Complainants

Weihai ILure Fishing Tackle Co., Ltd.  
No. 01 ZhouNing Road,  
LinGang District,  
Weihai, Shandong  
China

- ☐ Via Hand Delivery
- ☐ Via Express Delivery
- ☐ Via First Class Mail
- ☒ Other: Service to Be Completed by Complainants

**CERTAIN FISH-HANDLING PLIERS AND PACKAGING  
THEREOF**

**Inv. No. 337-TA-1169**

Certificate of Service – Page 2

SamsFX  
No. 11, Shikefa Road, Yangzhou City, 225000  
Jiangsu Province  
China

☐ Via Hand Delivery  
☐ Via Express Delivery  
☐ Via First Class Mail  
☒ Other: Service to Be  
Completed by Complainants

Wehai Lotus Outdoor Co., Ltd.  
Zhang CunTown, Weihai City  
Shandong Pro.  
China

☐ Via Hand Delivery  
☐ Via Express Delivery  
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☒ Other: Service to Be  
Completed by Complainants

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

**In the Matter of**

**CERTAIN FISH-HANDLING  
PLIERS AND PACKAGING  
THEREOF**

**Investigation No. 337-TA-1169**

**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 fish-handling pliers (*i.e.*, pliers that aid in the landing, weighing, and handling of fish by securely gripping the lip of a fish while the hook is removed) and packaging thereof that infringe one or more of United States Trademark Reg. Nos. 4,980,923 (“the ’923 mark”) and 5,435,944 (“the ’944 mark”).

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 pursuant to 19 U.S.C § 1337(d), that a general exclusion from entry for consumption is necessary (1) to prevent circumvention of an exclusion order limited to products of named persons and (2) because there is a pattern of violation of section 337 and it is difficult to identify the source of the infringing products. Accordingly, the Commission has determined to issue a general exclusion order prohibiting the unlicensed importation of infringing fish-handling pliers and packaging thereof.

The Commission has also determined that the public interest factors enumerated in 19 U.S.C. § 1337(d)(1) 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. Fish-handling pliers and packaging thereof that infringe the '923 and '944 marks (“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 until such date as the trademarks have been abandoned, canceled, or rendered invalid or unenforceable.

2. For the purpose of assisting U.S. Customs and Border Protection (“CBP”) in the enforcement of this Order, and without in any way limiting the scope of the Order, the Commission has attached to this Order copies of the relevant trademark registrations as Exhibit 1.

3. 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. Note, however, this provision does not exempt infringing articles from seizures under trademark laws enforced by Customs and Border Protection, most notably 19 U.S.C § 1526(e) and 19 U.S.C § 1595a(c)(2)(C) in connection with 15 U.S.C § 1124.

4. At the discretion of CBP and pursuant to procedures it establishes, persons seeking to import articles 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.

5. Complainant United Plastic Molders, Inc. (“UPM”) shall file a written statement with the Commission, made under oath, each year on the anniversary of the issuance of this Order stating whether UPM continues to use each of the aforesaid trademarks in commerce in the United States in connection with fish-handling pliers and packaging thereof, whether any of the aforesaid trademarks has been abandoned, canceled, or rendered invalid or unenforceable, and whether UPM continues to satisfy the domestic industry requirements of Section 337(a)(2) and (3).

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

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

8. 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'.

Lisa R. Barton  
Secretary to the Commission

Issued: August 10, 2020



**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served via EDIS upon the Commission Investigative Attorney, **Thomas C. Chen, Esq.**, and the following parties as indicated, on **August 10, 2020**.



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

**On Behalf of Complainant United Plastic Molders:**

Rett Snotherly, Esq.  
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Email: rsnootherly@levisnootherly.com

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- ☒ Other: Email Notification of Availability for Download

**Respondents:**

Yixing Five Union Industry & Trade Co., Ltd.  
Building A1, Innovation Park of Yixing City  
Jiangsu Province  
China

- ☐ Via Hand Delivery
- ☐ Via Express Delivery
- ☐ Via First Class Mail
- ☒ Other: Service to Be Completed by Complainants

NOEBY Fishing Tackle Co., Ltd.  
No. 81 Bohai Road, Eco-zone  
Weihai, Shandong  
China

- ☐ Via Hand Delivery
- ☐ Via Express Delivery
- ☐ Via First Class Mail
- ☒ Other: Service to Be Completed by Complainants

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No. 01 ZhouNing Road,  
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Weihai, Shandong  
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- ☒ Other: Service to Be Completed by Complainants

**CERTAIN FISH-HANDLING PLIERS AND PACKAGING  
THEREOF**

**Inv. No. 337-TA-1169**

Certificate of Service – Page 2

SamsFX  
No. 11, Shikefa Road, Yangzhou City, 225000  
Jiangsu Province  
China

☐ Via Hand Delivery  
☐ Via Express Delivery  
☐ Via First Class Mail  
☒ Other: Service to Be  
Completed by Complainants

Wehai Lotus Outdoor Co., Ltd.  
Zhang CunTown, Weihai City  
Shandong Pro.  
China

☐ Via Hand Delivery  
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☒ Other: Service to Be  
Completed by Complainants

UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, DC

**In the Matter of**

**CERTAIN FISH-HANDLING PLIERS  
AND PACKAGING THEREOF**

**Investigation No. 337-TA-1169**

**COMMISSION OPINION**

The Commission has determined that there has been a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, with respect to U.S. Trademark Registration Nos. 4,980,923 (“the ’923 trademark”) and 5,435,944 (“the ’944 trademark”) on review of an initial determination (“ID”) (Order No. 14) of the presiding administrative law judge (“ALJ”). This opinion sets forth the Commission’s reasoning in support of that determination. In addition, the Commission adopts the findings in the ID that are not inconsistent with this opinion.

**I. BACKGROUND**

**A. Procedural History**

On July 29, 2019, the Commission instituted this investigation based on a complaint filed by United Plastic Molders, Inc. of Jackson, Mississippi (“UPM”). 84 Fed. Reg. 36620-21. The complaint alleged violations of section 337 in the importation into the United States, the sale for importation, and the sale after importation within the United States of certain fish-handling pliers and packaging thereof by reason of infringement of one or more of claims 1-11 of U.S. Patent No. 6,256,923 (“the ’923 patent”) and infringement of one or more of the ’923 and ’944 trademarks. *Id.* at 36621. The notice of investigation named as respondents Yixing Five Union

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Industry & Trade Co., Ltd. of Yixing City, China (“Five Union”); NOEBY Fishing Tackle Co., Ltd. of Weihai, China (“NOEBY”); Weihai iLure Fishing Tackle Co., Ltd. of Weihai, China (“iLure”); SamsFX of Yangzhou City, China (“SamsFX”); and Weihai Lotus Outdoor Co., Ltd. of Weihai, China (“Lotus”) (collectively, “Respondents”). *Id.* The Office of Unfair Import Investigations (“OUII”) is a party to the investigation. *Id.*

All five respondents defaulted. On December 18, 2019, the Commission found NOEBY, iLure, Weihai Lotus, and Five Union in default for failing to respond to the complaint and notice of investigation. Order No. 11 (Nov. 19, 2019), *not reviewed*, Notice (Dec. 18, 2019). Also on December 18, 2019, the Commission found SamsFX in default for failing to respond to the complaint and notice of investigation. Order No. 12 (Nov. 25, 2019), *not reviewed*, Notice (Dec. 18, 2019).

On December 5, 2019, UPM moved for a summary determination of violation and for a recommendation for the issuance of a general exclusion order. On January 3, 2020, OUII filed a response that generally supported UPM’s motion except OUII believed that UPM had not shown that iLure infringed the ’923 and ’944 trademarks because the only evidence of iLure’s importation predated the registration of the trademarks.

On April 10, 2020, the ALJ issued an ID granting in part UPM’s motion for summary determination on violation. Specifically, the ALJ found that: (1) UPM established importation against all respondents; (2) UPM established infringement of claims 1 and 7 of the ’923 patent by SamsFX/Lotus, NOEBY, and iLure; (3) UPM satisfied the technical prong of the domestic industry requirement with respect to claim 1 of the ’923 patent; (4) UPM established infringement of the ’923 and ’944 trademarks by NOEBY, SamsFX, Lotus, and Five Union; (5) UPM failed to establish infringement of the ’923 and ’944 trademarks by iLure because all

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alleged acts of importation occurred prior to the registration of those trademarks; (6) UPM satisfied the technical prong of the domestic industry requirement with respect to the '923 and '944 trademarks; and (7) UPM satisfied the economic prong of the domestic industry requirement through substantial investments in plant and equipment and labor and capital with respect to its domestic industry products. The ALJ's recommended determination ("RD")<sup>1</sup> found that there was widespread violation and that a limited exclusion order was likely to be circumvented, and recommended that the Commission issue a general exclusion order ("GEO") and set the bond rate during the period of Presidential review at one hundred percent (100%) of the entered value of the infringing products subject to the GEO.

The Commission did not receive any petitions for review of the ID. On May 29, 2020, the Commission *sua sponte* determined to review the ID's finding of violation with respect to the '923 patent; the ID's findings of trademark infringement; the ID's finding that UPM satisfied the economic prong of the domestic industry requirement; and the ID's finding of violation with respect to Lotus and Five Union. The Commission requested briefing from the parties on two topics and 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.

On June 10, 2020, UPM<sup>2</sup> and OUII<sup>3</sup> provided submissions in response to the notice. On

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<sup>1</sup> The RD and ID are contained in the same document.

<sup>2</sup> Response of UPM to the Commission's Request for Written Submissions Regarding the Issues Under Review and Remedy, the Public Interest, and Bonding (Jun. 10, 2020) ("UPM Sub.").

<sup>3</sup> Response of the Office of Unfair Import Investigations to the Commission's Request for Written Submissions on the Issues Under Review, Remedy, the Public Interest, and Bonding (Jun. 10, 2020) ("OUII Sub.").

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June 17, 2020, OUII provided a reply submission<sup>4</sup> in response to UPM's submission. UPM declined to provide a reply submission. No government agency or other interested party responded to the notice.

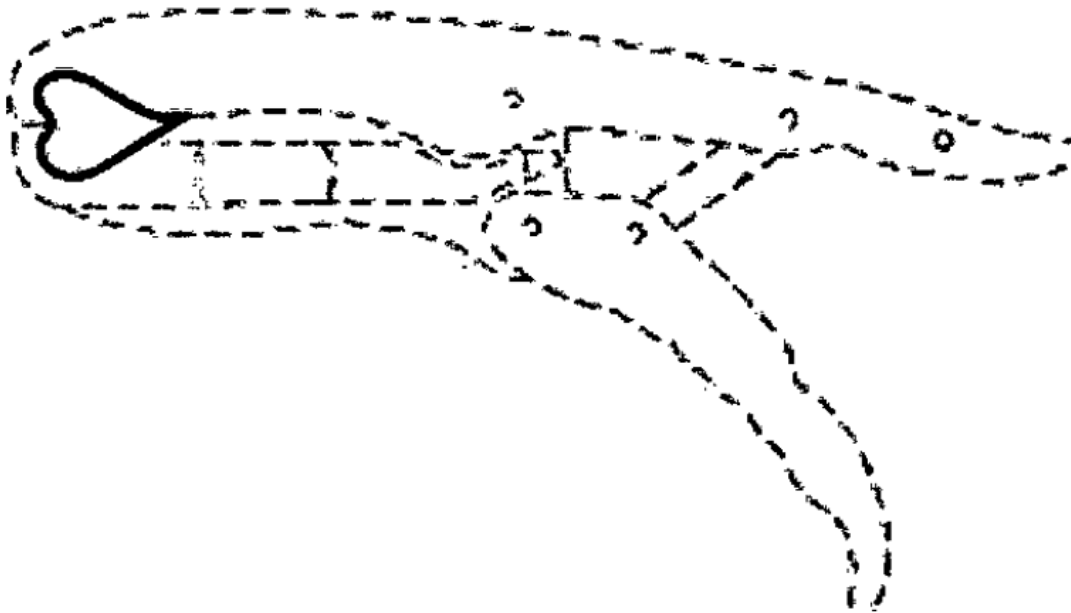
### **B. The Asserted Patent and Trademarks**

This investigation relates to intellectual property covering pliers for handling fish. The '923 patent is entitled "Fish Handling Pliers," and claims priority to its filing date, February 25, 2000. The patent term was not extended or adjusted by the U.S. Patent and Trademark Office, and thus expired on February 25, 2020.

The '923 trademark is for use with a "sport fishing accessory, namely, a feature of a sport fishing device which holds the lip of a fish caught by an angler for ease of landing, weighing, and release," and "consists of a heart shaped opening in the three-dimensional configuration of the sport fishing device." '923 trademark. The trademark is depicted as follows:

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<sup>4</sup> Reply of the Office of Unfair Import Investigations to the Commission's Request for Written Submissions on the Issues Under Review, Remedy, the Public Interest, and Bonding (Jun. 17, 2020) ("OUII Rep.").



*Id.* The '923 trademark was registered on June 21, 2016, and states that its first use in commerce was April 1, 2001.

The '944 trademark is for use with a “sport fishing accessory, namely, a feature of a sport fishing device which holds the lip of a fish caught by an angler for ease of landing, weighing, and release,” and “consists of a stylized gripper with heart-shaped opening.” '944 trademark.

The trademark is depicted as follows:



*Id.* The '944 trademark was registered on April 3, 2018, and states that its first use in commerce was “12-00-2002.”

### C. The Accused Products

The accused products are fish-handling pliers (*i.e.*, “pliers that aid in the landing, weighing, and handling of fish by securely gripping the lip of a fish while the hook is removed”). *See* 84 Fed. Reg. at 36621. Specifically, UPM accused the following respondents of infringing the following asserted intellectual property:

Accused Product	Respondent(s)	‘923 Patent	‘923 Trademark	‘944 Trademark
SamsFX 9” Fish Grip	SamsFX/Five Union		✓	
NOEBY Fishing Lip Grip	NOEBY	✓	✓	✓
iLure Fish Gripper	iLure	✓	✓	✓
SamsFX 6” Fish Grip	SamsFX/Lotus	✓	✓	✓

ID at 4. UPM alleges that Five Union manufactures the 9-inch SamsFX product and that Lotus manufactures the 6-inch SamsFX product.

### D. The Domestic Industry Products

The asserted domestic industry articles are UPM’s fish-handling plier products. UPM asserts that its investments in plant and equipment and labor and capital regarding its Fish Grip, Fish Grip Jr, and Fish Grip Mini satisfy the domestic industry requirement.

## II. STANDARD OF REVIEW

With respect to the issues under 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 take no position



on specific issues or portions of the initial determination,” and “may make any finding or conclusions that in its judgment are proper based on the record in the proceeding.” *Id.*

### **III. ANALYSIS**

The Commission determines to make the findings, conclusions, and supporting analysis set forth below. Any findings, conclusions, and supporting analysis in the ID regarding the issues under review that are not inconsistent with these findings, conclusions, and supporting analysis are affirmed and adopted herein.

#### **A. The '923 Patent**

The ID found that NOEBY, iLure, SamsFX, and Lotus violated section 337 with respect to claims 1 and 7 of the '923 patent. Section 337(a)(1)(B)(i), however, requires “a valid and enforceable United States patent,” and both UPM and OUII acknowledge in their submissions on review of the ID that the '923 patent is no longer valid and enforceable because it expired on February 25, 2020. UPM Sub. at 4; OUII Sub. at 4. The Commission has no statutory authority to find a violation and issue a remedy with respect to an expired patent. Accordingly, the Commission determines to reverse the ID’s finding of violation with respect to the '923 patent, and therefore finds that UPM failed to show that any respondent violated section 337 with respect to the '923 patent. Because the ID found that iLure violated section 337 solely with respect to the expired '923 patent, the Commission finds that UPM has failed to show that iLure violated section 337.

UPM and OUII differ on how the Commission should dispose of the ID’s subsidiary findings regarding infringement of the '923 patent. UPM contends that the Commission should not vacate those findings, and should instead take no position on those findings, because the parties and ALJ spent time and resources on those findings. UPM Sub. at 4. OUII contends that,

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consistent with Federal Circuit and Commission precedent, the Commission should vacate all findings relating solely to the expired '923 patent. OUII Rep. at 2.

The Commission has determined to vacate all of the ID's findings relating solely to the '923 patent because there is no dispute that the patent expired on February 25, 2020, prior to the issuance of the ALJ's ID. Once the '923 patent expired, there was no "valid and enforceable United States patent" to adjudicate in the ID. For this reason, the ID's findings related to the '923 patent are vacated.

### **B. The Economic Prong of the Domestic Industry Requirement**

The ID found that UPM's Fish Grip Mini practices the '923 patent and '923 trademark, and that the Fish Grip and Fish Grip Jr. practice the '923 patent, '923 trademark and the '944 trademark. ID at 78. The ID also found that UPM established that its investments in plant and equipment and labor with respect to these products were significant. *Id.* at 81-83. UPM argues that the expiration of the '923 patent has no impact on the economic prong findings because the ALJ analyzed the economic prong separately for the trademarks and the patent. UPM Sub. at 4-5. OUII agrees that the expiration of the '923 patent does not impact the economic prong findings because the investments are related to the domestic industry products (which are unchanged) rather than intellectual property rights. OUII Sub. at 5. Because the investments are directed to the same domestic industry products that are protected by the '923 trademark and the '944 trademark, the Commission finds that the expiration of the '923 patent does not require modification of the ID's economic prong findings, and therefore affirms the ID's findings on the economic prong of the domestic industry requirement.

### **C. Violation by Five Union and Lotus**

The ID found that the importation requirement is satisfied with respect to Lotus and Five

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Union. ID at 10-11, 13-14. Specifically, the ID found that the 6-inch SamsFX product is manufactured by Lotus and the 9-inch SamsFX product is manufactured by Five Union, and that those entities knew or should have known that SamsFX was selling and shipping the products to the United States based on SamsFX's Amazon.com sales account. *Id.* In support of the finding that the SamsFX products are manufactured by Lotus and Five Union, the ALJ relied upon the testimony of UPM's employee, William C. Hoge III, that certain fish pliers imported and sold by SamsFX are manufactured by Five Union and Lotus. Complaint, Exhibit 26C, Declaration of William C. Hoge III at ¶ 26, 30.

UPM and OUII both argue that the ALJ correctly found that Five Union and Lotus violated section 337 through their manufacture of SamsFX's infringing products. UPM Sub. at 6-7; OUII Sub. at 6-7. Both argued that the ALJ reasonably relied on Mr. Hoge's testimony to show that Five Union and Lotus sold the products to SamsFX and knew or should have known that the products would be imported and sold in the United States. *Id.*

In order to obtain a general exclusion order, UPM is required to show that "a violation is established by substantial, reliable, and probative evidence." 19 U.S.C. § 1337(g)(2)(B).<sup>5</sup> Here, the only evidence connecting Five Union and Lotus to the accused products is the testimony of Mr. Hoge. *See* Complaint, Exhibit 26C, Declaration of William C. Hoge III at ¶ 26, 30. Mr. Hoge testified that Five Union and Lotus manufactured the SamsFX products because he had

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<sup>5</sup> The Commission's assessment is governed by section 337(g)(2)—not by the presumptions applicable under section 337(g)(1)—because UPM seeks a general exclusion order rather than an exclusion order limited to the defaulting Respondents. *See* 19 U.S.C. § 1337(g)(1)(E), (g)(2); Complainant UPM's Motion for Summary Determination of Violation of Section 337 and for a Recommendation of a General Exclusion Order (Dec. 5, 2019). Section 337(g)(2) requires that, for the Commission to issue a general exclusion order, a violation must be proven based on "substantial, reliable, and probative evidence." 19 U.S.C. § 1337(g)(2)(B).

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previously seen those companies' products and "[b]ased in part on my extensive experience in plastic molding manufacturing, I concluded from the tool marks and other indicia that the two products came from the same source, i.e., Five Union [and Lotus]." *Id.* Mr. Hoge, however, did not specify which "tool marks and other indicia" are the same, and provided no evidence in support of his assertion. The Commission finds that Mr. Hoge's unsupported allegation that Five Union and Lotus manufacture the products in question does not satisfy the requirement for "substantial, reliable, and probative evidence." Accordingly, the Commission reverses the ID's finding that UPM established a violation with respect to Five Union or Lotus.<sup>6</sup>

OUII argues that the facts here are analogous to those in *Certain Powered Cover Plates*, Inv. No. 337-TA-1124, Initial Determination at 9-10 (Jul. 10, 2019) *not reviewed*, Notice (Aug. 12, 2019). OUII Sub. at 8. In that investigation, however, the complainant established that one respondent manufactured another respondent's product based in part on nine pages of side-by-side pictures demonstrating how the products had identical scratches, imprints, and other features. *See* SnapPower's Motion for Summary Determination Regarding Importation, *Certain Powered Cover Plates*, Inv. No. 337-TA-1124, at Ex. 1 (Nov. 28, 2018). In contrast, Mr. Hoge failed to explain which "tool marks and other indicia" he asserts are the same and failed to supply any pictures or other evidence in support of his assertion. The Commission finds that Mr. Hoge's testimony falls short of the evidence found sufficient in *Certain Powered Cover Plates*.

## IV. REMEDY, THE PUBLIC INTEREST, AND BONDING

### A. Remedy

Section 337(g)(2) provides that:

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<sup>6</sup> The Commission has determined to affirm the ID's finding that UPM demonstrated a violation by NOEBY and SamsFX, and not by iLure, with respect to the '923 and '944 trademarks by substantial, reliable, and probative evidence.

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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) provides that “[t]he 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— (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); *see also* 19 C.F.R. § 210.50(c).

The RD recommends that the Commission issue a general exclusion order with respect to the '923 patent and the '923 and '944 trademarks. RD at 85. The ALJ found that a general exclusion order was necessary to prevent circumvention of a limited exclusion order because the evidence shows that infringing products are sold in generic packaging without logos or other indication of origin, and the respondents' refusal to participate in the investigation suggests that they would not abide by an LEO. *Id.* at 86. The ALJ also found a widespread pattern of violation with difficulty in identifying the sources based on evidence showing eight infringing products available for sale on Amazon.com, ten infringing products available for sale on AliExpress, and two infringing products available for sale on Wal-Mart.com. *Id.* at 89. The ALJ

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did not recommend the issuance of cease and desist orders because UPM did not request them. *Id.* at 90. UPM and OUII agree that the issuance of a GEO is appropriate. UPM Sub. at 9-14; OUII Init. Sub. at 9-13.

The Commission finds that the appropriate remedy is the issuance of a GEO with respect to the '923 and '944 trademarks. Here, as required by section 337(g)(2), no person appeared to contest the investigation, and the Commission finds that UPM demonstrated a violation by NOEBY and SamsFX with respect to the '923 and '944 trademarks by substantial, reliable, and probative evidence for the reasons set forth in the ID.<sup>7</sup>

The remaining element is a demonstration that “the requirements of subsection (d)(2),” are met, which requires a showing that:

- (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).

The Commission finds that the evidence shows that a GEO is necessary to prevent the circumvention of a GEO. First, the Commission finds that the infringing articles are sold via numerous anonymous sellers in online marketplaces, so NOEBY and SamsFX could circumvent an LEO by similarly anonymously selling their articles on the Internet.<sup>8</sup> *See* UPM Summary

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<sup>7</sup> The Commission finds that UPM failed to establish a violation with respect to the '923 patent and by respondents iLure, Five Union, and Lotus for the reasons discussed above. Because the Commission finds that the statutory requirements for a GEO have been satisfied with respect to the '923 and '944 trademarks, however, any future imports of infringing articles by these respondents will be subject to the GEO.

<sup>8</sup> *See Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm'n Op., 2015 WL 5000874, at \*8 (June 26, 2015) (“[T]he record shows that infringing loom kits are widely offered for sale online by anonymous sellers . . . . If the Commission entered an exclusion

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Determination Motion at Attachments F-G. Second, the Commission finds that the infringing articles are sold in nondescript packaging that does not indicate origin, which increases the difficulty of enforcing an LEO.<sup>9</sup> *See* Complaint at Exs. 29-33. Third, NOEBY and SamsFX failed to respond to the complaint and notice of investigation and failed to participate in this investigation, suggesting they are unlikely to abide by a Commission remedy limited to NOEBY and SamsFX.

The Commission also finds that there is widespread infringement and that it is difficult to ascertain the infringing products' source. The Commission has found that these requirements may be satisfied by showing numerous anonymous Internet sales.<sup>10</sup> The Commission finds that there is a widespread pattern of infringement based on evidence of twenty instances of nondescript entities selling products infringing the '923 and '944 trademarks via online marketplaces. UPM Summary Determination Motion at Attachments F-G. The Commission finds that it is difficult to ascertain the source of those products based on evidence those products have been sold in anonymous packaging. *See* Complaint at Exs. 29-33. Accordingly, the

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order limited to the products of the defaulting respondents, the defaulting respondents could circumvent the order via anonymous sales on the internet.”); *see also Certain Mounting Apparatuses for Holding Portable Electronic Devices and Components Thereof*, Inv. No. 337-TA-1086, Comm’n Op. at 9 (Jun. 24, 2019) (determining to issue a GEO in part because of numerous infringing sales by non-respondents over the Internet).

<sup>9</sup> *See Certain Water Filters and Components Thereof*, Inv. No. 337-TA-1126, Comm’n Op. at 7 (Nov. 12, 2019) (finding likelihood of circumvention of an LEO by defaulting respondents where, *inter alia*, “[t]he record evidence shows numerous internet seller listings on Amazon and eBay as well as generic, unmarked product shipments.”); *see also Certain Mounting Apparatuses for Holding Portable Electronic Devices and Components Thereof*, Inv. No. 337-TA-1086, Comm’n Op. at 7, 9 (Jun. 24, 2019) (determining to issue a GEO in part because infringing products are shipped in packaging that lacks manufacturer identification).

<sup>10</sup> *See, e.g., 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.”).

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Commission finds that the appropriate relief is a GEO with respect to the '923 and '944 trademarks.

### **B. The Public Interest**

Section 337 requires the Commission, upon finding a violation of section 337, to issue a remedy “unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.” 19 U.S.C. § 1337(d)(1); *see also* 19 U.S.C. § 1337(g)(1).

Under appropriate facts and circumstances, the Commission may determine that no remedy should issue because of the adverse impacts on the public interest. *See, e.g., Certain Fluidized Supporting Apparatus & Components Thereof*, Inv. Nos. 337-TA-182/188, USITC Pub. 1667, Comm’n Op. at 1–2, 23–25 (Oct. 1984) (finding that the public interest warranted denying complainant’s requested relief). Moreover, when the circumstances of a particular investigation require, the Commission has tailored its relief in light of the statutory public interest factors. For example, the Commission has allowed continued importation for ongoing medical research, exempted service parts, grandfathered certain infringing products, and delayed the imposition of remedies to allow affected third-party consumers to transition to non-infringing products. *E.g., Certain Microfluidic Devices*, Inv. No. 337-TA-1068 Comm’n Op. at 1, 22–48, 53–54 (analyzing the public interest, discussing applicable precedent, and ultimately issuing a tailored LEO and a tailored CDO); *Certain Road Milling Machines & Components Thereof*, Inv. No. 337-TA-1067, Comm’n Op. at 32–33 (July 18, 2019) (exempting service parts); *Certain Baseband Processor Chips & Chipsets, Transmitter, & Receiver (Radio) Chips, Power Control Chips, & Prods. Containing Same, Including Cellular Tel. Handsets*, 337-TA-543, USITC Pub.



## Public Version

No. 4258, Comm'n Op. at 150–51 (Oct. 2011) (grandfathering certain products); *Certain Personal Data & Mobile Comm'n Devices & Related Software*, 337-TA-710, USITC Pub. No. 4331, Comm'n Op., at 72–73, 80–81 (June 2012) (delaying imposition of remedy).

The statute requires the Commission to consider and make findings on the public interest in every case in which a violation is found regardless of the quality or quantity of public interest information supplied by the parties. 19 U.S.C. § 1337(d)(1). Thus, the Commission publishes a notice inviting the parties as well as interested members of the public and interested government agencies to gather and present evidence on the public interest at multiple junctures in the proceeding. 19 U.S.C. § 1337(d)(1).

Both UPM and OUII contend that the statutory public interest factors do not warrant denying a remedy. UPM Statement on the Public Interest (May 8, 2020); OUII Sub. at 13-14. The Commission did not receive any comments from the public or interested government agencies 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, pliers to handle fish upon capture, would have an adverse impact on the public health and welfare concerns. Moreover, trademarks are necessarily nonfunctional,<sup>11</sup> so the GEO will not prevent competitors from importing and selling fish-handling pliers with identical functionality as long as they avoid the nonfunctional trademarked features at issue. Moreover,

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<sup>11</sup> *E.g., Qualitex Co. v. Jacobson Products Co.*, 514 US 159, 164 (1995); 15 U.S.C. § 1064(3).

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UPM's domestic industry products are manufactured in the United States whereas the accused products are imported from overseas. As such, the Commission finds that the GEO would not adversely impact production of the fish-handling pliers in the United States. Accordingly, the Commission finds that the statutory public interest factors do not preclude issuance of a GEO.

### C. Bonding

When the Commission enters an exclusion order or a cease and desist order, a respondent may continue to import and sell its products during the 60-day period of Presidential review under a 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). When reliable price information is available in the record, the Commission has often set the bond in an amount that would eliminate the price differential between the domestic product and the imported, infringing product. *See Certain Microsphere Adhesives, Processes for Making Same, & Prods. Containing Same, Including Self-stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. No. 2949, Comm'n Op. at 24 (Jan. 16, 1996). The Commission also has used a reasonable royalty rate to set the bond amount where a reasonable royalty rate could be ascertained from the evidence in the record. *See, e.g., Certain Audio Digital-to-Analog Converters & Prods. Containing Same*, Inv. No. 337-TA-499, Comm'n Op. at 25 (Mar. 3, 2005). Where the record establishes that the calculation of a price differential is impractical or there is insufficient evidence in the record to determine a reasonable royalty, the Commission has imposed a 100 percent bond. *See, e.g., Certain Liquid Crystal Display Modules, Prods. Containing Same, & Methods Using the Same*, Inv. No. 337-TA-634, Comm'n Op. at 6-7 (Nov. 24, 2009). The complainant, however, bears the burden of establishing the need for a bond.

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*Certain Rubber Antidegradants, Components Thereof & Prods. Containing Same*, Inv. No. 337-TA-533, USITC Pub. No. 3975, Comm'n Op. at 40 (July 21, 2006).

The ALJ recommends that the Commission set the bond rate at one hundred percent (100%) of the entered value. RD at 91. The ALJ found that UPM showed that a price differential would be difficult to calculate because the infringing products are sold at a variety of price points and quantities. *Id.* The ALJ also found that a one hundred percent (100%) bond was appropriate due to the respondents' default and failure to provide discovery. *Id.* UPM and OUII both agree with the ALJ's recommendation. UPM Sub. at 15; OUII Sub. at 14-15.

The Commission finds that the defaulting respondents' failure to appear and participate in the investigation prevents the Commission from determining a price differential or other basis for a bond. Accordingly, the Commission has determined to set the bond during the period of Presidential review in the amount of one hundred percent (100%) of the entered value of the infringing products subject to the GEO.

## V. CONCLUSION

For the reasons set forth herein, the Commission determines that UPM has established a violation of Section 337(a)(1)(C) by NOEBY and SamsFX with respect to the '923 and '944 trademarks. Accordingly, the investigation is terminated with a finding of a violation of section 337. The Commission determines that the appropriate remedy is a general exclusion order, the public interest does not preclude that remedy, and the bond during the period of Presidential review is set in the amount of one hundred percent (100%) of the entered value of the infringing products subject to the GEO.

**Public Version**

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton'.

Lisa R. Barton  
Secretary to the Commission

Issued: September 29, 2020

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **Order, Commission** has been served via EDIS upon the Commission Investigative Attorney, **Thomas C. Chen, Esq.**, and the following parties as indicated, on **September 29, 2020**.



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

**On Behalf of Complainant United Plastic Molders:**

Rett Snotherly, Esq.  
**LEVI & SNOTHERLY, PLLC**  
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Washington, DC 20036  
Email: rsnotherly@levisnotherly.com

- ☐ Via Hand Delivery
- ☐ Via Express Delivery
- ☐ Via First Class Mail
- ☒ Other: Email Notification of Availability for Download

**Respondents:**

Yixing Five Union Industry & Trade Co., Ltd.  
Building A1, Innovation Park of Yixing City  
Jiangsu Province  
China

- ☐ Via Hand Delivery
- ☐ Via Express Delivery
- ☐ Via First Class Mail
- ☒ Other: Service to Be Completed by Complainants

NOEBY Fishing Tackle Co., Ltd.  
No. 81 Bohai Road, Eco-zone  
Weihai, Shandong  
China

- ☐ Via Hand Delivery
- ☐ Via Express Delivery
- ☐ Via First Class Mail
- ☒ Other: Service to Be Completed by Complainants

Weihai ILure Fishing Tackle Co., Ltd.  
No. 01 ZhouNing Road,  
LinGang District,  
Weihai, Shandong  
China

- ☐ Via Hand Delivery
- ☐ Via Express Delivery
- ☐ Via First Class Mail
- ☒ Other: Service to Be Completed by Complainants

**CERTAIN FISH-HANDLING PLIERS AND PACKAGING  
THEREOF**

**Inv. No. 337-TA-1169**

Certificate of Service – Page 2

SamsFX  
No. 11, Shikefa Road, Yangzhou City, 225000  
Jiangsu Province  
China

☐ Via Hand Delivery  
☐ Via Express Delivery  
☐ Via First Class Mail  
☒ Other: Service to Be  
Completed by Complainants

Wehai Lotus Outdoor Co., Ltd.  
Zhang CunTown, Weihai City  
Shandong Pro.  
China

☐ Via Hand Delivery  
☐ Via Express Delivery  
☐ Via First Class Mail  
☒ Other: Service to Be  
Completed by Complainants

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

**In the Matter of**

**CERTAIN FISH-HANDLING PLIERS  
AND PACKAGING THEREOF**

**Investigation No. 337-TA-1169**

**NOTICE OF A COMMISSION DETERMINATION TO REVIEW-IN-PART  
AN INITIAL DETERMINATION FINDING A VIOLATION OF SECTION 337;  
SCHEDULE FOR FILING WRITTEN SUBMISSIONS ON THE ISSUES UNDER  
REVIEW AND ON REMEDY, THE PUBLIC INTEREST, AND BONDING**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission (“Commission”) has determined to review-in-part an initial determination (“ID”) (Order No. 14) of the presiding administrative law judge (“ALJ”). The Commission requests briefing from the parties on certain issues under review, as indicated in this notice. The Commission also 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:** Robert Needham, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street S.W., Washington, D.C. 20436, telephone (202) 205-2392. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email [EDIS3Help@usitc.gov](mailto:EDIS3Help@usitc.gov). 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 July 29, 2020, based on a complaint filed by complainant United Plastic Molders, Inc. of Jackson, Mississippi (“UPM”). 84 FR 36620-21 (July 29, 2020). The complaint, as supplemented, alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain fish-handling pliers and packaging thereof by reason of infringement

of claims 1-11 of U.S. Patent No. 6,256,923 (“the ’923 patent”) and U.S. Trademark Registration Nos. 4,980,923 (“the ’923 mark”) and 5,435,944 (“the ’944 mark”). *Id.* The complaint further alleges that a domestic industry exists. *Id.* The Commission’s notice of investigation named as respondents Yixing Five Union Industry & Trade Co., Ltd. of Yixing City, China (“Five Union”); NOEBY Fishing Tackle Co., Ltd. of Weihai, China (“NOEBY”); Weihai iLure Fishing Tackle Co., Ltd. of Weihai, China (“iLure”); SamsFX of Yangzhou City, China (“SamsFX”); and Weihai Lotus Outdoor Co., Ltd. of Weihai, China (“Lotus”) (collectively, “Respondents”). *Id.* The Office of Unfair Import Investigations (“OUII”) is participating in the investigation. *Id.*

All five Respondents defaulted. On December 18, 2019, the Commission found NOEBY, iLure, Weihai Lotus, and Five Union in default for failing to respond to the complaint and notice of investigation. Order No. 11 (Nov. 19, 2019), *not reviewed* Notice (Dec. 18, 2019). Also on December 18, 2019, the Commission found SamsFX in default for failing to respond to the complaint and notice of investigation. Order No. 12 (Nov. 25, 2019), *not reviewed* Notice (Dec. 18, 2019).

On December 5, 2019, UPM moved for a summary determination of violation based on infringement of the ’923 patent, the ’923 mark, and the ’944 mark and for a recommendation for the issuance of a general exclusion order (“GEO”). In its motion, UPM withdrew its infringement allegations with respect to claims 2-6 and 8-11 of the ’923 patent, but continued to assert claims 1 and 7 of the ’923 patent. On January 3, 2020, OUII filed a response that largely supported UPM’s motion.

On April 10, 2020, the ALJ issued the subject ID, Order No. 14, granting-in-part UPM’s motion. Specifically, the ALJ issued a summary of determination of violation finding that SamsFX, Lotus, and NOEBY violated section 337 with respect to claims 1 and 7 of the ’923 patent, as well as the ’923 and ’944 marks; that iLure violated section 337 with respect to claims 1 and 7 of the ’923 patent; and that Five Union violated section 337 with respect to the ’923 mark. The ALJ also found that UPM failed to show that iLure violated section 337 with respect to the ’923 and ’944 marks, as the only evidence of importation predates the registration of those marks. No petitions for review of the ID were filed.

The Commission has determined to review the subject ID in part. Specifically, the Commission has determined to review the ID’s finding of violation with respect to the ’923 patent; the ID’s findings of trademark infringement; the ID’s finding that UPM satisfied the economic prong of the domestic industry requirement; and the ID’s finding of violation with respect to Lotus and Five Union. The Commission has not determined to review any other findings in the ID.



In connection with its review, the Commission is interested in briefing on the following issues:

1. In view of UPM's acknowledgment that the '923 patent expired on February 25, 2020 (Complaint ¶ 23), how does that expiration impact the findings in the ID? Please specifically address any impact on the ID's findings on the economic prong of the domestic industry requirement.
2. Please identify all evidence in the record that demonstrates that Lotus and Five Union are involved in "the 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 infringing articles. 19 U.S.C. 1337(a)(1)(C). Please explain how that evidence constitutes "substantial, reliable, and probative evidence." 19 U.S.C. 1337(g)(2)(B).

The parties are invited to brief only the discrete issues described above, with reference to the applicable law and evidentiary record. The parties are not to brief other issues on review, which are adequately presented in the parties' existing filings.

In connection with the final disposition of this investigation, the statute authorizes issuance of (1) an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) cease and desist orders that could result in the respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or 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).

The statute requires the Commission to consider the effects of any remedy upon the public interest. The public interest factors the Commission will consider include the effect that an exclusion order and/or a cease and desist order 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, disapprove, or take no action on the Commission's determination. 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:** The Commission requests that the parties to the investigation file written submissions on the issues identified in this notice. 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 initial submissions should include views on the recommended determination by the ALJ on remedy and bonding.

In their initial submissions, Complainant and OUII are also requested to identify the remedy sought and to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the HTSUS subheadings 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 initial written submissions and proposed remedial orders must be filed no later than close of business on June 10, 2020. Reply submissions must be filed no later than the close of business on June 17, 2020. 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. The Commission's paper filing requirements in 19 C.F.R. 210.4(f) are currently waived. 85 FR 15798 (March 19, 2020). Submissions should refer to the investigation number (Inv. No. 337-TA-1169) in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, [https://www.usitc.gov/documents/handbook\\_on\\_filing\\_procedures.pdf](https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf)). Persons with questions regarding filing should contact the Secretary, (202) 205-2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. 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 personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

The Commission vote for these determinations took place on May 27, 2020.

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'.

Lisa R. Barton  
Secretary to the Commission

Issued: May 27, 2020

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served via EDIS upon the Commission Investigative Attorney, **Thomas C. Chen, Esq.**, and the following parties as indicated, on **May 27, 2020**.



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

**On Behalf of Complainant United Plastic Molders:**

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- ☐ Via Hand Delivery
- ☐ Via Express Delivery
- ☐ Via First Class Mail
- ☒ Other: Email Notification of  
Availability for Download

**PUBLIC VERSION**

**UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C. 20436**

**In the Matter of**

**CERTAIN FISH-HANDLING PLIERS  
AND PACKAGING THEREOF**

**Inv. No. 337-TA-1169**

**Order No. 14**

**INITIAL DETERMINATION**

**Granting in Part Complainant's Motion for Summary Determination  
of Violation by the Defaulting Respondents**

*And*

**RECOMMENDED DETERMINATION**

**On Remedy and Bonding**

## **PUBLIC VERSION**

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## **PUBLIC VERSION**

The following abbreviations may be used in this Initial Determination:

ALJ - Administrative Law Judge

EDIS - Electronic Document Imaging System

## PUBLIC VERSION

### I. Background

#### A. Institution of the Investigation; Procedural History

By publication of a notice in the *Federal Register* on July 29, 2019, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, the Commission instituted this investigation to determine:

(a) Whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain products identified in paragraph (2) by reason of infringement of one or more claims 1-11 of the ‘923 patent [U.S. Patent No. 6,256,923], and whether an industry in the United States exists as required by subsection (a)(2) of section 337; and

(b) Whether there is a violation of subsection (a)(1)(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 products identified in paragraph (2) by reason of infringement of one or more of the ‘923 mark [U.S. Trademark Registration No. 4,980,923] and the ‘944 mark [U.S. Trademark Registration No. 5,435,944], and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

84 Fed. Reg. 36620 (July 29, 2019).

Pursuant to section 210.10(b)(1) of the Commission’s Rules of Practice and Procedure, 19 CFR 210.10(b)(1):

[T]he plain language description of the accused products or category of accused products, which defines the scope of the investigation, is “pliers that aid in the landing, weighing, and handling of fish by securely gripping the lip of a fish while the hook is removed.”

*Id.*



## PUBLIC VERSION

The complainant is United Plastic Molders, Inc. of Jackson, Mississippi. The named respondents are:

1. Yixing Five Union Industry & Trade Co., Ltd. of Jiangsu Province, China;
2. NOEBY Fishing Tackle Co., Ltd. of Weihai, Shandong, China;
3. Weihai iLure Fishing Tackle Co., Ltd. of Weihai, Shandong, China;
4. SamsFX of Jiangsu Province, China; and
5. Weihai Lotus Outdoor Co., Ltd. of Shandong Province, China.

The Office of Unfair Import Investigations (“OUII” or “Staff”) is a party to this investigation. *Id.*

The target date for completion of this investigation was originally set at August 7, 2020, which is approximately twelve months and one week after institution of the investigation. *See* Order No. 3 (Sept. 9, 2019). Accordingly, the due date for the Initial Determination on violation was April 7, 2020.

On December 18, 2019, the Commission determined not to review an initial determination finding the following four respondents in default pursuant to 19 C.F.R. § 210.16: (1) Yixing Five Union Industry & Trade Co., Ltd.; (2) NOEBY Fishing Tackle Co., Ltd.; (3) Weihai iLure Fishing Tackle Co., Ltd.; and (4) Weihai Lotus Outdoor Co., Ltd.. Order No. 11 (Nov. 19, 2019), *aff’d*, Commission Determination Not to Review an Initial Determination Finding Four Respondents in Default (Dec. 18, 2019).

On the same day, the Commission determined not to review an initial determination finding respondent SamsFX in default pursuant to 19 C.F.R. § 210.16. Order No. 12 (Nov. 25, 2019), *aff’d*, Commission Determination Not to Review an Initial Determination Finding a Respondent in Default (Dec. 18, 2019).

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On December 5, 2019, complainant United Plastic Molders, Inc. (“UPM” or “complainant”) filed a motion for “a summary determination of violation of Section 337 by the Respondents and a recommendation that the Commission issue a general exclusion order.” Motion Docket No. 1169-7.

On December 13, 2019, and December 31, 2019, UPM filed supplemental documents at the request of the Staff. *See* EDIS Doc. ID Nos. 697222 (Dec. 13, 2019) (“Dec. 13 Supplement”) and 698163 (Dec. 31, 2019) (“Dec. 31 Supplement”).

On January 10, 2019, the Staff filed a response supporting the motion in part. *See* Staff Resp. at 1-2.

On April 6, 2020, the undersigned issued Order No. 13 extending the target date. The administrative law judge determined to extend the target date by three days, to August 10, 2020, and thus the violation phase of the investigation before the administrative law judge shall be completed by April 10, 2020. *See* Order No. 13 (Apr. 6, 2020).

### **B. The Parties**

Complainant UPM is a Mississippi corporation that was launched in 1978 with six employees and four machines. *See* Mem. Ex. A (Hoge Decl., ¶ 2). The company now has 36 employees operating over 96,000 square feet of factory, all located in Jackson, Mississippi. *Id.* It is a family-owned business with three generations of the Hoge family currently working at the company. *Id.*, ¶ 3. UPM domestically manufactures and sells the Fish Grip™, the Fish Grip Jr, and the Fish Grip Mini, the products relied upon to satisfy the domestic industry requirement (collectively, the “Domestic Industry Products”). *Id.*, ¶ 5.

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As noted above, the named respondents are (1) Yixing Five Union Industry & Trade Co., Ltd. (“Five Union”); (2) NOEBY Fishing Tackle Co., Ltd. (“NOEBY”); (3) Weihai iLure Fishing Tackle Co., Ltd. (“iLure”); (4) SamsFX (“SamsFX”); and (5) Weihai Lotus Outdoor Co., Ltd. (“Lotus”). UPM argues that respondents sell for importation into the United States, import, and/or sell after importation into the United States, fish-handling pliers that are accused of infringing UPM’s patent and trademarks. *See* Complaint, ¶¶ 12-19.

The Office of Unfair Import Investigations was also named a party to this investigation. 84 Fed. Reg. 36620 (July 29, 2019).

### C. The Accused Products

The Table below summarizes the intellectual property asserted by UPM against each defaulting respondent and their corresponding accused products (as indicated by a “✓”).

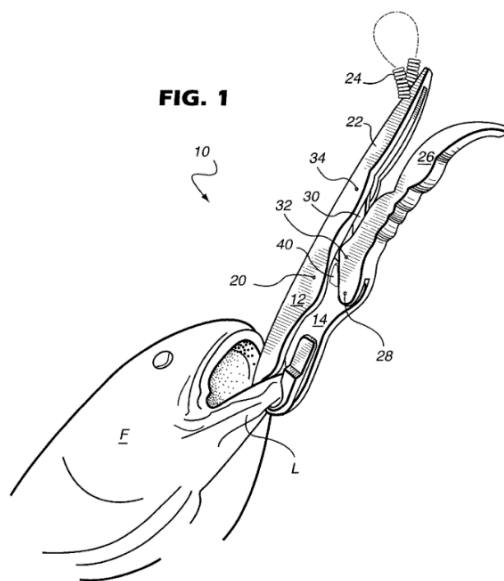
Accused Product	Respondent(s)	‘923 Patent	‘923 Trademark	‘944 Trademark
SamsFX 9” Fish Grip	SamsFX/Five Union		✓	
NOEBY Fishing Lip Grip	NOEBY	✓	✓	✓
iLure Fish Gripper	iLure	✓	✓	✓
SamsFX 6” Fish Grip	SamsFX/Lotus	✓	✓	✓

Staff Resp. at 4.

**D. Technological Background**

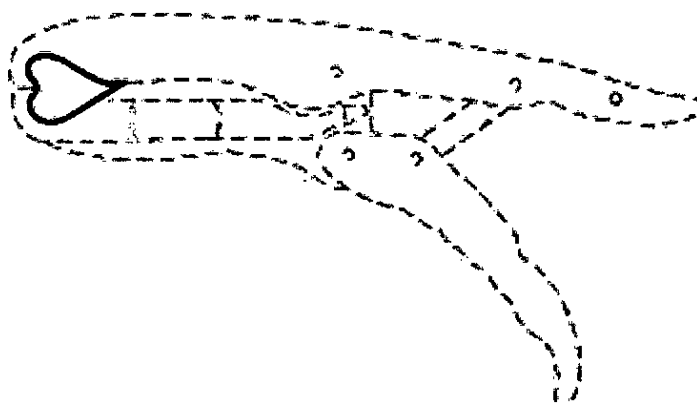
United States Patent No. 6,256,923 (“the ‘923 patent”), entitled “Fish handling pliers,” issued on July 10, 2001, to named inventor Don S. Norton. *See* Complaint, Ex. 1 (‘923 Patent). The ‘923 patent issued from Application No. 09/512,795, filed on February 25, 2000. *See id.* The ‘923 patent relates to “fish gripping and handling tools. More specifically, the present invention relates to pliers which are especially adapted to grip the lower lip of a fish.” Complaint, Ex. 1 (‘923 Patent) at 1:4-7. The ‘923 patent has a total of 11 claims.

The invention disclosed in the ‘923 patent includes a tongue and groove in the mouth of the pliers to limit lateral motion that could cause damage to the fish’s lip as well as a “stop boss” located between the upper and lower handle sections which limits the range of motion of the jaws beyond the open and closed positions. *See* Complaint, Ex. 1 (‘923 Patent) at 1:30-34; 3:38-50. An embodiment of the invention is shown in Figure 1 below:



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U.S. Trademark Registration No. 4,980,923 (“the ‘923 Mark” or “the ‘923 Trademark” or “the ‘923 trademark”) is registered on the Principal Register of the U.S. Patent and Trademark Office (“PTO”) and is a trade dress consisting of an opening in fish-handling pliers as shown below:



*See Complaint, Ex 2.*

U.S. Trademark Registration No. 5,435,944 (“the ‘944 Mark” or “the ‘944 Trademark” or “the ‘944 trademark”) is registered on the Principal Register and consists of a stylized gripper with an opening as shown below:



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*See* Complaint, Ex 3.

UPM is the owner of the '923 patent, the '923 Mark and the '944 Mark. *See* Complaint, Exs. 2-4.

### **II. Jurisdiction**

As indicated in the Commission's notice of investigation, discussed above, this investigation involves the importation of products alleged to infringe United States patent and trademarks in a manner that violates section 337 of the Tariff Act, as amended. No party has contested the Commission's jurisdiction over the subject matter of this investigation. It is found that the Commission has subject matter jurisdiction over this investigation.

No party has contested the Commission's personal jurisdiction over it. In particular, respondents have been given notice of this investigation at least through service of the complaint and notice of investigation. It is therefore found that the Commission has personal jurisdiction over all parties.

No party has contested the Commission's *in rem* jurisdiction over the accused products. Evidence of specific instances of importation of the accused products was provided in the complaint and accompanying exhibits. *See* Complaint, ¶¶ 48-53; Complaint, Exs. 15-18, 26C (¶¶ 21-30). Additionally, evidence of specific instances of importation of the accused products is discussed in the importation section of this initial determination. Accordingly, it is found that the Commission has *in rem* jurisdiction over the accused products.

### III. Importation

Section 337 prohibits “[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 – (i) infringe a valid and enforceable United States patent . . . .” 19 U.S.C. § 1337(a)(1)(B). Section 337 also prohibits “[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 trademark . . . .” 19 U.S.C. § 1337(a)(1)(C).

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 at 5 (Sept. 23, 2004); *Certain Trolley Wheel Assemblies*, Inv. No. 337-TA-161, Views of the Commission at 7-8 (Aug. 29, 1984), USITC Pub. No. 1605 (Nov. 1984), *available as* 1984 WL 951859 (importation of product sample sufficient to establish violation, even though sample “had no commercial value and had not been sold in the United States”).

As discussed below, UPM has presented substantial, reliable, and probative evidence of importation as to each of the defaulting respondents. *See* Mem. at 13-14. *See* Staff Resp. at 8-15.

#### **iLure**

UPM relies on Exhibit 15 to the complaint to satisfy the importation requirement as to respondent iLure. *See* Mem. at 13; Complaint, ¶ 50. Exhibit 15 includes an email order confirmation dated March 13, 2016, showing the purchase of yellow fish-handling pliers from eBay. Exhibit 15 also contains an email shipping confirmation dated March

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14, 2016, indicating that the order has shipped, and noting that shipping is available via “Economy Shipping from China/Hong Kong/Taiwan to worldwide.” Finally, Exhibit 15 includes photographs of the packaging and shipping label received by the purchaser, showing that the package was shipped from an address in China to a United States address in Chantilly, VA. The yellow fish-handling pliers inside the package bear a white “iLure” logo printed on the surface of the pliers.

The evidence in Exhibit 15 is substantial, reliable, and probative evidence that iLure has sold for importation the accused iLure product. Exhibit 15 indicates that the accused iLure product was available for purchase online at eBay, a well-known sales platform from which sales to U.S. customers is foreseeable and likely.

Additionally, although not cited in UPM’s memorandum, the Staff notes that Exhibits 11 and 14 to the complaint also contain screenshots from an Alibaba website establishing respondent iLure (Weihai iLure) is directly involved in making the accused fish-handling pliers available for sale and shipment to customers in the United States. *See* Staff Resp. at 9 (citing Complaint, Exs. 11 & 14, referencing the following website address: [https://www.alibaba.com/product-detail/ILURE-125g-25-6cm-Lip-Grip\\_60322306200.html?spm=a2700.7724857.normalList.17.2ca8V](https://www.alibaba.com/product-detail/ILURE-125g-25-6cm-Lip-Grip_60322306200.html?spm=a2700.7724857.normalList.17.2ca8V)). This website lists “Weihai iLure Fishing Tackle Co. as the manufacturer and supplier, and provides for shipping “to United States.”



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The screenshot shows the Alibaba.com website interface. At the top, the Alibaba.com logo is on the left, and a search bar with the text "What are you looking for..." is in the center. To the right of the search bar are icons for "Sign In", "Join Free", "Messages", and "Orders". Below the search bar, there are navigation links: "Categories", "Ready to Ship", "Trade Shows", "Services", "Sell on Alibaba", and "Help". On the far right, there are links for "Get the App" and "English".

The main product listing is for "ILURE 125g 25\*6cm Lip Grip Fish Controller Hard Plastic ABS Floating Lipgrip". The product image shows two lures, one yellow and one red, with black lines and hooks. The price is listed as \$2.90 for 50-199 pieces and \$2.50 for 200+ pieces. The quantity is set to 50 pieces. The product is marked as "Ready to Ship", "In Stock", and "Fast Dispatch".

On the right side of the product listing, there is a summary of the order: "50 Pieces" for "\$145.00", "Ship to United States by Alibaba.com Air" for "\$48.99", and a "Lead Time 5 days". The "Total" is "\$193.99". There are buttons for "Start Order" and "Contact Supplier".

Below the product image, there is a "View larger image" link and a "Share" button. At the bottom right, there is a "Gold Supplier" badge for "Weihei iLure Fishing Tackle Co., Ltd." with a "4.9" rating and "86.4% Response Rate".

Furthermore, iLure has defaulted in this investigation and thus has not identified any contrary evidence or genuine disputes of material fact as to importation.

Thus, the importation requirement of section 337 has been satisfied as to respondent iLure.

### **SamsFX/Five Union**

UPM relies on Exhibit 18 to the complaint to satisfy the importation requirement as to respondents SamsFX and Five Union. *See* Dec. 31 Supplement, EDIS Doc. ID No. 698163. Exhibit 18 includes an Amazon order and delivery confirmation indicating that on February 5, 2019, a pair of blue and black 9” fish-handling pliers was ordered from “SAMSFX Sports&Outdoors Co., Ltd.” and delivered to an address in the United States. UPM further relies on Exhibit 26C, an employee declaration from William C. Hoge, III, to explain how UPM determined that the accused pliers shown in Exhibit 18 were

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manufactured by respondent Five Union. *See* Complaint, Ex. 26C (Declaration of William C. Hoge, III), ¶¶ 21-29.<sup>1</sup>

This evidence presented by UPM is substantial, reliable, and probative evidence that the accused SamsFX 9” product was manufactured by Five Union and sold for importation into the United States by respondent SamsFX. Based on this evidence, the respondent SamsFX “knew or should have known that those articles would be subsequently exported to the United States.” *Certain Inkjet Ink Cartridges*, 2011 WL 3489151 at \*8. Inasmuch as the accused pliers specifically include the SamsFX logo, Five Union (as the manufacturer of those pliers) also knew or should have known that SamsFX was selling and shipping its products to U.S. customers, based on the sales information that was readily available on the Amazon website.

Furthermore, both Five Union and SamsFX have defaulted in this investigation and thus have not identified any contrary evidence or genuine disputes of material fact as to importation.

Thus, the importation requirement of section 337 has been satisfied as to defaulting respondents SamsFX and Five Union.

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<sup>1</sup> Mr. Hoge explained that two of UPM’s authorized sellers, Line Cutterz, Inc. and YakGear Inc., previously received sales solicitations and/or samples from a representative of Five Union inquiring whether they were interested in selling fishing pliers manufactured by Five Union. After comparing the Five Union sample with the blue/black SamsFX pliers shown in Exhibits 10 and 18 to the complaint, Mr. Hoge concluded that those SamsFX pliers were manufactured by Five Union based on his experience with plastic molding, the tooling marks, and other indicia.

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### **NOEBY**

UPM relies on Exhibit 17 to the complaint to satisfy the importation requirement as to respondent NOEBY. *See* Mem. at 13, Complaint, ¶ 52. Exhibit 17 includes a screenshot from the website AliExpress.com showing that the NOEBY brand-name fish-handling pliers are available for sale, with “Free Shipping to the United States.” Exhibit 17 also includes a sales invoice dated April 30, 2019, reflecting the purchase of the accused NOEBY fish-handling pliers. The photograph of the packaging and shipping label included with Exhibit 17 further indicates that the package was shipped from an address in China to a United States address in Washington, DC. The red fish-handling pliers received in the package match the fish-handling pliers depicted on the website.

The evidence in Exhibit 17 is substantial, reliable, and probative evidence that NOEBY has sold for importation the accused NOEBY product. Although Exhibit 17 does not establish that NOEBY was directly involved in the sales and/or importation of the accused pliers to U.S. customers, the evidence establishes that NOEBY knew or should have known that its accused fish-handling pliers were the subject of such sales and/or importation. Specifically, Exhibit 17 demonstrates that the accused NOEBY-brand products had been made available for sale online using only the English language, with the sales price listed only in U.S dollars, and with the United States identified as the only available shipping destination/method. In addition, although not cited in UPM’s memorandum, Exhibit 18 to the complaint establishes an instance of a direct sale by NOEBY to a U.S. customer in Washington, DC:

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**Delivered Feb 7, 2019**  
Your package was left near the front door or porch.




**SAMS FISHING Floating Fish Lip Grip Gripper Fish Grips Pliers (Blue-9.6")**  
Sold by: [SAMSFX Sports&Outdoors Co., Ltd](#)  
Return window closed on Mar 9, 2019  
**\$9.88**  
**Condition: New - Brand New Good Gift to Angler**  
[Buy it again](#)

[Write a product review](#)

[Archive order](#)



**NOEBY Fishing Lip Grip with Scale Portable Fish Lip Grabber Fish Holder Aluminium Alloy Fishing Tackle Gripper Accurate Weight Scale (Plastic Fish Gra**  
Sold by: [Noeby](#) [Product question? Ask Seller](#)  
Return window closed on Mar 9, 2019  
**\$7.98**  
**Condition: New**  
[Buy it again](#)



**SAMS FISHING Small 6.8" ABS Plastics Fish Grip Fishing Lip Grip Floating Gripper Fish Lip Grabber Holder (Green)**  
Sold by: [SAMSFX Sports&Outdoors Co., Ltd](#)  
Return window closed on Mar 9, 2019  
**\$8.88**  
**Condition: New**  
[Buy it again](#)

See Staff Resp. at 12-13. Thus, respondent NOEBY knew or should have known that its accused products would reach the United States.

Furthermore, NOEBY has defaulted in this investigation and thus has not identified any contrary evidence or genuine disputes of material fact as to importation.

Thus, the importation requirement of section 337 has been satisfied as to respondent NOEBY.

### SamsFX/Lotus

UPM relies on Exhibit 18 to the complaint to satisfy the importation requirement as to respondents SamsFX and Lotus. See Mem. at 13-14; Complaint, ¶ 53. Exhibit 18 includes an Amazon order summary indicating that the accused SamsFX 6" product (green) was ordered on February 7, 2019 and delivered to a United States address in Washington, DC on February 9, 2019. The invoice indicates that the product was "Sold by: SAMSFX Sports&Outdoors Co., Ltd." UPM further relies on **Exhibit 26C**, an

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employee declaration from William C. Hoge, III, to explain how UPM determined that the accused pliers shown in Exhibit 18 were manufactured by respondent Lotus. *See* Complaint, Ex. 26C (Declaration of William C. Hoge, III), ¶ 30.<sup>2</sup>

The evidence in Exhibits 18 and 26C is substantial, reliable, and probative evidence that the accused SamsFX product was manufactured by Lotus and sold for importation by respondent SamsFX. That evidence shows that SamsFX sold the accused fish-handling pliers to U.S. customers via Amazon.com, using the English language and U.S. pricing, thus making it reasonable to conclude that SamsFX knew or should have known that its product would reach the United States. Furthermore, inasmuch as the accused pliers depicted in Exhibit 18 specifically include the SamsFX logo, Lotus (as the manufacturer of those pliers) also knew or should have known that SamsFX was selling and shipping its products to U.S. customers, based on the sales information readily available on Amazon.com.

Furthermore, both SamsFX and Lotus have defaulted in this investigation and thus have not identified any contrary evidence or genuine disputes of material fact as to importation.

Thus, the the importation requirement of section 337 has been satisfied as to defaulting respondents SamsFX and Lotus.

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<sup>2</sup> Mr. Hoge explained that he compared the accused SamsFX plier identified in the complaint with fishing pliers manufactured by Lotus (depicted in Exhibit 35 to the complaint). Based on his experience with plastic molding and similarities in the tooling marks and other indicia, Mr. Hoge concluded that the accused SamsFX 6” pliers were manufactured by Lotus. Exhibit 35 is a screen capture of a website depicting yellow fish-handling pliers, and identifies the supplier/manufacturer as “Wehai Lotus Outdoor Co., Ltd.”

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For the reasons discussed above, UPM has presented substantial, reliable, and probative evidence of importation as to each of the defaulting respondents. Accordingly, the importation requirement for finding a violation of section 337 has been satisfied for each defaulting respondent.

### **IV. General Principles of Applicable Law**

#### **A. Summary Determination**

Section 337 prohibits “[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 (i) infringe a valid and enforceable United States patent ....” 19 U.S.C. § 1337(a)(1)(B). A complainant need only prove importation of a single accused product to satisfy the importation element. *See Certain Trolley Wheel Assemblies*, Inv. No. 337-TA-161, Comm’n Op. at 7-8, USITC Pub. No. 1605 (Nov. 1984).

The Commission Rules provide that “[a]ny party may move with any necessary supporting affidavits for a summary determination in its favor upon all or part of the issues to be determined in the investigation. 19 C.F.R. § 210.18(a). Summary determination “shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary determination as a matter of law.” 19 C.F.R. § 210.18(b).

**B. Patent Claim Construction**

Claim construction begins with the plain language of the claim.<sup>3</sup> Claims should be given their ordinary and customary meaning as understood by a person of ordinary skill in the art, viewing the claim terms in the context of the entire patent.<sup>4</sup> *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-13 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

In some instances, claim terms do not have particular meaning in a field of art, and claim construction involves little more than the application of the widely accepted meaning of commonly understood words. *Phillips*, 415 F.3d at 1314. “In such circumstances, general purpose dictionaries may be helpful.” *Id.*

In many cases, claim terms have a specialized meaning, and it is necessary to determine what a person of skill in the art would have understood the disputed claim language to mean. “Because the meaning of a claim term as understood by persons of skill in the art is often not immediately apparent, and because patentees frequently use terms idiosyncratically, the court looks to ‘those sources available to the public that show what a person of skill in the art would have understood disputed claim language to mean.’” *Phillips*, 415 F.3d at 1314 (quoting *Innova/Pure Water, Inc. v. Safari Water*

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<sup>3</sup> Only those claim terms that are in controversy need to be construed, and only to the extent necessary to resolve the controversy. *Vanderlande Indus. Nederland BV v. Int’l Trade Comm.*, 366 F.3d 1311, 1323 (Fed. Cir. 2004); *Vivid Tech., Inc. v. American Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999).

<sup>4</sup> Factors that may be considered when determining the level of ordinary skill in the art include: “(1) the educational level of the inventor; (2) type of problems encountered in the art; (3) prior art solutions to those problems; (4) rapidity with which innovations are made; (5) sophistication of the technology; and (6) educational level of active workers in the field.” *Environmental Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 696 (Fed. Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

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*Filtration Sys., Inc.*, 381 F.3d 1111, 1116 (Fed. Cir. 2004)). The public sources identified in *Phillips* include “the words of the claims themselves, the remainder of the specification, the prosecution history, and extrinsic evidence concerning relevant scientific principles, the meaning of technical terms, and the state of the art.” *Id.* (quoting *Innova*, 381 F.3d at 1116).

In cases in which the meaning of a claim term is uncertain, the specification usually is the best guide to the meaning of the term. *Phillips*, 415 F.3d at 1315. As a general rule, the particular examples or embodiments discussed in the specification are not to be read into the claims as limitations. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) (*en banc*), *aff’d*, 517 U.S. 370 (1996). The specification is, however, always highly relevant to the claim construction analysis, and is usually dispositive. *Phillips*, 415 F.3d at 1315 (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)). Moreover, “[t]he construction that stays true to the claim language and most naturally aligns with the patent’s description of the invention will be, in the end, the correct construction.” *Id.* at 1316.

### C. Patent Infringement

Under 35 U.S.C. §271(a), direct infringement consists of making, using, offering to sell, or selling a patented invention without consent of the patent owner. The complainant in a section 337 investigation bears the burden of proving infringement of the asserted patent claims by a “preponderance of the evidence.” *Certain Flooring Products*, Inv. No. 337-TA-443, Comm’n Notice of Final Determination of No Violation of Section 337, 2002 WL 448690, at \*59, (Mar. 22, 2002); *Enercon GmbH v. Int’l Trade Comm’n*, 151 F.3d 1376 (Fed. Cir. 1998).



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Literal infringement of a claim occurs when every limitation recited in the claim appears in the accused device, *i.e.*, when the properly construed claim reads on the accused device exactly.<sup>5</sup> *Amhil Enters., Ltd. v. Wawa, Inc.*, 81 F.3d 1554, 1562 (Fed. Cir. 1996); *Southwall Tech. v. Cardinal IG Co.*, 54 F.3d 1570, 1575 (Fed Cir. 1995).

### C. Trademarks

“To establish infringement of a trademark under the Lanham Act, [Complainant] must prove (1) that it has a valid and legally protectable mark; (2) it owns the mark; and (3) the [Respondent’s] use of the mark to identify goods or services causes a likelihood of confusion.” *Converse Inc. v. Int’l Trade Comm’n*, 909 F.3d 1110, 1116 (Fed. Cir. 2018) (“*Converse*”); *see also Certain Protective Cases and Components Thereof*, Inv. No. 337-TA-780 (“*Protective Cases*”), Final Initial Determination at 84-85 (June 29, 2012) (unreviewed in relevant parts, Aug. 30, 2012).

Federal registration of a mark is *prima facie* evidence of the validity of a trademark, as well as of the registrant’s ownership of and exclusive right to use the mark. 15 U.S.C. §§ 1057(b), 1115(a); *Certain Handbags, Luggage, Accessories, and Packaging Thereof*, Inv. No. 337-TA-754 (“*Handbags*”), Order No. 16 (Initial Determination Granting Complainants’ Motion for Summary Determination of Violation) at 6 (Mar. 5, 2012) (unreviewed, Apr. 12, 2012). This presumption “shift[s] the burden of production to the defendant.” *See Apple Inc. v. Samsung Elec. Co.*, 786 F.3d 983, 995 (Fed. Cir.

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<sup>5</sup> Each patent claim element or limitation is considered material and essential. *London v. Carson Pirie Scott & Co.*, 946 F.2d 1534, 1538 (Fed. Cir. 1991). If an accused device lacks a limitation of an independent claim, the device cannot infringe a dependent claim. *See Wahpeton Canvas Co. v. Frontier, Inc.*, 870 F.2d 1546, 1552 n.9 (Fed. Cir. 1989).

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2015) (internal citations omitted). If this presumption is overcome, however, the registration loses its legal significance. *Id.*

Although actual confusion is not required to prevail on a claim of trademark infringement, “actual confusion is routinely considered by the Commission as proof of trademark infringement as it is ‘undoubtedly the best evidence of likelihood of confusion.’” *Handbags*, Order No. 16 (Initial Determination) at 14 (citing *Daddy’s Junky Music Stores, Inc. v. Big Daddy’s Family Music Center*, 109 F.3d 275, 284 (6th Cir. 1997); *Certain Strip Lights*, Inv. No. 337-TA-287, 1989 WL 608725 (Jun. 27, 1989)) (unreviewed, Apr. 12, 2012).

In determining whether any consumer confusion is likely, the Commission may balance the following factors: (1) the degree of similarity between the designation and the trademark in appearance, the pronunciation of words used, verbal translation of pictures or designs involved, and suggestion; (2) the intent of the actor in adopting the designation; (3) the relation in use and manner of marketing between the goods and services marked by the actor and those by the other; and (4) the degree of care likely to be exercised by purchasers. *Protective Cases*, Final Initial Determination at 85-86. The Commission may also consider additional factors, such as the strength of the mark or actual confusion, and all factors must be evaluated in the context of the ultimate question of likelihood of confusion as to the source or sponsorship of the product. *Certain Purple Protective Gloves*, Inv. No. 337-TA-500, Order No. 17 (Initial Determination) at 13 (Sept. 23, 2004) (unreviewed, Oct. 19, 2004); *Certain Hair Irons and Packaging Thereof*, Inv. No. 337-TA-637, Order No. 14 (Initial Determination) at 22 (Mar. 10, 2009) (unreviewed, Apr. 23, 2009).

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### D. Domestic Industry

A violation of section 337(a)(1)(B), (C), (D), or (E) can be found “only if an industry in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2). Section 337(a) further provides:

(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.

19 U.S.C. § 1337(a)(3).

These statutory requirements consist of an economic prong (which requires certain activities)<sup>6</sup> and a technical prong (which requires that these activities relate to the intellectual property being protected). *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm’n Op. at 13 (May 16, 2008)

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<sup>6</sup> The Commission practice is usually to assess the facts relating to the economic prong at the time that the complaint was filed. *See Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same*, Inv. No. 337-TA-560, Comm’n Op. at 39 n.17 (Apr. 14, 2010) (“We note that only activities that occurred before the filing of a complaint with the Commission are relevant to whether a domestic industry exists or is in the process of being established under sections 337(a)(2)-(3).”) (citing *Bally/Midway Mfg. Co. v. U.S. Int’l Trade Comm’n*, 714 F.2d 1117, 1121 (Fed. Cir. 1983)). In some cases, however, the Commission will consider later developments in the alleged industry, such as “when a significant and unusual development occurred after the complaint has been filed.” *See Certain Video Game Systems and Controllers*, Inv. No. 337-TA-743, Comm’n Op., at 5-6 (Jan. 20, 2012) (“[I]n appropriate situations based on the specific facts and circumstances of an investigation, the Commission may consider activities and investments beyond the filing of the complaint.”).

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(“*Stringed Musical Instruments*”). The burden is on the complainant to show by a preponderance of the evidence that the domestic industry requirement is satisfied.

*Certain Multimedia Display and Navigation Devices and Systems, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-694, Comm’n Op. at 5 (July 22, 2011).

“With respect to section 337(a)(3)(A) and (B), the technical prong is the requirement that the investments in plant or equipment and employment in labor or capital are actually related to ‘articles protected by’ the intellectual property right which forms the basis of the complaint.” *Stringed Musical Instruments*, Comm’n Op. at 13-14. “The test for satisfying the ‘technical prong’ of the industry requirement is essentially 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). “With respect to section 337(a)(3)(C), the technical prong is the requirement that the activities of engineering, research and development, and licensing are actually related to the asserted intellectual property right.” *Stringed Musical Instruments*, Comm’n Op. at 13.

With respect to the economic prong, and whether or not section 337(a)(3)(A) or (B) is satisfied, the Commission has held that “whether a complainant has established that its investment and/or employment activities are significant with respect to the articles protected by the intellectual property right concerned is not evaluated according to any rigid mathematical formula.” *Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Comm’n Op. at 27 (Feb. 17, 2011) (“*Printing and Imaging Devices*”) (citing *Certain Male Prophylactic Devices*, Inv. No. 337 TA-546, Comm’n Op. at 39 (Aug. 1, 2007)). Rather, the Commission examines “the facts in each investigation, the article of commerce, and the realities of the marketplace.” *Id.* “The

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determination takes into account the nature of the investment and/or employment activities, ‘the industry in question, and the complainant’s relative size.’” *Id.* (citing *Stringed Musical Instruments* at 26).

The Commission has rejected a finding of quantitative significance based solely on the absolute value of the domestic industry investments devoid of any context. A contextual analysis is required. The analysis may include a discussion of the value of domestic investments in the context of the relevant marketplace, such as by comparing a complainant’s domestic expenditures to its foreign expenditures or considering the value added to the product from a complainant’s activities in the United States. *See Certain Carburetors and Products Containing Such Carburetors*, Inv. No. 337-TA-1123, Comm’n Op. at 18 (Oct. 28, 2019).

### **E. Default**

“In any motion requesting the entry of default or the termination of the investigation with respect to the last remaining respondent in the investigation, the complainant shall declare whether it is seeking a general exclusion order.” 19 C.F.R. § 210.16(b)(4)(2). “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). After a respondent has been found in default by the Commission, “[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(c).

**V. U.S. Patent No. 6,256,923**

United States Patent No. 6,256,923 (“the ‘923 patent”), entitled “Fish handling pliers,” issued on July 10, 2001, to named inventor Don S. Norton. *See* Complaint, Ex. 1 (‘923 Patent). The ‘923 patent issued from Application No. 09/512,795, filed on February 25, 2000. *See id.* The ‘923 patent relates to “fish gripping and handling tools. More specifically, the present invention relates to pliers which are especially adapted to grip the lower lip of a fish.” Complaint, Ex. 1 (‘923 Patent) at 1:4-7. The ‘923 patent has a total of 11 claims.

Complainant asserts independent apparatus claims 1 and 7<sup>7</sup> of the ‘923 patent against respondents SamsFX/Lotus, NOEBY, and iLure.

**A. Claim Construction**

**1. A Person of Ordinary Skill in the Art**

Complainant argues that although Mr. Hoge is an interested party, expert testimony from such witnesses has been relied upon in prior investigations, with the witness’s interest an issue of weight rather than admissibility. Mem. at 16 n.2 (citing *Certain Arrowheads with Arcuate Blades and Components Thereof*, Inv. No. 337-TA-1033, Initial Determination, 2017 WL 5990007, at \*9 (Nov. 8, 2017)).

The Staff argues that although Mr. Hoge’s expert opinion regarding patent infringement largely consists of a single sentence indicating his agreement that various accused products infringe based on his review of the corresponding claim charts (*see* Mem. Attachment A (Declaration of William C. Hoge, III), ¶¶ 12-15), the claim charts

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<sup>7</sup> UPM is no longer asserting dependent claims 2-6, 8-11. *See* Mem. at 16 n.1.

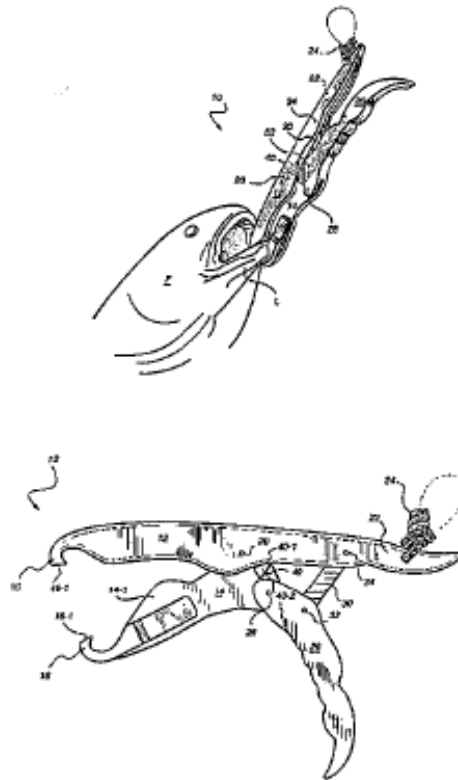
## PUBLIC VERSION

are sufficient alone to demonstrate infringement and Mr. Hoge's expertise is not required to establish infringement, as the technology here involves "relatively simple technology" that is "easily understandable without the need for expert explanatory testimony." Staff Resp. at 19-20 n.4 (citing *K-TEC, Inc. v. Vita-Mix Corp.*, 696 F.3d 1364, 1374 (Fed. Cir. 2012)).

The administrative law judge has determined that a person of ordinary skill in the art at the time of the claimed invention would have experience and/or education in design and manufacture of simple plastic molded products. Mr. Hoge meets and exceeds that requirement. *See* Mem. Attachment A (Declaration of William C. Hoge, III), ¶¶ 1-7.

### **2. Claim Construction**

The '923 patent specification states that the "present invention relates generally to fish gripping and handling tools. More specifically, the present invention relates to pliers which are especially adapted to grip the lower lip of a fish." Complaint, Ex. 1 ('923 Patent) at 1:4-7. The '923 patent includes various figures that depict embodiments of the claimed invention, as reproduced below:



As noted above, UPM asserts independent apparatus claims 1 and 7 of the '923 patent against respondents SamsFX/Lotus, NOEBY, and iLure. Claims 1 and 7 are recited below:

**1.** Fish handling pliers comprising upper and lower members pivotally connected to one another and having respective upper and lower opposed jaws, wherein said upper and lower members have a lengthwise mated tongue and groove coupling when said upper and lower opposed jaws are in a closed condition, whereby lateral movement between said upper and lower members is resisted;

an upper handle section immovably connected to said upper member;  
and

a lower handle section pivotally connected at a forward end thereof to a rearward end of said lower member such that pivotal movements of said lower handle section between open and closed conditions responsively pivotally moves said lower member away from and towards said upper member to open and close said opposed jaws, respectively; and wherein



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said lower member includes a stop boss having convergent upper and lower surfaces which respectively establish said open and closed conditions, respectively, of said lower handle section, and wherein said stop boss is positioned such that said upper surface contacts said upper handle section and said lower surface is spaced from said lower handle section when said lower handle section is in said open condition, and said lower surface contacts said lower handle section and said upper surface is spaced from said upper handle section when said lower handle section is in said closed condition, whereby pivotal movements of said lower handle section beyond said open and closed conditions is limited.

### 7. Fish handling pliers comprising:

an upper member having an upper handle section at a rearward end thereof, and an upper jaw at a forward end thereof;

a lower member having a lower jaw at a forward end thereof which is opposed to said upper jaw, and having a rearward end pivotally connected to said upper member to allow for pivotal movements towards and away from said upper member to thereby close and open said opposed upper and lower jaws;

said upper handle section immovably connected to said upper member; and

a lower handle section pivotally connected at a forward end thereof to said rearward end of said lower member such that pivotal movements of said lower handle section between open and closed conditions responsively pivotally moves said lower member away from and towards said upper member to open and close said opposed jaws, respectively; wherein

said lower member includes a stop boss having convergent upper and lower surfaces which respectively establish said open and closed conditions, respectively, of said lower handle section, and wherein said stop boss is positioned such that said upper surface contacts said upper handle section and said lower surface is spaced from said lower handle section when said lower handle section is in said open condition, and said lower surface contacts said lower handle section and said upper surface is spaced from said upper handle section when said lower handle section is in said closed condition, whereby pivotal movements of said lower handle section beyond said open and closed conditions is limited, and wherein

said upper member defines a lengthwise-extending groove; and said lower member includes a lengthwise extending tongue in opposition to said groove, said tongue being seated within said

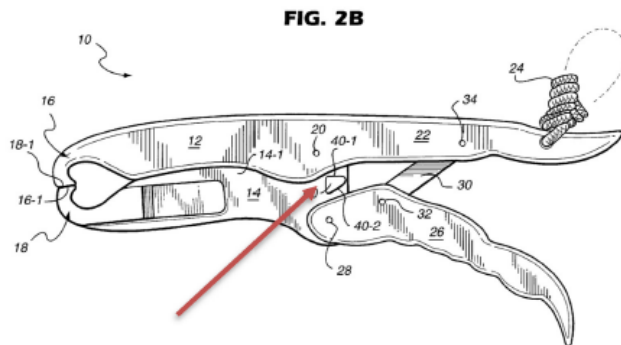
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groove when said upper and lower jaws are closed by movement of said lower handle section from said open condition to said closed condition thereof.

Complaint, Ex. 1 ('923 Patent) at 4:20-49, 5:5 - 6:13.

With one exception, UPM argues that the claim language should be interpreted consistent with its plain and ordinary meaning, and thus does not propose any specific constructions for the asserted claim language. *See* Mem. at 14. The Staff agrees. *See* Staff Resp. at 18.

The sole exception noted by UPM is the “stop boss” limitation recited in both claim 1 and claim 7. As UPM explains in its memorandum, the recited “stop boss” structure “prevents the plier from being overextended in either the open or closed position thereby avoiding damage to the pliers that could occur from such overextension,” and on that basis, argues that the “stop boss” limitation be construed as “a protrusion on the lower member section of the pliers that establishes the open-most and closed-most positions of the pliers by limiting pivotal movements of the handles.” Mem. at 14-15. UPM provides an annotated version of Fig. 2B identifying the position of the recited “stop boss” structure, as reproduced below:



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Claim 1 describes the stop boss as follows:

a stop boss having convergent upper and lower surfaces which respectively establish said open and closed conditions, respectively, of said lower handle section, and wherein said stop boss is positioned such that said upper surface contacts said upper handle section and said lower surface is spaced from said lower handle section when said lower handle section is in said open condition, and said lower surface contacts said lower handle section and said upper surface is spaced from said upper handle section when said lower handle section is in said closed condition, whereby pivotal movements of said lower handle section beyond said open and closed conditions is limited.

Complaint, Ex. 1 ('923 Patent) at 4:37-49. The stop boss prevents the plier from being overextended in either the open or closed position. *Id.* at 3:37-58.

UPM's and the Staff's proposed construction for the "stop boss" limitation is consistent with a plain reading of the claim language in which that limitation appears, as well as the embodiments depicted in the Figures of the '923 patent, including Fig. 2B. *See Staff Resp.* at 19.

Accordingly, as proposed by UPM and the Staff, the administrative law judge construes the claim term "stop boss" as "a protrusion on the lower member section of the pliers that establishes the open-most and closed-most positions of the pliers by limiting pivotal movements of the handles."

### **B. Infringement Analysis of the '923 Patent**

To establish infringement of the '923 patent, UPM relies on various claim charts attached as exhibits to the complaint, as well as the opinions of employee William C. Hoge, III, who has offered opinions regarding infringement based on his review of the claim charts attached to the complaint. *See Mem.* at 16-18; Complaint, Exs. 5-7 (claim charts); and Mem. Attachment A (Declaration of William C. Hoge, III). An infringement

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analysis for each of the defaulting respondents accused of infringing the ‘923 patent is discussed below.

### **SamsFX/Lotus (SamsFX 6” Fish Grip)**

UPM relies on Exhibit 5 to the complaint to establish infringement of the ‘923 patent by the accused SamsFX 6” product, which is sold by SamsFX and manufactured by Lotus, as evidenced by Exhibits 18 and 26C. *See* Mem. at 16; Complaint, Ex. 26C (Declaration of William C. Hoge, III), ¶ 30; Dec. 31 Supplement (EDIS Doc. ID No. 698163) (noting that “Exhibit 18 to the Complaint shows delivery confirmation in the U.S. of the green SamsFX 6” product . . . This is the same SamsFX product depicted in Exhibits 5, 9, and 13 to the Complaint.”). The Staff analyzed infringement with respect to this product, and the administrative law judge adopts its undisputed analysis. *See* Staff Resp. at 20. Exhibit 5 contains claim charts that include annotated photographs to illustrate and explain, on a limitation-by-limitation basis, how and why the accused SamsFX 6” product meets every limitation of independent claims 1 and 7 of the ‘923 patent. In addition, Mr. Hoge has also provided his expert opinion that based on his review of the claim charts, the accused SamsFX 6” product infringes claims 1 and 7 of the ‘923 patent. *See* Mem. Attachment A (Declaration of William C. Hoge, III), ¶ 13.

Respondents SamsFX and Lotus have defaulted and thus have not presented any contrary evidence or otherwise raised any genuine disputes of material fact regarding UPM’s evidence of infringement.

Thus, summary determination of infringement of claims 1 and 7 of the ‘923 patent is appropriate as to respondents SamsFX and Lotus.

**NOEBY**

UPM relies on Exhibit 6 to the complaint to establish infringement of the ‘923 patent by the accused NOEBY product imported into the United States. *See* Mem. at 17; Complaint, Ex. 6. The Staff analyzed infringement with respect to this product, and the administrative law judge adopts its undisputed analysis. *See* Staff Resp. at 21; Complaint, Exs. 6, 17, and Physical Ex. D. Exhibit 6 contains claim charts that include annotated photographs to illustrate and explain, on a limitation-by-limitation basis, how and why the accused NOEBY product meets every limitation of independent claims 1 and 7 of the ‘923 patent.<sup>8</sup> In addition, Mr. Hoge has also provided his expert opinion that based on his review of the claim charts, the accused NOEBY product infringes claims 1 and 7 of the ‘923 patent. *See* Mem. Attachment A (Declaration of William C. Hoge, III), ¶ 14.

Respondent NOEBY has defaulted and thus has not presented any contrary evidence or otherwise raised any genuine disputes of material fact regarding UPM’s evidence of infringement.

Thus, summary determination of infringement of claims 1 and 7 of the ‘923 patent is appropriate as to respondent NOEBY.

**iLure**

UPM relies on Exhibit 7 to the complaint to establish infringement of the ‘923 patent by the accused iLure product imported into the United States. *See* Mem. at 17-18;

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<sup>8</sup> On July 19, 2019, UPM submitted a revised version of Exhibit 6 to the complaint, which contains complete claim charts for claims 1 and 7 of the ‘923 patent. *See* EDIS Doc ID No. 682355.

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Complaint, Exs. 7 and 15. The Staff analyzed infringement with respect to this product, and the administrative law judge adopts its undisputed analysis. *See* Staff Resp. at 21-22. Exhibit 7 contains claim charts that include annotated photographs to illustrate and explain, on a limitation-by-limitation basis, how and why the accused iLure product meets every limitation of independent claims 1 and 7 of the ‘923 patent. In addition, Mr. Hoge has also provided his expert opinion that based on his review of the claim charts, the accused iLure product infringes claims 1 and 7 of the ‘923 patent. *See* Mem. Attachment A (Declaration of William C. Hoge, III), ¶ 15.

Respondent iLure has defaulted and thus has not presented any contrary evidence or otherwise raised any genuine disputes of material fact regarding UPM’s evidence of infringement.

Thus, summary determination of infringement of claims 1 and 7 of the ‘923 patent is appropriate as to respondent iLure.

### **C. Domestic Industry (Technical Prong)**

“With respect to section 337(a)(3)(A) and (B), the technical prong is the requirement that the investments in plant or equipment and employment in labor or capital are actually related to ‘articles protected by’ the intellectual property right which forms the basis of the complaint.” *Stringed Musical Instruments*, Comm’n Op. at 13-14. “The test for satisfying the ‘technical prong’ of the industry requirement is essentially 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). “With respect to section 337(a)(3)(C), the technical prong is the requirement that the activities of engineering, research and development, and licensing are actually related to the

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asserted intellectual property right.” *Stringed Musical Instruments*, Comm’n Op. at 13.

UPM relies on three products to meet the technical prong of the domestic industry requirement: (1) The Fish Grip (introduced in 2002); (2) the Fish Grip Jr. (introduced in 2014); and (3) the Fish Grip Mini (introduced in 2016) (collectively, the “Domestic Industry Products.”). *See* Mem. at 39.



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The evidence demonstrates that each of the Domestic Industry Products satisfies the technical prong of the domestic industry requirement by practicing the asserted claims of the ‘923 patent.

UPM argues that the claim chart attached as Exhibit 20 to the complaint demonstrates that the Fish Grip meets every element of claim 1 of the ‘923 patent. Mem. at 40. UPM further argues that the claim chart included as Attachment B to its memorandum demonstrates that the Fish Grip Jr. meets every element of claim 1 of the ‘923 patent. *Id.* UPM also relies on the opinion of employee William Hoge that the Fish Grip and Fish Grip Jr. both meet every element of claim 1. *Id.* (citing Mem. Attachment A (Declaration of William C. Hoge, III), ¶¶ 39-40).

The Staff analyzed the technical prong with respect to the ‘923 patent, and the administrative law judge adopts its undisputed analysis. *See* Staff Resp. at 56.

The evidence shown in the cited claim charts supports summary determination that UPM has satisfied the technical prong with respect to the ‘923 patent. Defaulting respondents have not identified any contrary evidence or raised any genuine factual disputes that would preclude summary determination.



**D. Validity of the ‘923 Patent**

The patent at issue is presumed valid as a matter of law. 35 U.S.C. § 282. This resumption of validity may be overcome only by “clear and convincing evidence.”

*Pfizer, Inc. v. Apotex, Inc.*, 480 F.3d 1348, 1359 (Fed. Cir. 2007).

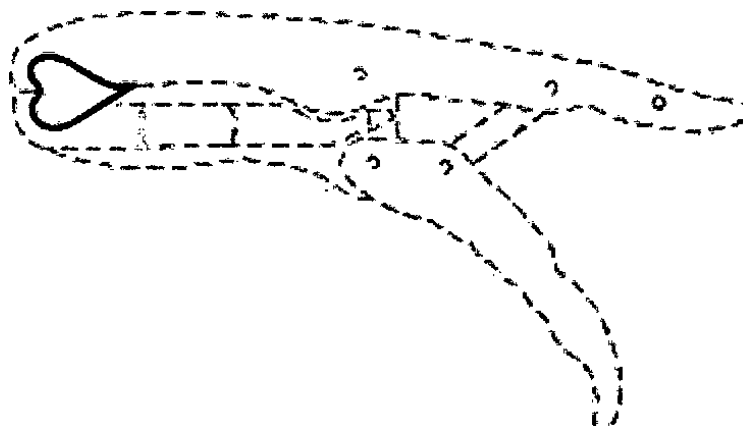
The evidence establishes that UPM is the owner by assignment of the ‘923 patent. Specifically, the face page of the ‘923 patent lists UPM as the assignee and Exhibit 4 to the complaint is a certified assignment record reflecting the assignment of the ‘923 patent from the named inventor, Don S. Norton, to UPM.

No party has challenged the validity or enforceability of the ‘923 patent. Thus, there is no issue of material fact as to the validity or enforceability of the asserted patents. *See Lannom Mfg. Co., Inc. v. Int’l Trade Comm’n*, 799 F.2d 1572, 1580 (Fed. Cir. 1986) (Commission did not have authority to redetermine patent validity when no defense of invalidity had been raised).

**VI. United States Trademark Registration Nos. 4,980,923 and 5,435,944**

U.S. Trademark Registration No. 4,980,923 (“the ‘923 Mark” or “the ‘923 Trademark” or “the ‘923 trademark”) is registered on the Principal Register of the PTO and is a trade dress consisting of an opening in fish-handling pliers as shown below:

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*See* Complaint, Ex 2.

U.S. Trademark Registration No. 5,435,944 (“the ‘944 Mark” or “the ‘944 Trademark” or “the ‘944 trademark”) is registered on the Principal Register and consists of a stylized gripper with an opening as shown below:



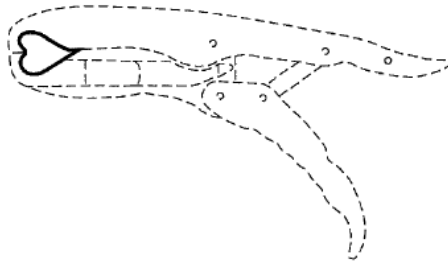
*See* Complaint, Ex 3.

UPM is the owner of the ‘923 trademark and the ‘944 trademark. *See* Complaint, Exs. 2-4.

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### A. Infringement Analysis for the ‘923 Trademark

The ‘923 trademark is registered on the Principal Register of the U.S. Patent and Trademark Office, with a registration date of June 21, 2016. *See* Complaint, Ex. 2. According to the registration, the ‘923 trademark “consists of a heart shaped opening in the three-dimensional configuration of [a] sport fishing device” (*i.e.*, fish-handling pliers), as reproduced below:



**Reg. No. 4,980,923**

**Registered June 21, 2016**

**Int. Cl.: 28**

**TRADEMARK**

**PRINCIPAL REGISTER**

UNITED PLASTIC MOLDERS, INC. (MISSISSIPPI CORPORATION)  
105 E. RANKIN STREET  
JACKSON, MS 39201

FOR: SPORT FISHING ACCESSORY, NAMELY, A DEVICE WHICH HOLDS THE LIP OF A FISH CAUGHT BY AN ANGLER FOR EASE OF LANDING, WEIGHING AND RELEASE, IN CLASS 28 (U.S. CLS. 22, 23, 38 AND 50).

FIRST USE 4-1-2001; IN COMMERCE 4-1-2001.

THE MARK CONSISTS OF A HEART SHAPED OPENING IN THE THREE-DIMENSIONAL CONFIGURATION OF THE SPORT FISHING DEVICE. THE BROKEN LINES ARE INTENDED TO SHOW THE POSITION OF THE MARK BUT ARE NOT PART OF THE MARK.

To establish infringement of the ‘923 trademark, UPM relies on various claim charts included in its memorandum, exhibits attached to the complaint, and the opinions of employee William C. Hoge, III. *See* Mem. at 18-29; Complaint, Exs. 8-11 (claim charts); Mem. Attachment A (Declaration of William C. Hoge, III), ¶¶ 20-24.<sup>9</sup> An

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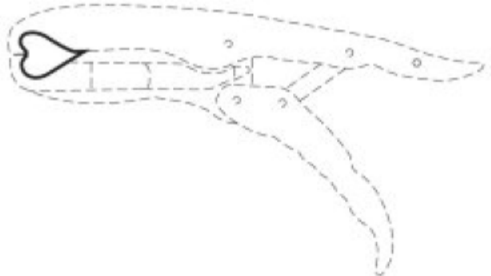

<sup>9</sup> The Staff argues that although Mr. Hoge’s expert opinion regarding likelihood of confusion largely consists of a single sentence indicating his agreement that the accused products infringe based on his review of the corresponding claim charts (*see* Attachment A (Declaration of William C. Hoge, III), ¶¶ 20-24), a detailed expert analysis is not necessary here to establish likelihood of confusion, given the relatively simple nature of the accused products at issue. Staff Resp. at 23 n.6 (citing McCarthy on Trademarks and

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infringement analysis for each respondent accused of infringing the '923 trademark is discussed below.

### 1. NOEBY

UPM has provided a claim chart comparing the '923 trademark with the accused NOEBY product, reproduced below. *See also* Complaint, Ex. 8.

U.S. Trademark Reg. No. 4,980,923	NOEBY
<p>The '923 Mark consists of a heart shaped opening in fish-handling pliers as shown below:</p> 	

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Unfair Competition (5<sup>th</sup> Ed.) § 23:2.75 (“Especially if the goods or services involved are ordinary consumer items familiar to most people, a [factfinder] does not need an expert’s opinion . . . .”).



### **Degree of Similarity Between the Trademark and Accused Product**

The claim chart included in UPM’s memorandum shows that the mouth of the accused NOEBY product has the same heart-shaped opening depicted and described in the ‘923 trademark. *See* Mem. at 18. The Staff analyzed the similarity between the ‘923 trademark and the accused product, and the administrative law judge adopts its undisputed analysis. *See* Staff Resp. at 23-24; Complaint, Ex. 8 and Physical Ex. D.

Respondent NOEBY has defaulted and thus has not presented any contrary evidence or otherwise raised any genuine disputes of material fact regarding UPM’s evidence.

### **Intent of the Actor in Adopting the Designation**

According to UPM, the shape of the ‘923 trademark is a “non-functional, ornamental feature” that supports the inference that NOEBY’s intent in adopting the

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same shape for its accused product was to create confusion as to the source of its product, due to the strength of UPM's heart-shaped '923 trademark in the relevant consumer market. *See* Mem. at 19; Complaint, Ex. 2. UPM further notes that discovery into NOEBY's intent was not possible due to NOEBY's default and non-participation in this investigation. *Id.*

This factor supports a finding of likelihood of confusion, due to the conspicuous similarity and overlap in the overall shape and appearance between the '923 trademark and the accused NOEBY product. Respondent NOEBY has defaulted, and therefore has not presented any contrary evidence or raised any genuine disputes of material fact regarding this factor.

### **Relation in Use and Manner of Marketing**

According to UPM, the accused NOEBY product and UPM's domestic industry products are both sold and marketed online in the same distribution channels. *See* Mem. at 19-20. Specifically, UPM has provided evidence that the accused NOEBY product and UPM's domestic industry product are both available for sale online. *See* Mem. at 20; Complaint, Ex. 12. Exhibit 12 to the complaint shows that the accused NOEBY product is also available for sale on Amazon.com, and UPM's Dec. 13, 2019 supplement indicates that at least two domestic industry products are available for sale online at Amazon.com. This factor supports a finding of likelihood of confusion. *See Certain Footwear Products*, Inv. No. 337-TA-936, Initial Determination, 2015 WL 13808550, at \*45 (Nov. 17, 2015) (unreviewed in relevant parts, June 23, 2016) (“[T]his factor weighs in favor of a finding of likelihood of confusion. The evidence shows that Walmart sells both [complainant's] shoes and the Accused Products on its website.”).

**Degree of Care Likely to Be Exercised by Purchasers**

According to UPM, this factor supports a finding of likelihood of confusion because the accused NOEBY products are “low-dollar plastic consumer goods,” sold at price points at which “consumers are more likely to buy on impulse and without additional research”—in other words, consumers are likely to exercise a relatively low degree of care. *See* Mem. at 20. In these circumstances, UPM reasons that “consumers are likely to assume that a plastic fish-handling plier with a heart-shaped opening comes from the original source of the design, UPM.” *Id.* UPM has also presented purported evidence of actual consumer confusion, in the form of Amazon customer reviews in which verified purchasers expressed their surprise that the purchased product was not made by UPM. *See id.*, Attachment J.

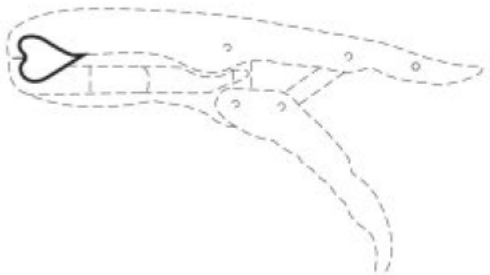

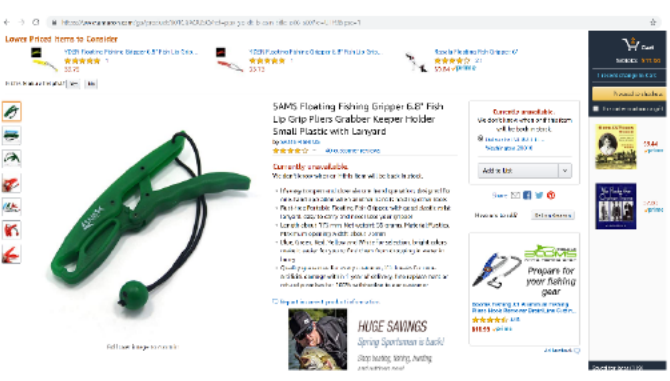
Respondent NOEBY has defaulted and thus has not presented any contrary evidence or raised any genuine disputes of material fact as to this factor. Thus, this factor supports a finding of likelihood of confusion. *See Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000) (“When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.”); *Certain Footwear Products*, Initial Determination, 2015 WL 13808550, at \*41 (noting that purchasers of relatively inexpensive sporting goods are not likely to exercise a great degree of care in distinguishing between trademarks when purchasing such goods).

**2. SamsFX 6” Pliers (manufactured by Lotus)**

UPM has provided a claim chart comparing the ‘923 trademark with the accused SamsFX/Lotus 6” pliers, sold by SamsFX and manufactured by Lotus. *See* Complaint,

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Exs. 9 and 18; Dec. 31, 2019 Supplement (EDIS Doc ID No. 698163) (noting that “Exhibit 18 to the Complaint shows delivery confirmation in the U.S. of the green SamsFX 6” product . . . . This is the same SamsFX product depicted in Exhibits 5, 9, and 13 to the Complaint.”).

U.S. Trademark Reg. No. 4,980,923	SamsFX 6” Fish Grip
<p>The ‘923 Mark consists of a heart shaped opening in fish-handling pliers as shown below:</p> 	 



	<a href="https://www.amazon.com/gp/product/B01CGAOUSO/ref=ppx_od_dt_b_asin_title_s00?ie=UTF8&amp;psc=1">https://www.amazon.com/gp/product/B01CGAOUSO/ref=ppx_od_dt_b_asin_title_s00?ie=UTF8&amp;psc=1</a>
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**Degree of Similarity Between the Trademark and Accused Product**

The claim chart included in UPM’s memorandum shows that the mouth of the accused SamsFX 6” pliers has the same heart-shaped opening depicted and described in the ‘923 trademark. *See* Mem. at 21. The Staff analyzed the similarity between the ‘923 trademark and the accused product, and the administrative law judge adopts its undisputed analysis. *See* Staff Resp. at 26-27; Complaint, Ex. 9 and Physical Ex. F.

Respondents SamsFX and Lotus have defaulted and thus have not presented any contrary evidence or otherwise raised any genuine disputes of material fact regarding UPM’s evidence. Thus, this factor favors summary determination as to respondents SamsFX and Lotus.

**Intent of the Actor in Adopting the Designation**

According to UPM, the shape of the ‘923 trademark is a “non-functional, ornamental feature” that supports the inference that SamsFX’s and Lotus’s intent in adopting the same shape for its accused product was to create confusion as to the source of its product, due to the strength of UPM’s heart-shaped ‘923 trademark in the relevant consumer market. *See* Mem. at 22. UPM further notes that discovery into both respondents’ intent was not possible due to their default and non-participation in this investigation. *Id.*

This factor supports a finding of likelihood of confusion due to the striking similarity and overlap in the overall shape and appearance between the ‘923 trademark

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and the accused SamsFX 6” product. Respondents SamsFX and Lotus have defaulted and thus have not presented any contrary evidence or raised any genuine disputes of material fact regarding this factor.

### **Relation in Use and Manner of Marketing**

According to UPM, the accused SamsFX 6” pliers and UPM’s domestic industry products are both sold and marketed online in the same distribution channels. *See* Mem. at 22-23. Specifically, UPM has provided evidence that the accused SamsFX 6” product and UPM’s domestic industry product are both available for sale online. *See* Mem. at 22; Complaint, Ex. 9. Exhibit 9 to the complaint shows that the accused SamsFX/Lotus 6” product is also available for sale on Amazon.com, and UPM’s Dec. 13, 2019 supplement indicates that at least two domestic industry products are available for sale online at Amazon.com. This factor supports a finding of likelihood of confusion.

### **Degree of Care Likely to Be Exercised by Purchasers**

According to UPM, this factor supports a finding of likelihood of confusion because the accused SamsFX 6” products are “low-dollar plastic consumer goods,” sold at price points at which “consumers are more likely to buy on impulse and without additional research”—in other words, consumers are likely to exercise a relatively low degree of care. *See* Mem. at 23. In these circumstances, UPM reasons that “consumers are likely to assume that a plastic fish-handling plier with a heart-shaped opening comes from the original source of the design, *viz.*, UPM.” *Id.*

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Respondents SamsFX and Lotus have defaulted and thus have not presented any contrary evidence or raised any genuine disputes of material fact as to this factor. Thus, this factor supports a finding of likelihood of confusion. *See Recot*, 214 F.3d at 1329.

### **3. SamsFX 9” Pliers (manufactured by Five Union)**

UPM has provided a claim chart comparing the ‘923 trademark with the accused SamsFX/Five Union 9” pliers imported into the United States, which are sold by SamsFX and manufactured by Five Union. *See* Complaint, Exs. 10 and 18; Dec. 31, 2019 Supplement (EDIS Doc. ID No. 698163) (“The SamsFX 9” product shown in Exhibit 10 to the Complaint . . . is the same SamsFX 9” product model depicted in Exhibit 18 to the Complaint that was purchased by counsel for UPM . . . . This product was manufactured by Five Union in China and imported from abroad.”).

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U.S. Trademark Reg. No. 4,980,923	Accused SamsFX 9" Fish Grip
<p>The '923 Mark consists of a heart shaped opening in fish-handling pliers as shown below:</p> 	  <p><a href="https://www.ebay.com/itm/SAMSFX-Floating-Fish-Gripper-Lip-Grip-Fishing-Pliers-Grabber-Clamp-Griper-Too/323670727726?epid=1074826960&amp;hash=item4b5c475c2e:g:pWwAAOSwyn1cT55X">https://www.ebay.com/itm/SAMSFX-Floating-Fish-Gripper-Lip-Grip-Fishing-Pliers-Grabber-Clamp-Griper-Too/323670727726?epid=1074826960&amp;hash=item4b5c475c2e:g:pWwAAOSwyn1cT55X</a></p>

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### **Degree of Similarity Between the Trademark and Accused Product**

The claim chart included in UPM's memorandum shows that the mouth of the accused SamsFX/Five Union 9" pliers has the same heart-shaped opening depicted and described in the '923 trademark. *See* Mem. at 25. The Staff analyzed the similarity between the '923 trademark and the accused product, and the administrative law judge adopts its undisputed analysis. *See* Staff Resp. at 29-30; Complaint, Ex. 10 and Physical Ex. C.

Respondents SamsFX and Five Union have defaulted and thus have not presented any contrary evidence or otherwise raised any genuine disputes of material fact regarding UPM's evidence. Thus, this factor favors summary determination as to respondents SamsFX and Five Union.

### **Intent of the Actor in Adopting the Designation**

According to UPM, the shape of the '923 trademark is a "non-functional, ornamental feature" that supports the inference that SamsFX's and Five Union's intent in adopting the same shape for its accused product was to create confusion as to the source of its product, due to the strength of UPM's heart-shaped '923 trademark in the relevant consumer market. *See* Mem. at 22. UPM further notes that discovery into both respondents' intent was not possible due to their default and non-participation in this investigation. *Id.*

This factor supports a finding of likelihood of confusion, due to the striking similarity and overlap in the overall shape and appearance between the '923 trademark and the accused SamsFX 9" product. Respondents SamsFX and Five Union have

defaulted and thus have not presented any contrary evidence or raised any genuine disputes of material fact regarding this factor.

**Relation in Use and Manner of Marketing**

According to UPM, the accused SamsFX/Five Union 9” pliers and UPM’s domestic industry products are both sold and marketed online in the same distribution channels. *See* Mem. at 26. Exhibit 18 to the complaint indicates that the SamsFX 9” pliers have been sold on amazon.com, while the Dec. 13 Supplement indicates that at least two domestic industry products are also available for sale on Amazon.com. This factor supports a finding of likelihood of confusion. *See Certain Footwear Products*, Initial Determination, 2015 WL 13808550, at \*45.

**Degree of Care Likely to Be Exercised by Purchasers**

According to UPM, this factor supports a finding of likelihood of confusion because the accused SamsFX/Five Union 9” products are “low-dollar plastic consumer goods,” sold at price points at which “consumers are more likely to buy on impulse and without additional research”—in other words, consumers are likely to exercise a relatively low degree of care. *See* Mem. at 26. In these circumstances, UPM reasons that “consumers are likely to assume that a plastic fish-handling plier with a heart-shaped opening comes from the original source of the design, *viz.*, UPM.” *Id.*

Respondents SamsFX and Lotus have defaulted and thus have not presented any contrary evidence or raised any genuine disputes of material fact as to this factor. Thus, this factor supports a finding of likelihood of confusion. *See Recot*, 214 F.3d at 1329.

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### 4. iLure

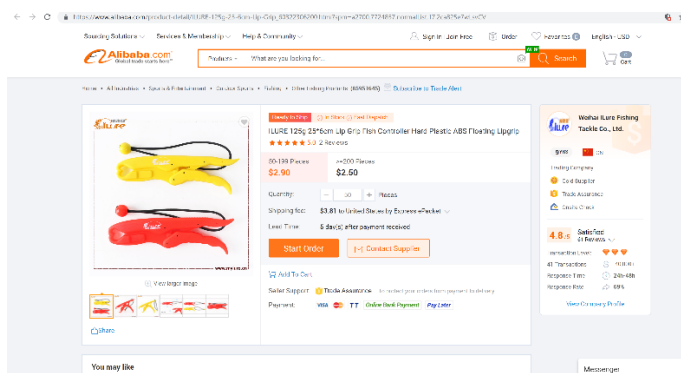
As an initial matter, the only evidence of importation and alleged infringement for the accused iLure products set forth in UPM's complaint is dated March 13, 2016, before the '923 trademark was registered on the Principal Register. *See* Complaint, Ex. 15. Inasmuch as UPM has not presented affirmative evidence demonstrating that the '923 trademark had acquired secondary meaning at the time of iLure's alleged violation, it has not shown infringement of a "valid and enforceable trademark" with respect to iLure, as required by section 337(a)(1)(C). *See Converse*, 909 F.3d at 1118 ("[W]ith respect to infringement by [any] respondents whose first uses came before the registration," a Complainant "must establish without the benefit of the presumption that its mark had acquired secondary meaning before the first infringing use by each respondent.").

Nonetheless, infringement analysis for the accused iLure products with respect to the '923 trademark is provided below.

UPM has provided a claim chart comparing the '923 trademark with the accused iLure product imported into the United States, reproduced below. *See* Complaint, Exs. 11 and 15.

U.S. Trademark Reg. No. 4,980,923	Accused iLure Fish Gripper
The '923 Mark consists of a heart shaped opening in fish-handling pliers as shown below:	

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[https://www.alibaba.com/product-detail/ILURE-125g-25-6cm-Lip-Grip\\_60322306200.html?spm=a2700.7724857.normalList.17.2ca825e7wLsvCV](https://www.alibaba.com/product-detail/ILURE-125g-25-6cm-Lip-Grip_60322306200.html?spm=a2700.7724857.normalList.17.2ca825e7wLsvCV)



**Degree of Similarity Between the Trademark and Accused Product**

The claim chart included in UPM’s memorandum shows that the mouth of the accused iLure product has the same heart-shaped opening depicted and described in the ‘923 trademark. *See* Mem. at 27. The Staff analyzed the similarity between the ‘923 trademark and the accused product, and the administrative law judge adopts its undisputed analysis. *See* Staff Resp. at 32-33; Complaint, Ex. 11 and Physical Ex. E.

Respondent iLure has defaulted and thus has not presented any contrary evidence or otherwise raised any genuine disputes of material fact regarding UPM’s evidence. This factor favors summary determination of likelihood of confusion as to iLure.

**Intent of the Actor in Adopting the Designation**

According to UPM, the shape of the ‘923 trademark is a “non-functional, ornamental feature” that supports the inference that iLure’s intent in adopting the same shape for its accused product was to create confusion as to the source of its product, due to the strength of UPM’s heart-shaped ‘923 trademark in the relevant consumer market. *See* Mem. at 28. UPM further notes that discovery into iLure’s intent was not possible due to its default and non-participation in this investigation. *Id.*

This factor supports a finding of likelihood of confusion, due to the conspicuous similarity and overlap in the overall shape and appearance between the ‘923 trademark and the accused iLure product. Respondent iLure has defaulted and thus has not presented any contrary evidence or raised any genuine disputes of material fact regarding this factor.

**Relation in Use and Manner of Marketing**

According to UPM, the accused iLure pliers and UPM's domestic industry products are both sold and marketed online in the same distribution channels. *See* Mem. at 28-29. UPM notes in its Dec. 13, 2019 supplemental filing that the accused iLure product is available for sale on Amazon.com, and that at least one domestic industry product is also available for sale online at Amazon.com. *See* EDIS Doc. ID No. 697222. This factor supports a likelihood of confusion.

**Degree of Care Likely to Be Exercised by Purchasers**

According to UPM, this factor supports a finding of likelihood of confusion because the accused iLure products are "low-dollar plastic consumer goods," sold at price points at which "consumers are more likely to buy on impulse and without much if any research"—in other words, consumers are likely to exercise a relatively low degree of care. *See* Mem. at 29. In these circumstances, UPM reasons that "consumers are likely to assume that a plastic fish-handling plier with a heart-shaped opening comes from the original source of the design, viz., UPM." *Id.*

Respondent iLure has defaulted and thus has not presented any contrary evidence or raised any genuine disputes of material fact as to this factor. This factor supports a finding of likelihood of confusion. *See Recot*, 214 F.3d at 1329.

**B. Infringement Analysis for the '944 Trademark**

The '944 trademark is registered on the Principal Register of the U.S. Patent and Trademark Office, with a registration date of April 3, 2018. *See* Complaint, Ex. 3. According to the registration, the '944 trademark "consists of a stylized gripper with

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heart-shaped opening,” as reproduced below:



**Reg. No. 5,435,944**

**Registered Apr. 03, 2018**

**Int. Cl.: 28**

**Trademark**

**Principal Register**

UNITED PLASTIC MOLDERS, INC. (MISSISSIPPI CORPORATION)  
105 E. Rankin St.  
Jackson, MISSISSIPPI 39201

CLASS 28: Sport fishing accessory, namely, a feature of a sport fishing device which holds the lip of a fish caught by an angler for ease of landing, weighing and release

FIRST USE 12-00-2002; IN COMMERCE 12-00-2002

The mark consists of a stylized gripper with heart-shaped opening.

The ‘944 trademark is a two-dimensional silhouette or logo mark, as opposed to a trademark protecting the trade dress of the three-dimensional product. Indeed, in the prosecution history the applicant, in response to the May 12, 2017 office action, describes the mark as a silhouette design that appears on the product packaging and distinguishes this silhouette design from the goods themselves which also appear in the submitted specimen of use in commerce. *See* Appendix D to the Complaint (“Submitted herewith is a photo of the entire package for applicant’s goods which displays the Silhouette Design and clearly shows the goods themselves placed on the backer and beneath a clear plastic overlay. The substitute specimen was in actual use in commerce at least as early as the filing date of the application.”).

To establish infringement of the ‘944 trademark, UPM relies on various claim charts included in its memorandum, exhibits attached to the complaint, and the opinions of employee William C. Hoge, III. *See* Mem. at 29-39; Complaint, Exs. 12-14 (claim

charts); Mem. Attachment A (Declaration of William C. Hoge, III), ¶¶ 25-28.<sup>10</sup> An infringement analysis for each respondent accused of infringing the ‘944 trademark is discussed below.

### **Point-of-Sale Websites**

UPM’s infringement allegations involving the ‘944 trademark are directed to “point-of-sale” websites; the trademark does not appear anywhere on the accused products themselves or their packaging. In other words, the allegedly infringing mark in question here (the two-dimensional photographs of the respondents’ products) appears on point-of-sale websites such as Amazon.com and Alibaba.com, but the accused fish-handling pliers that are actually imported and delivered into the United States do not themselves bear the allegedly infringing photographs appearing on the website. UPM argues that “because the trademark is a silhouette of the product, the display of the accused product and the trademark are one and the same,” based on the holding in *In re Sones*, 590 F.3d 1282, 1288-89 (Fed. Cir. 2009). Mem. at 29. However, *Sones* arose in the trademark registration context and addressed the requirements for a website-based specimen of use, and did not specifically address the precise scenario presented here—allegations of trademark infringement flowing from a point-of-sale website using an

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<sup>10</sup> Although Mr. Hoge’s expert opinion regarding likelihood of confusion largely consists of a single sentence indicating his agreement that the accused products infringe based on his review of the corresponding claim charts (*see* Attachment A (Declaration of William C. Hoge, III), ¶¶ 26-28), a detailed expert analysis is not necessary here to establish likelihood of confusion, given the relatively simple nature of the accused products at issue. *See, e.g.,* McCarthy on Trademarks and Unfair Competition (5<sup>th</sup> Ed.) § 23:2.75 (“Especially if the goods or services involved are ordinary consumer items familiar to most people, a [factfinder] does not need an expert’s opinion . . .”).

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allegedly infringing mark in connection with the sales of accused products that do not themselves bear the asserted mark.

The point in *Sones*, that the display of a mark closely associated with goods available for purchase on a website constitutes “use in commerce,” is also consistent with the cases cited below in the context of infringement under the Lanham Act. As argued by the Staff, the below-cited cases are persuasive and supports UPM’s position.

Specifically, courts confronting similar scenarios have held that an asserted trademark is infringed when used in connection with the sale of products or goods, even if the physical products or goods themselves do not bear the asserted mark. *See, e.g., Chloe SAS v.*

*Sawabeh Info. Servs. Co.*, No. CV 110-4147, 2014 WL 4402218, at \*7 (C.D. Cal. Sept. 5, 2014) (holding that under 15 U.S.C. § 1114, “a protected mark need not appear ‘on’ the good offered for sale; it must only be used ‘in connection with’ the sale”); *Tiffany & Co.*

*v. Costco Wholesale Corp.*, 127 F.Supp.3d 241, 255 (S.D.N.Y. 2015) (“There is no statutory requirement that the counterfeit mark be placed on the product itself.”); *Ent’mt*

*One UK Ltd. v. 2012Shiliang*, 384 F.Supp.3d 941, 949-50 (N.D. Ill. 2019) (“[A] protected mark need not appear on an item to render it counterfeit; rather, the Lanham Act only

requires that the protected mark be used ‘in connection with’ the sale.”); *Jae Enterprises,*

*Inc. v. Ovgord Inc.*, No. 5:15-CV-228-TBR, 2016 WL 865328, at \*4 (W.D. Ky. Mar. 2,

2016) (holding that trademark owner had plausibly alleged trademark infringement where defendants had used mark “to advertise and sell products using the Eagle Flight mark to

consumers,” even though the products actually sold “did not bear the Eagle Flight

mark.”). What is required is that the point-of-sale website “(1) contains a picture or

textual description of the identified goods; (2) shows the mark in association with the

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goods; and (3) provides a means for ordering the identified goods.” *Jae Enterprises*, 2016 WL 865328, at \*3.

UPM’s position regarding likelihood of confusion flowing from the respondents’ use of confusingly similar marks on their point-of-sale websites, notwithstanding the absence of accused marks from the accused products, is consistent with the above-cited case law. An analysis of likelihood of confusion flowing from each respondents’ point-of-sale websites is reviewed below.

### 1. NOEBY

UPM has provided a claim chart comparing the ‘944 trademark with the accused NOEBY product, which was purchased from the website on which the image confusingly similar to the mark appears, reproduced below. *See also* Complaint, revised Ex. 12 at 2.

As noted above, the website constitutes a “use in commerce” because it (1) contains a picture of the accused product, (2) uses the allegedly infringing mark in association with the accused product, and (3) provides a means for ordering the accused product.

U.S. Trademark Reg. No. 5,435,944	The NOEBY Fishing Lip Grip
The Mark consists of a stylized gripper with a heart-shaped opening as shown below:	



### Degree of Similarity Between the Trademark and Accused Product

According to UPM, there are a “multitude” of “striking” similarities between the

‘944 trademark and the image of the NOEBY product shown at the point-of-sale:

the heart-shaped opening of the mouth of the pliers, the tilt of the pliers are at similar angles, the four pin openings in the handles are at very similar locations, the shape of the opening in the center of the pins are similar, the lower handle is ribbed to foster gripping, the ends of the handles both curve outward to help prevent dropping, and there is a

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circular ball at the end of a lanyard that is attached to the end of the top handle. In fact, the overall shape of the NOEBY product and the ‘944 Mark are virtually identical – perhaps the only noticeable difference appears to be the curl of the lanyard.

Mem. at 31. In addition, Mr. Hoge has provided his opinion that “a consumer looking at the website with the NOEBY product displayed on it as shown in Exhibit 12 to the complaint would likely be confused as to the product’s source or origin.” Mem. Attachment A (Declaration of William C. Hoge, III), ¶ 26. The Staff analyzed the similarity between the ‘944 trademark and the accused product, and the administrative law judge adopts its undisputed analysis. *See* Staff Resp. at 38-39.

Respondent NOEBY has defaulted and thus has not presented any contrary evidence or otherwise raised any genuine disputes of material fact regarding UPM’s evidence of infringement. This factor favors summary determination of likelihood of confusion as to NOEBY.

### **Intent of the Actor in Adopting the Designation**

UPM argues that “[t]here is no explanation for the similarities in the NOEBY product and the ‘944 Mark other than to provide the impression that the source of its product is the same as that of the Domestic Industry Products,” and emphasizes the strength of its ‘944 trademark to infer NOEBY’s bad faith intent in utilizing a confusingly similar design at the point-of-sale for its product. Mem. at 31. UPM further argues that discovery into NOEBY’s intent was not possible due to its default and non-participation in this investigation. *Id.*

This factor supports a finding of likelihood of confusion, due to the similarity and overlap in the overall shape and appearance between the ‘944 trademark and the



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photograph of the accused NOEBY product that appears at the point-of-sale, coupled with NOEBY's lack of good-faith explanation for such similarities. *See Samara Bros. v. Wal-Mart Stores, Inc.*, 165 F.3d 120, 128 (2d Cir. 1998) ("In light of the extensive copying, Wal-Mart was required to come forward with some explanation of its conduct, which it has utterly failed to do."). Here, respondent NOEBY has defaulted and thus has not provided any good-faith explanation for the prominent similarities between the photograph of its accused product appearing at the point-of-sale website and the '944 trademark, or otherwise presented any contrary evidence or raised any genuine disputes of material fact regarding this factor.

### **Relation in Use and Manner of Marketing**

UPM notes that its domestic industry products and the accused NOEBY product are sold and marketed online, and has presented evidence that both are available for sale on Amazon.com. *See* Mem. at 32; Complaint, Ex. 12; Dec. 13, 2019 Supplement to Motion for Summary Determination (EDIS Doc. ID No. 697222). This factor supports a likelihood of confusion.

### **Degree of Care Likely to Be Exercised by Purchasers**

According to UPM, this factor supports a finding of likelihood of confusion because the accused NOEBY products are "low-dollar plastic consumer goods," sold at price points at which "consumers are more likely to buy on impulse and without any additional research"—in other words, consumers are likely to exercise a relatively low degree of care. *See* Mem. at 32. In these circumstances, UPM reasons that "consumers are likely to assume that a plastic fish-handling plier with features strikingly similar to the

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‘944 Mark comes from the original source of the design, UPM.” *Id.*

Respondent NOEBY has defaulted and thus has not presented any contrary evidence or raised any genuine disputes of material fact as to this factor. This factor supports a finding of likelihood of confusion.

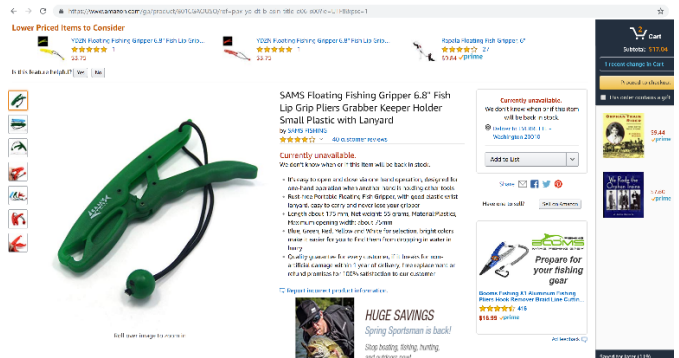
### 2. SamsFX 6” Pliers (manufactured by Lotus)

UPM has provided a claim chart comparing the ‘944 trademark with the accused SamsFX 6” product, which was purchased on Amazon.com and imported into the United States. *See* Complaint Exs. 13, 18.

As noted above, the website constitutes a “use in commerce” because it (1) contains a picture of the accused product, (2) uses the allegedly infringing mark in association with the accused product, and (3) provides a means for ordering the accused product.<sup>11</sup>

U.S. Trademark Reg. No. 5,435,944	SamsFX 6”Fish Grip
The Mark consists of a stylized gripper with a heart-shaped opening as shown below:	

<sup>11</sup> Although the Amazon.com link included in Ex. 13 of the complaint indicates that the accused product is no longer available for purchase from that webpage, “counsel for UPM avers that when the product was purchased on February 5, 2019, from that webpage the depiction of the product was identical to the one shown in Exhibit 13.” Dec. 31 Supplement (EDIS Doc. ID No. 698163).



[https://www.amazon.com/gp/product/B01CGAOU SO/ref=ppx\\_od\\_dt\\_b\\_asin\\_title\\_s00?ie=UTF8&psc=1](https://www.amazon.com/gp/product/B01CGAOU SO/ref=ppx_od_dt_b_asin_title_s00?ie=UTF8&psc=1)

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### **Degree of Similarity Between the Trademark and Accused Product**

According to UPM, there are a “multitude” of “striking” similarities between the ‘944 trademark and the image of the SamsFX 6” product shown at the point-of-sale:

the heart-shaped opening of the mouth, the four pin openings in the handles are at very similar locations, the lower handle is ribbed to foster gripping, a component that connects the two handles at the two rearmost pins, the ends of the handles both curve outward to help prevent dropping, and there is a circular ball at the end of a lanyard that is attached to the end of the top handle. In fact, the overall shape of the SamsFX 6” and the ‘944 Mark are virtually identical -- the only noticeable difference appears to be the curl of the lanyard.

Mem. at 34. In addition, Mr. Hoge has provided his opinion that “a consumer looking at the website with the SamsFX product displayed on it as shown in Exhibit 13 to the complaint would likely be confused as to the product’s source or origin.” Mem.

Attachment A (Declaration of William C. Hoge, III), ¶ 27. The Staff analyzed the similarity between the ‘944 trademark and the accused product, and the administrative law judge adopts its undisputed analysis. *See* Staff Resp. at 42-43.

Respondents SamsFX and Lotus have defaulted and thus have not presented any contrary evidence or otherwise raised any genuine disputes of material fact regarding UPM’s evidence of infringement. This factor favors summary determination of likelihood of confusion as to the SamsFX 6” pliers sold by SamsFX and manufactured by Lotus.

### **Intent of the Actor in Adopting the Designation**

UPM argues that “[t]here is no explanation for the similarities in the SamsFX/Lotus 6” grip and the ‘944 Mark other than to provide the impression that the source of the SamsFX product is the same as that of the Domestic Industry Products,”

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and emphasizes the strength of its ‘944 trademark to infer SamsFX’s and Lotus’s bad faith intent in utilizing a confusingly similar design at the point-of-sale for the accused product. Mem. at 34. UPM further notes that discovery into both respondents’ intent was not possible due to their default and non-participation in this investigation. *Id.*

This factor supports a finding of likelihood of confusion, due to the similarity and overlap in the overall shape and appearance between the ‘944 trademark and the photograph of the accused SamsFX 6” product that appears at the point-of-sale, coupled with respondents’ lack of good-faith explanation for such similarities. *See Samara Bros.*, 165 F.3d at 128 (“In light of the extensive copying, Wal-Mart was required to come forward with some explanation of its conduct, which it has utterly failed to do.”). Here, respondents SamsFX and Lotus have defaulted and thus have not provided any good-faith explanation for the similarities between the photograph of its accused product appearing at the point-of-sale website and the ‘944 trademark, or otherwise presented any contrary evidence or raised any genuine disputes of material fact regarding this factor.

### **Relation in Use and Manner of Marketing**

UPM notes that its domestic industry products and the accused SamsFX/Lotus 6” product are sold and marketed online, and also has presented evidence that both are available on Amazon.com. *See* Mem. at 35; Complaint, Ex. 13; Dec. 13, 2019 Supplement to Motion for Summary Determination (EDIS Doc. ID No. 697222). This factor supports a likelihood of confusion.

### **Degree of Care Likely to Be Exercised by Purchasers**

According to UPM, this factor supports a finding of likelihood of confusion

because the accused SamsFX/Lotus 6” products are “low-dollar plastic consumer goods,” sold at price points at which “consumers are more likely to buy on impulse and without additional research”—in other words, consumers are likely to exercise a relatively low degree of care. *See* Mem. at 35. In these circumstances, UPM reasons that “consumers are likely to assume that a plastic fish-handling plier with features strikingly similar to the ‘944 Mark comes from the original source of the design, UPM.” *Id.* The administrative law judge finds that a reasonable conclusion.

Respondents SamsFX and Lotus have defaulted and thus have not presented any contrary evidence or raised any genuine disputes of material fact as to this factor. This factor supports a finding of likelihood of confusion.

### 3. iLure

As an initial matter, the only evidence of importation and alleged infringement for the accused iLure products set forth in UPM’s complaint is dated March 13, 2016, before the ‘944 trademark was registered on the Principal Register. *See* Complaint, Ex. 15. Inasmuch as UPM has not presented affirmative evidence demonstrating that the ‘944 trademark had acquired secondary meaning at the time of iLure’s alleged violation, it has not shown infringement of a “valid and enforceable trademark” with respect to iLure, as required by section 337(a)(1)(C). *See Converse*, 909 F.3d at 1118 (“[W]ith respect to infringement by [any] respondents whose first uses came before the registration,” a Complainant “must establish without the benefit of the presumption that its mark had acquired secondary meaning before the first infringing use by each respondent.”).

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Nonetheless, infringement analysis for the accused iLure products with respect to the ‘944 trademark is provided below.

UPM has provided a claim chart comparing the ‘944 trademark with the accused iLure product, which was purchased on the Alibaba.com website and imported into the United States, reproduced below. *See also* Complaint, Exs. 14, 15.

As noted above, the website constitutes a “use in commerce” because it (1) contains a picture of the accused product, (2) uses the allegedly infringing mark in association with the accused product, and (3) provides a means for ordering the accused product.

U.S. Trademark Reg. No. 5,435,944	The iLure Lip Grip
<p>The Mark consists of a stylized gripper with a heart-shaped opening as shown below:</p> 	 <p>www.mylure.cn</p>  <p><a href="https://www.alibaba.com/product-detail/ILURE-125g-25-6cm-Lip-Grip_60322306200.html?spm=a2700.7724857.normalList.17.2ca825e7wLsvCV">https://www.alibaba.com/product-detail/ILURE-125g-25-6cm-Lip-Grip_60322306200.html?spm=a2700.7724857.normalList.17.2ca825e7wLsvCV</a></p>

### **Degree of Similarity Between the Trademark and Accused Product**

According to UPM, there are a “multitude” of “striking” similarities between the ‘944 trademark and the image of the iLure product shown at the point-of-sale:



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the heart-shaped opening of the mouth, the four pin openings in the handles are at very similar locations, the lower handle is ribbed to foster gripping, a bridge component that connects the two handles at the two rearmost pins, the ends of the handles both curve outward to help prevent dropping, and there is a circular ball at the end of a lanyard that is attached to the end of the top handle. In fact, the overall shape of the iLure Product and the ‘944 Mark are very similar -- the only noticeable difference appears to be the curl of the lanyard.

Mem. at 37. In addition, Mr. Hoge has provided his opinion that “a consumer looking at the website with the iLure product displayed on it as shown in Exhibit 14 to the complaint would likely be confused as to the product’s source or origin.” Mem.

Attachment A (Declaration of William C. Hoge, III), ¶ 28. The Staff analyzed the similarity between the ‘944 trademark and the accused product, and the administrative law judge adopts its undisputed analysis. *See* Staff Resp. at 45-46.

Respondent iLure has defaulted and thus has not presented any contrary evidence or otherwise raised any genuine disputes of material fact regarding UPM’s evidence of infringement. This factor favors summary determination of likelihood of confusion as to the accused iLure product.

### **Intent of the Actor in Adopting the Designation**

UPM argues that “[t]here is no explanation for the similarities in the iLure Product and the ‘944 Mark other than to provide the impression that the source of its product is the same as that of the Domestic Products,” and emphasizes the strength of its ‘944 trademark to infer iLure’s bad faith intent in utilizing a confusingly similar design at the point-of-sale for the accused product. Mem. at 37. UPM further notes that discovery into iLure’s intent was not possible due to its default and non-participation in this investigation. *Id.* at 38.

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This factor supports a finding of likelihood of confusion, due to the similarity and overlap in the overall shape and appearance between the ‘944 trademark and the photograph of the accused iLure product that appears at the point-of-sale, coupled with iLure’s lack of good-faith explanation for such similarities. *See Samara Bros.*, 165 F.3d at 128 (“In light of the extensive copying, Wal-Mart was required to come forward with some explanation of its conduct, which it has utterly failed to do.”). Here, respondent iLure has defaulted and thus has not provided any good-faith explanation for the similarities between the photograph of its accused product appearing at the point-of-sale website and the ‘944 trademark, or otherwise presented any contrary evidence or raised any genuine disputes of material fact regarding this factor.

### **Relation in Use and Manner of Marketing**

UPM notes that its domestic industry products and the accused iLure product are sold and marketed online, and has presented evidence that both are available for sale on Amazon.com. *See* Dec. 13, Supplement (EDIS Doc. ID No. 697222). This factor supports a likelihood of confusion.

### **Degree of Care Likely to Be Exercised by Purchasers**

According to UPM, this factor supports a finding of likelihood of confusion because the accused iLure products are “low-dollar plastic consumer goods,” sold at price points at which “consumers are more likely to buy on impulse and without additional research”—in other words, consumers are likely to exercise a relatively low degree of care. *See* Mem. at 38. In these circumstances, UPM reasons that “consumers are likely to assume that a plastic fish-handling plier with features strikingly similar to the ‘944

Mark comes from the original source of the design, UPM.” *Id.*

Respondents iLure has defaulted and thus has not presented any contrary evidence or raised any genuine disputes of material fact as to this factor. This factor supports a finding of likelihood of confusion.

**The Use of Respondents’ Own Logos and/or the Absence of UPM’s Logo on the Accused Products**

Although not specifically addressed in UPM’s memorandum, the Staff considered whether and to what extent the respondents’ use of their own logos and/or the absence of UPM’s logo on the accused products (or the corresponding point-of-sale websites) would affect the likelihood of confusion analysis with respect to such products.<sup>12</sup> The Staff argues that neither factor should preclude summary determination of likelihood of infringement. *See* Staff Resp. at 48-49.

The “majority view is that labeling or use of a word mark does not avoid what would otherwise be an infringing trade dress.” McCarthy on Trademarks and Unfair Competition, § 23:53 (5th ed.).<sup>13</sup> Conversely, the mere absence of UPM’s “Fish Grip”

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<sup>12</sup> Specifically, the SamsFX logos appears on the point-of-sale website for the accused SamsFX 9” pliers manufactured by Five Union. *See* Complaint, Ex. 10. Similarly, the iLure logo appears both at the point-of-sale website (*see* Complaint, Exs. 7, 11, 14, 15) and on the physical product itself. *See* Staff Resp. at 48 n.9; Complaint, Physical Ex. E. For the SamsFX 6” pliers, the SamsFX logo also appears on both the point-of-sale website (*see* Complaint, Exs. 5, 9, 13) and the physical product itself. *See* Staff Resp. at 48 n.9; Complaint, Physical Ex. F. By contrast, the NOEBY product is unmarked, both at the point-of-sale website and the physical product delivered to the consumer. *See* Staff Resp. at 48 n.9; Complaint, Exs. 6, 8, 12 and Physical Ex. D.

<sup>13</sup> *See also* *McNeil Nutritionals, LLC v. Heartland Sweeteners, LLC*, 511 F.3d 350, 360 (3d Cir. 2007) (“The majority of cases hold that labeling an otherwise infringing look-alike product does not prevent infringement.”); *T & T Mfg. Co. v. A.T. Cross Co.*, 449 F.Supp. 813, 822 (D.D.R. 1978) (“In fact, display of the housename generally does not excuse infringement of a valid trademark.”); *Tas-T-Nut Co. v. Variety Nut & Date Co.*,

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logo from the accused products does not insulate respondents from infringement. *See Certain Hand Dryers & Housings for Hand Dryers*, Inv. No. 337-TA-1015, Order No. 27 (Initial Determination), 2017 WL 2709424 (“the distinctiveness of the shape of the cover is itself sufficient to conclude that the degree of similarity factor weighs in favor of a likelihood of confusion, even if that weight may be somewhat less significant than if the US air dryer also included the nameplate and arrow-shaped label of the [Complainant’s product].”) (unreviewed in relevant parts, Comm’n Op. (Oct. 30, 2017)).

The addition of an accused infringer’s logo typically is helpful in avoiding likelihood of confusion only where there is persuasive evidence that the logo is famous or well-known. *See* McCarthy, § 23:53 (“The issue here is whether a junior user who infringes upon the shape trademark or trade dress can avoid causing a likelihood of confusion by placing its own name or mark on a label on the shape. Whether such a word mark will be successful in avoiding infringement will largely turn upon,” *inter alia*, “the fame and prominence of the word mark used by the accused.”). Here, the relevant defaulting respondents have not presented any record evidence that the “SamsFX” and/or

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245 F.2d 3, 7 (6th Cir. 1957) (“This court has consistently held that when the unfair competition complained of is the marketing of a product in containers or labels deceptively similar to the first comer’s containers or labels which have acquired a secondary meaning, the competitor cannot avoid liability merely by affixing his own name.”); *Ralston Purina Co. v. Thomas J. Lipton, Inc.*, 341 F.Supp. 129, 135-36 (S.D.N.Y. 1972) (Use of a house name will generally not excuse infringement of a valid trademark); *Source Perrier, S.A. v. Waters of Saratoga Springs, Inc.*, No. 81-CV-178, 1982 WL 51044, at \*3 (S.D.N.Y. Dec. 9, 1982) (“The addition of a second trademark (here the Saratoga Springs label) to the infringing trademark (the bottle shape) does not dissipate the confusion engendered through the use of the infringing trademark. . . . Here the near identity of the bottle shapes, even with different labels, is likely to lead to purchaser confusion as to origin.”).

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“iLure” logos appearing on those accused products and/or point-of-sale websites are sufficiently famous or well-known to negate consumer confusion.

The addition of an accused infringer’s own logo will not negate likelihood of confusion where, as here, the products at issue are “relatively inexpensive and [thus] consumers cannot be expected to examine the labels carefully.” *Scott Paper Co. v. Scott’s Liquid Gold, Inc.*, 589 F.2d 1225, 1230 (3d Cir. 1978). Here, UPM has presented uncontroverted evidence that the fish-handling pliers at issue are inexpensive, and thus purchased by consumers without close scrutiny. *See* Mem. at 20 (“The products at issue in this investigation are low-dollar plastic consumer goods, and at these price points consumers are more likely to buy on impulse and without additional research.”).

\* \* \*

Accordingly, substantial, reliable, and probative evidence discussed above supports summary determination of likelihood of confusion against each defaulting respondent.

### **C. Domestic Industry (Technical Prong)**

“Where registered trademark rights are asserted, the test for determining whether the technical prong is met through the practice of a trademark is plain use of the trademark on products and packaging.” *Certain Mounting Apparatuses for Holding Portable Elec. Devices and Components Thereof*, Inv. No. 337-TA-1086 (“*Mounting Apparatuses*”), Initial Determination, 2018 WL 6837931, at \*12 (Nov. 28, 2018) (unreviewed in relevant part, June 24, 2019).

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UPM relies on three products to meet the technical prong of the domestic industry requirement: (1) The Fish Grip (introduced in 2002); (2) the Fish Grip Jr. (introduced in 2014); and (3) the Fish Grip Mini (introduced in 2016) (collectively, the “Domestic Industry Products.”). Mem. at 39.



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For the reasons discussed below, each of the Domestic Industry Products satisfies the technical prong of the domestic industry requirement, by practicing the ‘923 trademark, and/or ‘944 trademark.

### **The ‘923 Trademark**

UPM argues that the claim charts submitted with the complaint demonstrate that the Fish Grip (Exhibit 21 to complaint), Fish Grip Jr. (Exhibit 22 to complaint), and Fish Grip Mini (Exhibit 23 to complaint) each practice the ‘923 trademark, because each product is “advertised, offered for sale, and sold in packaging that prominently displays” the “distinctive heart-shaped opening in the mouth of the pliers.” Mem. at 40; *see also* Mem. Attachments C-E. The Staff analyzed the technical prong with respect to the ‘923 trademark, and the administrative law judge adopts its undisputed analysis. *See* Staff Resp. at 57-58.

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U.S. Trademark Reg. No. 4,980,923	The Fish Grip (Domestic Industry Product) <sup>1</sup>
<p>The '923 Mark consists of a heart shaped opening in fish-handling pliers as shown below:</p> 	

U.S. Trademark Reg. No. 4,980,923	The Fish Grip Junior (Domestic Industry Product) <sup>1</sup>
<p>The '923 Mark consists of a heart shaped opening in fish-handling pliers as shown below:</p> 	

U.S. Trademark Reg. No. 4,980,923	The Fish Grip Mini (Domestic Industry Product) <sup>1</sup>
<p>The '923 Mark consists of a heart shaped opening in fish-handling pliers as shown below:</p> 	

The undisputed evidence shown in the cited claim charts and Attachments supports summary determination that UPM's Domestic Industry Products satisfy the



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technical prong with respect to the ‘923 Trademark. Defaulting respondents have not identified any contrary evidence or factual disputes that would preclude summary determination.

### **The ‘944 Trademark**

UPM argues that the claim charts provided with the complaint demonstrate that the Fish Grip (Exhibit 24 to complaint) and the Fish Grip Jr. (Exhibit 25 to complaint) practice the ‘944 Trademark, because “each of the two products is advertised, offered for sale, and sold in packaging that prominently displays” the “distinctive silhouette of the pliers with a heart-shaped opening on the packaging.” Mem. at 41. The Staff analyzed the technical prong with respect to the ‘944 trademark, and the administrative law judge adopts its undisputed analysis. *See* Staff Resp. at 58-59.

U.S. Trademark Reg. No. 5,435,944	The Fish Grip (Domestic Industry Product) <sup>1</sup>
The Mark consists of a stylized gripper with a heart-shaped opening as shown below: 	

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U.S. Trademark Reg. No. 5,435,944	The Fish Grip Junior (Domestic Industry Product) <sup>1</sup>
The Mark consists of a stylized gripper with a heart-shaped opening as shown below:	

The undisputed evidence shown in the cited claim charts supports summary determination that UPM has satisfied the technical prong with respect to the ‘944 Trademark. Defaulting respondents have not identified any contrary evidence or factual disputes that would preclude summary determination.

### D. Validity of the Trademarks

For trademarks registered on the Principal Register, “[t]rademark registration certificates for the asserted trademarks create a statutory presumption that each of the marks is valid, that [Complainant] is the owner of the mark, and that [Complainant] has the exclusive right to use the registered mark.” *Certain Indus. Automation Sys. & Components Thereof*, Inv. No. 337-TA-1074, Initial Determination, 2018 WL 6119536, at \*10 (Oct. 23, 2018).<sup>14</sup>

“However, under the statute, the registration and its accompanying presumption of validity operate only prospectively from the date of registration, i.e., the date on which

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<sup>14</sup> See also 15 U.S.C. 1115(a) (noting that registration of a trademark on the Principal Register “shall be prima facie evidence of the validity of the registered mark . . . of the registrant’s ownership of the mark, and of the registrant’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the registration . . .”).

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the Patent and Trademark Office (‘PTO’) determined that secondary meaning had been acquired.” *Converse, Inc. v. Int’l Trade Comm’n*, 909 F.3d 1110, 1117 (Fed. Cir. 2018) (emphasis added). “Thus, with respect to infringement by those respondents whose first uses came before the registration,” UPM “must establish without the benefit of the presumption that its mark had acquired secondary meaning before the first infringing use by each respondent.” *Id.* at 1118.

The evidence establishes that UPM is the owner of the asserted trademarks. Specifically, Exhibits 2 and 3 to the complaint indicate that the ‘923 trademark and the ‘944 trademark are each registered to UPM. Complaint, Exs. 2, 3.

Both the ‘923 trademark and the ‘944 trademark are registered on the Principal Register. *See* Complaint, Exs. 2, 3. UPM argues that the ‘923 trademark and ‘944 trademark are valid in view of the statutory presumption of validity for such trademarks, and the fact that the validity of those trademarks has not been challenged in any U.S. court or administrative proceeding. *See* Mem. at 45; 15 U.S.C. § 1115(a).

Exhibits 2 and 3 to the complaint show that UPM registered the ‘923 trademark and ‘944 trademark on the Principal Register on June 21, 2016, and April 3, 2018, respectively. Summary determination of validity is therefore appropriate as to respondents NOEBY, SamsFX, Five Union, and Lotus, because the first allegedly infringing use by those respondents occurred at various dates in 2019, after the respective registration dates for the asserted trademarks. *See* Complaint, Ex. 17 (NOEBY); Ex. 18 (SamsFX/Five Union); Ex. 16 (SamsFX/Lotus).<sup>15</sup>

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<sup>15</sup> As discussed above in the infringement section, the only evidence of importation and alleged infringement for the accused iLure products set forth in UPM’s complaint is

**VII. Domestic Industry (Economic Prong)**

With respect to the economic prong, and whether or not section 337(a)(3)(A) or (B) is satisfied, the Commission has held that “whether a complainant has established that its investment and/or employment activities are significant with respect to the articles protected by the intellectual property right concerned is not evaluated according to any rigid mathematical formula.” *Printing and Imaging Devices*, Comm’n Op. at 27 (Feb. 17, 2011) (citing *Certain Male Prophylactic Devices*, Inv. No. 337 TA-546, Comm’n Op. at 39 (Aug. 1, 2007)). Rather, the Commission examines “the facts in each investigation, the article of commerce, and the realities of the marketplace.” *Id.* “The determination takes into account the nature of the investment and/or employment activities, ‘the industry in question, and the complainant’s relative size.’” *Id.* (citing *Stringed Musical Instruments* at 26).

The Commission has rejected a finding of quantitative significance based solely on the absolute value of the domestic industry investments devoid of any context. A contextual analysis is required. The analysis may include a discussion of the value of domestic investments in the context of the relevant marketplace, such as by comparing a complainant’s domestic expenditures to its foreign expenditures or considering the value added to the product from a complainant’s activities in the United States. *See Certain*

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dated March 13, 2016, before either asserted trademark was registered on the Principal Register. *See* Complaint, Ex. 15. Inasmuch as UPM has not presented affirmative evidence demonstrating that the ‘923 trademark and/or ‘944 trademark had acquired secondary meaning at the time of iLure’s alleged violation, it has not shown infringement of a “valid and enforceable trademark” with respect to iLure, as required by section 337(a)(1)(C). *See Converse*, 909 F.3d at 1118 (“[W]ith respect to infringement by [any] respondents whose first uses came before the registration,” a Complainant “must establish without the benefit of the presumption that its mark had acquired secondary meaning before the first infringing use by each respondent.”).

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*Carburetors and Products Containing Such Carburetors*, Inv. No. 337-TA-1123, Comm’n Op. at 18 (Oct. 28, 2019).

As discussed above with respect to the technical prong analysis, the ‘923 patent and the ‘923 trademark is practiced by all three Domestic Industry Products, while the ‘944 trademark is practiced by only two Domestic Industry Products – the Fish Grip and Fish Grip Jr. (but not the Fish Grip Mini). *See* Mem. at 41.

According to UPM, total annual sales for all three Domestic Industry Products since the year 2016 have totaled [ ] (FY2016); [ ] (FY2017); [ ] (FY2018); and [ ] (FY2019, year to date). *See* Mem. at 41 (citing Complaint, Ex. 26C (Declaration of William C. Hoge, III), ¶ 8). Sales for the Fish Grip Mini were [ ] (FY2016); [ ] (FY2017); [ ] (FY2018), and [ ] (FY2019 YTD).<sup>16</sup> Thus, for the individual fiscal years from 2016 through 2019, the annual sales for the Fish Grip Mini have ranged from approximately [ ] of total annual sales for all three Domestic Industry Products. Mem. at 41; Mem. Attachment A (Declaration of William C. Hoge, III), ¶ 47. Based on these revenue figures and percentages, UPM calculates that “100% of all domestic activities . . . can be credited to the ‘923 Trademark while at least [ ] of the activities can be credited to the ‘923 Patent and ‘944 Trademark.” Mem. at 41.<sup>17</sup>

UPM states that “all of the Domestic Industry Products are manufactured in

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<sup>16</sup> The figures for the Fish Grip Mini are included for the ‘923 patent and the ‘923 trademark.

<sup>17</sup> Although UPM calculated the 96% figure for purposes of allocating domestic industry activities to the ‘923 patent and ‘944 trademark, UPM does not appear to have actually applied the 96% figure in performing its domestic industry analysis. However, the 96% and 100% figures are not substantially different. *See* Staff Resp. at 60 n.12.

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UPM’s factory located in Jackson, Mississippi,” and further emphasizes that “all activities performed by UPM in connection with Domestic Industry Products take place at the Jackson Facility.” Mem. at 41-42 (citing Complaint, Ex. 26C (Declaration of William C. Hoge, III), ¶ 9).

For purposes of determining the costs at its Jackson Facility attributable to the Domestic Industry Products, UPM calculates that its Domestic Industry Products have accounted for the following percentages of UPM’s total revenues for the following years: [ ] (FY2015); [ ] (FY2016); [ ] (FY2017); [ ] (FY2018); and [ ] (FY2019 YTD). Mem. at 42 (citing Complaint, Ex. 26C (Declaration of William C. Hoge, III), ¶ 11).

### **Plant and Equipment**

UPM states that it has invested in machines and fixtures at its Jackson facility that are currently valued at [ ]. Mem. at 42 (citing Complaint, Ex. 26C (Declaration of William C. Hoge, III), ¶ 13). Using the FY2017 sales apportionment [ ],<sup>18</sup> UPM calculates that [ ] of the value of the machines and fixtures in Jackson is attributable to the Domestic Industry Products.

UPM further states that in 2015, it spent [ ] to purchase the 96,700 square foot property in which the Domestic Industry Products are manufactured. *Id.* Using the FY2017 sales apportionment [ ], UPM calculates that [ ] of that property value is attributable to the Domestic Industry Products.

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<sup>18</sup> UPM applied the data from FY2017, even though figures from FY2019(YTD) were also available and would have been the more appropriate basis for calculating UPM’s investments. However, the figures for FY2017 and FY2019(YTD) do not appear to be substantially different. *See* Staff Resp. at 61 n.13.

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UPM also states that it initially incurred [ ] in tooling costs attributable to the Domestic Industry Products, and since that time has incurred additional tooling costs of [ ] attributable to the Domestic Industry Products. Mem. at 42 (citing Complaint, Ex. 26C (Declaration of William C. Hoge, III), ¶ 14).

Finally, UPM states that from FY2002 to FY2019(YTD), it incurred [ ] in repair and maintenance costs attributable to the Domestic Industry Products. Mem. at 42 (citing Complaint, Ex. 26C (Declaration of William C. Hoge, III), ¶ 15). UPM further states that it incurred [ ] in repair and maintenance costs of molds that is attributable to the Domestic Industry Products from FY2002 to FY2018. Mem. at 43; Ex. 26C (Declaration of William C. Hoge, III), ¶ 15.

### **Labor and Capital**

UPM argues that it employs [ ] individuals in various positions, with total headcount remaining stable over the past few years. Mem. at 43 (citing Attachment A (Declaration of William C. Hoge, III), ¶ 50). For these employees, UPM calculates that it has incurred payroll costs in the following amounts attributable to the Domestic Industry Products: a cumulative total of [ ] for FY 2002-2018, with payroll costs of [ ] (FY2016); [ ] (FY2017); [ ] (FY2018), and [ ] (FY2019 YTD). Mem. at 43 (citing Complaint, Ex. 26C (Declaration of William C. Hoge, III), ¶ 18).

UPM also states that it subcontracts with third parties for additional labor performed at the Jackson Facility in producing the Domestic Industry Products in the following amounts: a cumulative total of [ ] for FY2002 to FY2018; [ ] (FY2016); [ ] (FY2017); [ ] (FY2018); and [ ] (FY2019 YTD).

Mem. at 43.<sup>19</sup>

**Contextual Analysis of UPM's Domestic Industry Figures**

UPM makes several arguments in support of its position that its asserted domestic industry activities are “significant” as required by section 337(a)(3)(A) and (B). Mem. at 43-44.

UPM argues that its alleged domestic industry activities “are of critical importance to the Domestic Industry Products given that every facet of their production and sale takes place in the United States.” Mem. at 44 (citing Complaint, Ex. 26C (Declaration of William C. Hoge, III), ¶ 9). UPM argues that the ratio of its annual domestic activities to annual sales “reinforces their importance to the protected articles.” Mem. at 44. Specifically, UPM calculates that for its Domestic Industry Products, its labor costs (for employees and contractors) were [ ] of sales revenue for FY2016; [ ] for FY2017; [ ] for FY2018; and [ ] for FY2019YTD. *Id.*; *see also* Dec. 31, 2019 Supplement.

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<sup>19</sup> The Staff states that it does not agree that UPM's subcontracting costs are properly credited to labor and capital, inasmuch as UPM only states those costs in general without specifically explaining how and what percentage of those expenditures relate to the domestic industry products at issue. *See* Staff Resp. at 62 n.14 (citing *Certain Collapsible Sockets for Mobile Electronic Devices and Components Thereof*, Inv. No. 337-TA-1056, Comm'n Op. at 18-20 (July 9, 2018) (“Since *Lelo*, the Commission has found evidence insufficient where the complainant relied on supplier payments without providing evidence regarding its suppliers' relevant investments in the complainant's products. . . . [Complainant's] payments to Amazon.com, vendors with physical retail stores, and website hosting services and/or website developers also are not credited for a similar reason. [Complainant] has not shown what portion of these investments pertains to the employment of labor or capital.”)).



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<b>Year</b>	<b>Labor Costs (Employees)</b>	<b>Labor Costs (Contractors)</b>	<b>Annual Sales</b>	<b>Total Labor Costs as Percentage of Sales</b>	<b>Employee Costs as a Percentage of Sales<sup>20</sup></b>
2016	[ ]	[ ]	[ ]	[ ]	[ ]
2017	[ ]	[ ]	[ ]	[ ]	[ ]
2018	[ ]	[ ]	[ ]	[ ]	[ ]
2019 (YTD)	[ ]	[ ]	[ ]	[ ]	[ ]

Similarly, UPM calculates that its total plant and equipment costs of [ ] (calculated as the sum total of [ ] in apportioned value of the machines and fixtures at the Jackson facility; [ ] in apportioned property value of the Jackson facility; [ ] initial tooling costs; [ ] subsequent tooling costs; and [ ] and [ ] in repair and maintenance costs) are significant relative to sales of the Domestic Industry Products from 2016-2019. Mem. at 44.

UPM's investments in plant and equipment, and/or labor and capital (even if the subcontractor payments are excluded) are significant and thus satisfy the economic prong of the domestic industry requirement, for several reasons. The fact that UPM's production and sales activities all occur solely in the U.S. strongly supports UPM's position regarding the economic prong. With the exception of UPM's reliance on subcontracting expenditures, UPM's approach to calculating the investments attributable to the Domestic Industry Products is supported by the evidence. Moreover, UPM's

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<sup>20</sup> In view of the Staff's persuasive argument, the administrative law judge is adopting the Staff's revised labor cost percentages based only on labor costs attributable to UPM employees and not including UPM's subcontracting costs. See Staff Resp. at 61-63.

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investments in plant and equipment, and/or labor and capital, are significant “given [that UPM’s] domestic industry products would not exist without these investments.” *Certain Water Filters & Components Thereof*, Inv. No. 337-TA-1126 (“*Water Filters*”), Order No. 17 (Initial Determination), 2019 WL 4072337, at \*33 (July 11, 2019) (unreviewed in relevant parts, Comm’n Op. (Nov. 15, 2019)).

Accordingly, the record evidence supports a finding that UPM’s domestic activities add significant value to its domestic industry products, and are significant in the context of its entire operations in view of (1) the quantitative levels of activity in the United States discussed above, (2) the importance of those activities to the Domestic Industry Products; and (3) the fact that all activities relevant to the Domestic Industry Products occur solely within the United States. The evidence shows that UPM has made and continues to make significant U.S. investments in plant, equipment, labor and capital under 19 U.S.C. § 1337(a)(3)(A) and (B).

### **VIII. Remedy and Bonding**

The Commission has broad discretion in selecting the form of the remedy in a section 337 proceeding. *See Fuji Photo Film v. International Trade Comm’n*, 386 F.3d 1095, 1106-07 (Fed. Cir. 2004); *Certain Hydraulic Excavators and Components Thereof*, Inv. No. 337-TA-582, Comm’n Op. at 15 (Feb. 3, 2009), USITC Pub. No. 4115 (Dec. 2009). Where a violation is found, the Commission generally issues a limited exclusion order directed against products imported by persons found in violation of the statute. In certain circumstances, however, the Commission may issue a general exclusion order directed against all infringing products. 19 U.S.C. § 1337(d)(2).

UPM requests, along with a finding of violation, that the administrative law judge

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recommend a remedy in the form of a general exclusion order (GEO) with respect to each of the asserted patent and trademarks. *See* Mem. at 45-49. Complainant requests that bond during the presidential review period be set at 100% of the value of the accused products. *See* Mem. at 50.

The Staff supports complainant's request for a GEO, and request for a 100% bond. *See* Staff Resp. at 65-70.

### **A. General Exclusion Order**

Under 19 U.S.C. § 1337(g)(2), “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) are met.” 19 U.S.C. § 1337(g)(2).

Section 337(d)(2) states in relevant part:

(d) Exclusion of articles from entry . . .

(2) 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 –

(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).

Thus, a GEO is warranted when “a general exclusion from entry of articles is

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necessary to prevent circumvention of an exclusion order limited to products of named persons” or “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)(A); 19 U.S.C. § 1337(d)(2)(B). Satisfaction of either criterion is sufficient for imposition of a GEO. *Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-643, Comm’n Op. at 24 (Oct. 1, 2009). The Commission “now focus[es] principally on the statutory language itself” when determining whether a GEO is warranted. *Certain Ground Fault Circuit Interrupters and Products Containing Same*, Inv. No. 337-TA-615, Comm’n Op. at 25 (Mar. 27, 2009). The Commission may look not only to the activities of active respondents, but also to those of non-respondents as well as respondents who have defaulted or been terminated from an investigation. *See, e.g., Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same*, Inv. No. 337-TA-650, Comm’n Op. at 59 (Apr. 14, 2010).

As discussed above, in this investigation, each named respondent has defaulted, and a violation has been shown as to the ‘923 patent, ‘923 trademark, and/or ‘944 trademark by multiple respondents. A GEO is warranted in this investigation both to prevent circumvention of an exclusion order limited to products of named entities, and because there is a pattern of violation of section 337 and it is difficult if not impossible to identify the source of infringing products, as discussed below.

In the event the Commission does not issue a GEO, the administrative law judge finds that the default determination is sufficient to establish a violation for the purpose of

issuing limited exclusion orders directed to the defaulting respondents.<sup>21</sup> *See* 19 C.F.R. § 210.16(c)(1).

**Necessary to Prevent Circumvention of LEO**

UPM argues that a GEO is necessary to prevent circumvention of an LEO for several reasons. *See* Mem. 45-47. The Staff agrees that the evidence supports UPM's position. *See* Staff Resp. at 66-67.

UPM cites evidence that the accused products are sold online anonymously and by multiple sellers, such that the issuance of an LEO against only the named defaulting respondents would fail to stop the flow of infringing products into the United States. Mem. at 45-46. This evidence supports issuance of a GEO to prevent circumvention an LEO. *See Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm'n Op., 2015 WL 5000874, at \*8 (June 26, 2015) (“[T]he record shows that infringing loom kits are widely offered for sale online by anonymous sellers. . . . If the Commission entered an exclusion order limited to the products of the defaulting respondents, the defaulting respondents could circumvent the order via anonymous sales on the internet.”).

UPM has presented evidence that the infringing products are “mailed in generic packaging often with no logos” or “any other indication as to their source of origin.”

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<sup>21</sup> “After a respondent has been found in default by the Commission, the complainant may file with the Commission a declaration that it is seeking immediate entry of relief against the respondent in default. The facts alleged in the complaint will be presumed to be true with respect to the defaulting respondent. The Commission may issue an exclusion order, a cease and desist order, or both, affecting the defaulting respondent only after considering the effect of such order(s) upon the public [interest.]” 19 C.F.R. § 210.16(c)(1).

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Mem. at 46 (citing Complaint, Exs. 29-33). This further supports issuance of a GEO. *See Water Filters*, Order No. 17 (Initial Determination), 2019 WL 4072337, at \*41 (July 11, 2019) (“The evidence showing . . . generic, unmarked product shipments illustrates a clear risk of circumvention of any LEO in the absence of a GEO.”) (unreviewed in relevant parts, Comm’n Op. (Nov. 15, 2019)).

UPM argues that defaulting respondents’ failure to participate in this investigation is further evidence that they “would not abide by the terms of a limited exclusion order.” Mem. at 46. Respondents’ lack of participation in this investigation also supports issuance of a GEO. *See Certain Self-Anchoring Beverage Containers*, Inv. No. 337-TA-1092, Initial Determination, 2018 WL 4357626, at \* (Aug. 27, 2018) (“Moreover, the fact that the Defaulting Respondents have ignored proceedings in this Investigation (which resulted in them being found in default) suggests that they would not abide by the terms of any limited exclusion order the Commission may impose.”).

Accordingly, a GEO is warranted as to each of the ‘923 patent, ‘923 trademark, and ‘944 trademark, due to the likelihood of circumvention of an LEO.

### **Widespread Pattern of Violation and Difficulty Identifying the Source(s) of Infringing Products**

The record evidence supports issuance of a GEO under section 337(d)(2)(B) because there is a widespread pattern of violation, and it is difficult to identify the source of infringing products.

Under Commission precedent, UPM’s evidence discussed above in connection with “circumvention” under section 337(d)(2)(A) is also relevant to establishing difficulty in identifying the source(s) of infringing products under section 337(d)(2)(B).

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*See Certain Loom Kits*, Comm’n Op., 2015 WL 5000875, at \*8 (June 26, 2015) (“We note that many of the facts described above in connection with subparagraph (A) are also relevant to subparagraph (B).”).

The record evidence demonstrates that “there are dozens of infringing products offered on eBay, Amazon, Wal-Mart, and AliExpress,” and that “[t]hese products are shipped in generic packaging that does not identify the manufacturers, retailers, or the source of the infringing products.” *See* Mem. at 47. This evidence supports issuance of a GEO under section 337(d)(2)(B). *See Certain Ink Cartridges and Components Thereof*, Inv. No. 337-TA-946, Initial Determination, 2015 WL 8641224, at \*55 (Oct. 28, 2015) (“GEO authorized under section 19 U.S.C. § 1337(d)(2)(B) when there are a multitude of existing sources of infringing products and low barriers to entry for future participants, and where products are packaged in unmarked, generic packaging . . . making it difficult to identify the source of infringing goods.”) (unreviewed in relevant parts, June 29, 2016); *Certain Personal Transporters*, Inv. No. 337-TA-935, Comm’n Op., 2019 WL 4010936, at \*15 (June 1, 2019) (“The Commission has recognized that the anonymity over the Internet increases the difficulty in identifying the sources of infringing products.”).

UPM argues that its prior “difficulties in serving two of the five respondents with the Complaint further indicates that it is difficult to identify the source of the infringing products.” Mem. at 48. This evidence supports UPM’s requested GEO under section 337(d)(2)(B). *See Mounting Apparatuses*, Initial Determination, 2018 WL 6837931, at \*37 (Nov. 28, 2018) (“Furthermore, the difficulty in serving some respondents (with some being unlocatable) demonstrates that it is difficult to identify the sources of the

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products.”) (unreviewed in relevant part, June 24, 2019).

UPM’s un rebutted evidence regarding widespread online sales establishes a pattern of violation warranting a GEO under section 337(d)(2)(B). Specifically, UPM has presented evidence of widespread internet sales activities extending beyond the named defaulting respondents in this investigation. For example, Attachment F shows at least eight infringing products available for sale on Amazon; Attachment G shows at least nine infringing products available for sale on eBay; Attachment H shows at least ten infringing products available for sale on AliExpress; and Attachment I shows at least two infringing products available for sale on Wal-Mart. A review of those Attachments indicates that many of those infringing products are shipped from China. Under Commission precedent, UPM’s evidence of extensive online sales by both the named respondents and unnamed parties supports finding a pattern of violation and issuance of a GEO. *See Water Filters*, Order No. 17 (Initial Determination), 2019 WL 4072337, at \*43 (July 11, 2019) (“The Commission has found that such evidence of numerous online sales of infringing imported goods can demonstrate a violation of section 337.”) (unreviewed in relevant parts, Comm’n Op. (Nov. 15, 2019)).

The evidence shows that UPM’s prior efforts in enforcing its intellectual property have failed to stop the flow of infringing products into the United States. *See* Mem. at 49. This evidence further supports a finding of widespread violation and issuance of a GEO. *See Handbags*, Order No. 16 (Initial Determination) at 21 (“The undersigned finds that a pattern of violation of section 337 is further evinced by [complainant’s] extensive . . . enforcement activities within the United States. . . . Continued infringement despite [complainant’s] diligence in policing its marks provides ample



support for a finding of widespread violation.”) (unreviewed, Apr. 12, 2012).

Accordingly, the issuance of a GEO under 19 U.S.C. § 1337(d)(2)(B) is appropriate with respect to the asserted patent and trademarks.

**B. Cease and Desist Orders**

UPM argues:

Under the Commission’s current interpretation of the Section 337, cease and desist orders typically do not issue against defaulting Respondents where, as here, a complainant is unable to ascertain whether the Respondents maintained commercially significant inventory of the accused products in the United States. Accordingly, UPM does not request that C&Ds issue against the Respondents.

Mem. at 49-50; *see* Staff Resp. at 65.

Thus, UPM has not requested entry of any cease and desist orders.

**C. Bond**

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. The purpose of the bond is to protect the complainant from any injury. 19 U.S.C. § 1337(j)(3); 19 C.F.R. §§ 210.42(a)(1)(ii),

When reliable price information is available, the Commission has often set bond by eliminating the differential between the domestic product and the imported, infringing product. *See Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm’n Op. at 24 (1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained.

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*See Certain Integrated Circuit Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm’n Op. at 41 (1995). A 100 percent bond has been required when no effective alternative existed. *See Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm’n Op. at 26-27 (July 1997) (a 100% bond imposed 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 minimis* and without adequate support in the record).

UPM argues:

The typical retail price for UPM’s Fish Grip is \$14.95. Attachment A hereto (Hoge Decl. ¶ 32). While the range of retail prices for the competing infringing products varies, it is typically about half the price of the Fish Grip. *Id.* at ¶ 31. The typical retail price for UPM’s Fish Grip, Jr. is \$11.99. *Id.* at ¶ 32. While the range of retail price for the competing infringing products varies, it is typically less than half the price of the Fish Grip Jr. *Id.* Given these values, UPM submits that the appropriate bond to be assessed during the Presidential Review Period is 100% of entered value.

Mem. at 50.

The Staff agrees. *See Staff Resp.* at 70.

A bond of 100% is appropriate in this investigation. Inasmuch as the evidence shows that the sales were made online at various price points and quantities, calculating an average price would be difficult. Given this state of the evidentiary record, and the fact that all of the affected respondents have defaulted rather than provide discovery, a bond value of 100% is appropriate. Under these circumstances, the administrative law judge recommends that the defaulting respondents be required to post a bond of 100% of

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entered value during the 60-day Presidential review period. This amount should be sufficient to prevent any harm to complainant during the Presidential review period.

### **IX. Conclusions of Law**

1. The Commission has subject matter, personal, and *in rem* jurisdiction in this investigation.
2. The accused products have been imported or sold for importation into the United States.
3. The accused products infringe the asserted claims of U.S. Patent No. 6,256,923.
4. The domestic industry requirement has been satisfied with respect to U.S. Patent No. 6,256,923.
5. The accused products except iLure products have been shown to infringe the asserted U.S. Trademark Registration No. 4,980,923.
6. The domestic industry requirement has been satisfied with respect to U.S. Trademark Registration No. 4,980,923.
7. The accused products except iLure products have been shown to infringe the asserted U.S. Trademark Registration No. 5,435,944.
8. The domestic industry requirement has been satisfied with respect to U.S. Trademark Registration No. 5,435,944.

### **X. Initial Determination and Order**

It is the initial determination of the administrative law judge that complainant's Motion No. 1169-7 for summary determination of violation of section 337 by the

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defaulting respondents is granted in part as indicated in this initial determination and as summarized in the Conclusions of Law.

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

Further, it is recommended that the Commission issue a GEO, and that a 100 percent bond be established for importation during the Presidential review period.

All issues delegated to the administrative law judge, pursuant to the notice of investigation, have been decided, with dispositions as to all respondents. Accordingly, this investigation before the administrative law judge is concluded in its entirety.

\* \* \*

To expedite service of the public version, each party is hereby ordered to file with the Commission Secretary no later than April 20, 2020, a copy of this initial determination with brackets to show any portion considered by the party (or its suppliers of information) to be confidential, accompanied by a list indicating each page on which such a bracket is to be found. At least one copy of such a filing shall be served upon the office of the undersigned, and the brackets shall be marked in red. If a party (and its suppliers of information) considers nothing in the initial determination to be confidential,

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and thus makes no request that any portion be redacted from the public version, then a statement to that effect shall be filed.<sup>22</sup>

*DPShaw*

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David P. Shaw  
Administrative Law Judge

Issued: April 10, 2020

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<sup>22</sup> Confidential business information (“CBI”) is defined in accordance with 19 C.F.R. § 201.6(a) and § 210.5(a). When redacting CBI or bracketing portions of documents to indicate CBI, a high level of care must be exercised in order to ensure that non-CBI portions are not redacted or indicated. Other than in extremely rare circumstances, block-redaction and block-bracketing are prohibited. In most cases, redaction or bracketing of only discrete CBI words and phrases will be permitted.

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **Initial Determination** has been served via EDIS upon the Commission Investigative Attorney, **Thomas C. Chen, Esq.**, and the following parties as indicated, on **August 7, 2020**.



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

**On Behalf of Complainant United Plastic Molders:**

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