

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN WRAPPING MATERIAL
AND METHODS FOR USE IN
AGRICULTURAL APPLICATIONS**

Investigation No. 337-TA-1210

**NOTICE OF COMMISSION DETERMINATION TO REVIEW IN PART A FINAL
INITIAL DETERMINATION FINDING NO VIOLATION OF SECTION 337;
SCHEDULE FOR FILING WRITTEN SUBMISSIONS; EXTENSION OF TARGET
DATE**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the final initial determination (“final ID”) issued by the presiding administrative law judge (“ALJ”) on December 10, 2021, finding no violation of section 337 of the Tariff Act of 1930, as amended. 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. The Commission has also determined to extend the target date for the completion of the investigation to May 9, 2022.

FOR FURTHER INFORMATION CONTACT: Ronald A. Traud, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3427. 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. 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: On August 11, 2020, the Commission instituted this investigation based on a complaint filed on behalf of Tama Group of Israel and Tama USA Inc. of Dubuque, Iowa (together, “Tama”). 85 FR 48561-62 (Aug. 11, 2020). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based upon the importation into the United States, the sale for importation, and the sale within the United States

after importation of certain wrapping material and methods for use in agricultural applications by reason of infringement of one or more of claims 1, 2, 4–16, 18, 28, 32, 33, and 35–45 of U.S. Patent No. 6,787,209 (“the ’209 patent”). *Id.* The Commission’s notice of investigation named as respondents Zhejiang Yajia Cotton Picker Parts Co., Ltd. of Zhuji City, China (“Yajia Cotton”); Southern Marketing Affiliates, Inc. of Jonesboro, Arkansas (“SMA”); Hai’an Xin Fu Yuan of Agricultural, Science, and Technology Co., Ltd. of Nantong, China (“XFY”); and Gosun Business Development Co. Ltd. of Grande Prairie, Canada (“Gosun”). *Id.* at 48561. The Office of Unfair Import Investigations is not participating in this investigation. *Id.*

The Commission previously terminated this investigation with respect to Gosun. Order No. 6, *unreviewed by* Notice (Oct. 5, 2020).

Based on Tama’s motion, the Commission later amended the complaint and notice of investigation to add Zhejiang Yajia Packaging Materials Co., Ltd. (“Yajia Packaging”) as a respondent. Order No. 8, *unreviewed by* Notice (Oct. 27, 2020); 85 FR 68,916 (Oct. 30, 2020). Yajia Cotton and Yajia Packaging are collectively referred to herein as “Yajia.” Yajia, SMA, and XFY are collectively referred to herein as “Respondents.”

On November 16, 2020, XFY was found in default pursuant to Commission Rule 210.16 (19 CFR 210.16). Order No. 11, *unreviewed by* Notice (Nov. 30, 2020).

On December 10, 2021, the ALJ issued the final ID, which found that Respondents did not violate section 337. The final ID found (1) that Tama no longer asserts claims 15, 16, 18, 28, and 45 of the ’209 patent; (2) the importation or sale requirement of section 337 has been satisfied; (3) the Accused Products infringe claims 1, 2, 4–7, and 10-14 of the ’209 patent; (4) Yajia and SMA do not infringe claims 32, 33, 35-38, and 41–44 of the ’209 patent; (5) the technical prong of the domestic industry requirement for the ’209 patent has been satisfied; (6) the ’209 patent is not invalid; and (7) the economic prong of the domestic industry requirement has not been satisfied. The ALJ’s Recommended Determination on remedy and bonding (“RD”) recommended that should the Commission find a violation, it should issue a limited exclusion order directed to certain wrapping material and methods for use in agricultural applications imported, sold for importation, and/or sold after importation by respondents Yajia, SMA, and XFY. The RD further recommended that the issuance of cease and desist orders would be unnecessary. The RD additionally recommended that the Commission set a bond during the period of Presidential review using a price differential between the Accused Products and Tama’s TamaWrap products. Thus, the CALJ recommended that the Commission set a bond in the amount of \$119 (or 20%) for Tama’s Premium product and \$23 (or 4%) for Tama’s Blue Value product. The Commission did not instruct the CALJ to make findings concerning the public interest.

On December 27, 2021, Yajia and SMA filed a joint petition for review, and Tama also filed a petition for review. On January 4, 2022, Yajia Cotton and SMA filed a joint response to Tama’s petition for review, and Tama filed a response to Yajia and SMA’s joint petition for review.

The Commission received no public interest comments from the public in response to the Commission's *Federal Register* notice seeking comment on the public interest. 86 FR 71664–65 (Dec. 17, 2021). Tama, Yajia, and SMA did not submit any public interest comments pursuant to Commission Rule 210.50(a)(4) (19 CFR 210.50(a)(4)).

Having examined the record in this investigation, including the final ID, the petitions for review, and the responses thereto, the Commission has determined to review the final ID in part. In particular, the Commission has determined to review the following:

- (1) the final ID's findings that Yajia and SMA do not infringe claims 32, 33, 35–38, and 41–44 directly or indirectly; and
- (2) the final ID's finding that the economic prong of the domestic industry requirement has not been satisfied.

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

The Commission has also determined to extend the target date for the completion of the investigation to May 9, 2022.

The parties are requested to brief their positions with reference to the applicable law and the evidentiary record regarding the questions provided below:

- (1) Under Commission and judicial precedent, section 337 and its legislative history, and any other relevant authority, is a license (express or otherwise) between Tama and John Deere & Co. (“Deere”) necessary for the Commission to consider Deere’s investments in its On-Board Module Harvesters, including model numbers 7760, CP690, and CS690 (“the Deere Machines”), towards Tama’s satisfaction of the economic prong of the domestic industry requirement? Or, is it sufficient that Deere and Tama collaborated to design a system that requires Tama’s TamaWrap and Deere’s Deere Machines? Is it necessary that Tama authorized Deere to use the patented devices and methods?
- (2) What evidence is in the record that shows that Deere was authorized to use the ’209 patent?
- (3) Under Commission and judicial precedent, section 337 and its legislative history, and any other relevant authority, if the Commission considers Deere’s investments in the categories listed in section 337(a)(3)(A)-(C) towards the satisfaction of the economic prong of the domestic industry requirement, to what extent and in which statutory category(ies) should the Commission consider the Deere expenditures? For example, should such expenditures be

in TamaWrap itself and/or the method of using TamaWrap; should such expenditures be related to ensuring TamaWrap is compatible with the Deere Machines; should such expenditures have some other connection to TamaWrap and/or the '209 patent; or, should all expenditures related to the Deere Machines in each relevant statutory category contribute towards the satisfaction of the domestic industry requirement?

- (4) What evidence is in the record that Deere specifically invested in TamaWrap and/or the method of using TamaWrap? For example, what activities did Deere undertake to ensure the Deere Machines would work well with TamaWrap?
- (5) What part of the Deere Machines are specifically designed to interact with TamaWrap and what, if any, of Deere's investments asserted by Tama were specifically related to that portion of the Deere Machines and/or ensuring that Deere Machines are compatible with TamaWrap?
- (6) Does the "article[] protected by the patent" (19 U.S.C. 1337(a)(3)) differ for the asserted apparatus claims and method claims? For example, are the Deere Machines "articles protected by the patent" with respect to the method claims while only the TamaWrap is an "article[] protected by the patent" with respect to the apparatus claim? If the articles protected by the patent differ as between the apparatus and the method claims, please provide a chart with supporting citations to the record indicating the expenditures for each statutory category for the respective apparatus and method claims.
- (7) Can the Commission consider Deere's expenditures related to the Deere Machines under an "article of commerce theory"? *See, e.g., Certain Video Game Sys. & Wireless Controllers & Components Thereof*, Inv. No. 337-TA-770, Comm'n Op. at 66–70 (Oct. 28, 2013) (Public Version) ("*Video Game Sys.*").
- (8) To what extent do Deere's activities related to the Deere Machines have a direct relationship to the exploitation of the patented technology, and to what extent can the expenditures be considered on that basis? *See, e.g., Video Game Sys.*, Comm'n Op. at 67–68.
- (9) To what extent do the "realities of the marketplace" require Deere's expenditures in the Deere Machines for Tama to sell TamaWrap (or articles practicing the Asserted Patent)? *See, e.g., Video Game Sys.*, Comm'n Op. at 68.
- (10) Were the expenditures related to the Deere Machines necessary to bringing TamaWrap to the consumer market, and if so, should the Commission

consider those expenditures, and to what extent? *See, e.g., Video Game Sys., Comm'n Op. at 69–70; Certain Digital Set-Top Boxes & Components Thereof, Inv. No. 337-TA-712, Order No. 33 (Jan. 11, 2011), aff'd in part, Notice (July 21, 2011).*

- (11) Were the expenditures related to the Deere Machines central to the exploitation of TamaWrap, and if so, should the Commission consider those expenditures, and to what extent? *See, e.g., Certain Magnetic Tape Cartridges & Components Thereof, Inv. No. 337-TA-1058, Comm'n Op. at 50 (Apr. 9, 2019) (Public Version); Certain Sleep-Disordered Breathing Treatment Sys. & Components Thereof, Inv. No. 337-TA-890, Final ID at 147–50 (Sept. 16, 2014) (Public Version), unreviewed in relevant part by Notice, (Oct. 16, 2014).*
- (12) With citations to record evidence and any relevant Commission and/or judicial precedent, including, *e.g., Certain In Vitro Fertilization Products, Components Thereof, and Products Containing the Same, Inv. No. 337-TA-1196, Dissenting Views of Commissioners Schmidlein and Karpel (Oct. 28, 2021)*, please discuss whether Tama's domestic activities as a whole indicate that it is more than a "mere importer." Please note that this question is different from Question 13.
- (13) With citations to record evidence and any relevant Commission and/or judicial precedent, please discuss whether Tama's qualifying domestic activities indicate that it is more than a "mere importer."
- (14) Please indicate how Tama's claimed investments in the acquisition of Ambraco, components, administrative fees, and administrative expenses qualify as investments in "labor or capital" under section 337(a)(3)(B)? Please allocate those investments with respect to the articles protected by the patent and to those portions attributable to labor or capital.
- (15) What arguments were presented to the ALJ that the amount of Deere's investment were significant or substantial?
- (16) To the extent Tama is not a mere importer and certain domestic activities and investments with respect to the asserted patent excluded by the final ID (see *e.g., certain warehousing, inventory, logistics, finance, invoicing, account management, and/or promotion, marketing, and sales expenditures*) should be credited as cognizable domestic industry investments, please discuss whether Tama's cognizable domestic industry investments (apart from any investments by Deere) are significant or substantial within the meaning of section 337(a)(3)(A)–(C), with citation to record evidence.

- (17) To the extent investments by Deere are considered by the Commission along with the investments excluded by the final ID (*see, e.g.*, certain warehousing, inventory, logistics, finance, invoicing, account management, and/or promotion, marketing, and sales expenditures) with respect to satisfaction of the economic prong of the domestic industry requirement under section 337(a)(3)(A)–(C), please discuss whether domestic industry investments are significant or substantial within the meaning of section 337(a)(3)(A)–(C), with citation to record evidence.

In connection with the final disposition of this investigation, the statute authorizes issuance of, *inter alia*, (1) an exclusion 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 are 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 (Dec. 1994).

The statute requires the Commission to consider the effects of that remedy upon the public interest. The public interest factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on: (1) The public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve, 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 parties to the investigation are requested to file written submissions on the questions 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 written submissions should include views on the RD that issued on December 10, 2021.

Initial written submissions, limited to 80 pages, must be filed no later than the close of business on March 23, 2022. Complainants are requested to identify the form of the remedy sought and to submit proposed remedial orders for the Commission's consideration. Complainants are also requested to state the HTSUS subheadings under which the accused articles are imported, and to supply identification information for all known importers of the accused products. Reply submissions, limited to 50 pages, must be filed no later than the close of business on March 30, 2022. 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 CFR 210.4(f) are currently waived. 85 FR 15798 (Mar. 19, 2020). Submissions should refer to the investigation number ("Inv. No. 337-TA-1210") 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). Persons with questions regarding filing should contact the Secretary at (202) 205-2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment by marking each document with a header indicating that the document contains confidential information. This marking will be deemed to satisfy the request procedure set forth in Rules 201.6(b) and 210.5(e)(2) (19 CFR 201.6(b) & 210.5(e)(2)). 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 this determination took place on March 9, 2022.

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.



Lisa R. Barton
Secretary to the Commission

Issued: March 9, 2022