

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN PLAYARDS AND
STROLLERS**

Investigation No. 337-TA-1288

**NOTICE OF A COMMISSION DETERMINATION TO REVIEW IN PART
A FINAL INITIAL DETERMINATION FINDING A VIOLATION; REQUEST FOR
WRITTEN SUBMISSIONS ON THE ISSUES UNDER REVIEW AND ON REMEDY,
THE PUBLIC INTEREST, AND BONDING; EXTENSION OF TARGET DATE**

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 a final initial determination (“ID”) of the presiding administrative law judge (“ALJ”), finding a violation. The Commission requests written submissions from the parties on the issues under review and submissions from the parties, interested government agencies, and other interested persons on the issues of remedy, the public interest, and bonding, under the schedule set forth below. The Commission has also determined to extend the target date for completion of the investigation to August 28, 2023.

FOR FURTHER INFORMATION CONTACT: Benjamin S. Richards, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street S.W., Washington, D.C. 20436, telephone (202) 708-5453. 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: The Commission instituted this investigation by publication in the Federal Register on December 27, 2021. 86 FR 73318 (Dec. 27, 2021). The complainants are Graco Children’s Products Inc., of Atlanta, GA (“Graco”) and Wonderland Nurserygoods Co., Ltd. of Taipei, Taiwan (“Wonderland”). Graco and Wonderland’s 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 playards and strollers by reason of infringement of

certain claims of U.S. Patent Nos. 9,706,855 (“the ’855 patent”); 9,414,694 (“the ’694 patent”); RE43,919 (“the ’919 patent”); and 6,979,017 (“the ’017 patent”). *Id.* The complaint further alleged that a domestic industry exists. *Id.* The Commission’s notice of investigation named as respondents Baby Trend, Inc. of Fontana, CA (“Baby Trend”); Dongguan Golden Prosper Baby Products Co., Ltd., of Guangdong, China (“Golden Prosper”); Sichuan Hobbies Baby Products Co., Ltd., of Sichuan, China (“Sichuan Hobbies”); and Anhui Chile Baby Products Co., Ltd. of Anhui Province, China (“Anhui Chile”). *Id.* The Office of Unfair Import Investigations is not participating in the investigation. *Id.*

On April 1, 2022, the Commission determined not to review an ID terminating the investigation as to the ’017 patent. Order No. 7 (Mar. 7, 2022), *unreviewed by* Comm’n Notice (Apr. 1, 2022). On April 12, 2022, the Commission determined not to review an ID terminating the investigation as to respondent Golden Prosper based on withdrawal of the complaint. Order No. 8 (Mar. 23, 2022), *unreviewed by* Comm’n Notice (Apr. 12, 2022). And, on December 14, 2022, the Commission determined not to review an ID terminating the investigation as to claims 3–9, 11–12, 14, and 16–20 of the ’855 patent, claims 2, 4–9, 11–17, and 19–20 of the ’694 patent, and claims 8, 10–12, 14–19, and 27–28 of the ’919 patent as to all respondents, and terminating the investigation as to claim 20 of the ’919 patent as to respondents Sichuan Hobbies and Anhui Chile (but not Baby Trend). Order No. 21 (Nov. 15, 2022), *unreviewed by* Comm’n Notice (Dec. 14, 2022).

The ALJ held an evidentiary hearing from December 12–15, 2022, at which point, only claims 1, 2, 10, 13, and 15 of the ’855 patent and claims 1, 10, and 18 of the ’694 patent remained as to all respondents and claim 20 of the ’919 patent remained as to respondent Baby Trend. At the time of the evidentiary hearing, there were three remaining respondents in this investigation: Baby Trend, Sichuan Hobbies, and Anhui Chile (“Respondents”).

On March 31, 2023, the ALJ issued the final ID in this investigation. The ID found that a violation of section 337 has occurred based on the respondents’ importation and sale of products that infringe certain claims of the ’855 patent and the ’694 patent. By contrast, the ID found that no violation has occurred in connection with the ’919 patent. The ALJ issued his recommended determination (“RD”) on remedy and bond concurrently with the ID. The RD recommended issuance of a limited exclusion order (“LEO”) directed to accused products that infringe the ’855 or ’694 patents. In addition to the LEO, the RD recommended the issuance of a cease-and-desist order (“CDO”). As to bond, the RD recommended a bond rate of 4% for the product accused of infringing only the ’919 patent and a bond rate of 59% for the remaining accused products.

The parties filed petitions for review of the ID on April 14, 2023, and responses thereto on April 24, 2023.

Having reviewed the record of the investigation, including the final ID, the parties’ submissions to the ALJ, and the petitions for review, the Commission has determined to review the ID in part. Specifically, the Commission has determined to review: (1) for the ’855 patent, whether claim 15 is anticipated by Gabriella, and whether claims 1, 2, 10, and 13 are obvious

based on Troutman and Song or Hsia and Song; (2) for the '694 patent, whether claim 18 is anticipated by Hsia and whether claims 1 and 10 are obvious based on Troutman and Tharalson; (3) the '919 patent in its entirety; and (4) whether the technical and economic prongs of the domestic industry requirement are met for all three patents.

In connection with its review, the Commission requests responses to the following questions. The parties are requested to brief their positions with reference to the applicable law and the existing evidentiary record.

- (1) Must the Commission identify a reason that an ordinary artisan would have been motivated to add legs like those claimed in claim 1 and 10 of the '855 patent (such as those disclosed in Song) to the stationary bassinet of Troutman, as opposed to adding legs generally? *See, e.g.*, ID at 64 (“I find that Respondents have established that a person of ordinary skill in the art would have been motivated to add legs to Troutman’s infant support unit.”). Does the evidence of record demonstrate clearly and convincingly that such a motivation exists?
- (2) On page five (5) of their petition for review, Respondents identify “[w]hether ... Hsia anticipates ... claim 18 of the '694 Patent” as an issue for review. Identify where, if anywhere, Respondents raised that issue in their pre- and/or post-hearing briefs before the ALJ? Did the ALJ address that issue?
- (3) What is the status of the *Wonderland Nursery Goods Co., Ltd. v. Baby Trend Inc.*, Case No. 5:14-cv-01153-JWH-SP, district court decision? Is it a final decision? Has an appeal been filed? Must the Commission give the judgment preclusive effect with regard to invalidity under 35 U.S.C. 251?
- (4) Did Respondents preserve the argument that the recited “attachment structure” in claim 20 of the '919 patent excludes external fasteners?
- (5) Is Complainants’ argument that “mount and secure” as used in the '919 patent requires only that the fabric member be “held securely” along the inside of the support tubes a new claim construction that is waived?
- (6) Is there any evidence in the record that a skilled searcher conducting a diligent search reasonably could have been expected to discover Mariol, Tabarin, or Noblet?
- (7) Should the Manufacturing Respondents, against whom claim 20 of the '919 patent was not asserted, be allowed to assert a defense of invalidity as to claim 20?
- (8) For purposes of determining estoppel in a second proceeding, does privity require that there be a relationship between Baby Trend and the Manufacturing Respondents at the time of the first proceeding or the second? Is the answer different for purposes of IPR

- estoppel? Did Complainants establish that privity exists between Baby Trend and the Manufacturing Respondents for the purposes of IPR estoppel?
- (9) Did the ALJ address privity with regard to the second Manufacturer Respondent, Anhui Chile?
 - (10) Do the customer-manufacturer contracts between Baby Trend and each Manufacturing Respondent create privity for purposes of IPR estoppel?
 - (11) Does claim 20 of the '919 patent require the Clamped/Slit connection? Does the specification clearly and unequivocally disclose any embodiments that do not use the Clamped/Slit connection?
 - (12) The Final ID considered the investments for the '855 and '694 patents together. *See, e.g.*, ID at 118. If the Commission determines that one or more claims of the '855 patent and/or '694 patent asserted for purposes of domestic industry in this case have been shown to be invalid, please identify, with citations to the record, the appropriate domestic industry investments attributable to each patent.
 - (13) Can investments made by an entity that is a contractor/subcontractor, but is not a licensee of the complainant, be considered part of the domestic industry under the facts in this investigation? For purposes of determining significant or substantial investments or employment with respect to articles that practice the patents asserted in this investigation under section 337(a)(3), should the Commission consider the actual investments made by the entity or the payments made to that party by the Complainant for contracted manufacturing activity?
 - (14) Please discuss whether, in an investigation in which the DI products are manufactured outside the United States, it is consistent with the statute, legislative history, and court and Commission precedent not to consider foreign manufacturing expenses in determining the significance of domestic industry investments and expenditures.

The parties are invited to brief only the discrete issues requested above. 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, *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 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 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 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 submissions should address the recommended determination by the ALJ on remedy and bonding. The parties should specifically address, among other things, whether the Commission should issue a cease and desist order as to all respondents or just to Baby Trend.

In its initial submission, Complainants are also requested to identify the remedy sought and to submit proposed remedial orders for the Commission's consideration. Complainants are further requested to provide 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 **July 20, 2023**. Reply submissions must be filed no later than the close of business on **July 27, 2023**. No further submissions on these issues will be permitted unless otherwise ordered by the Commission. Opening submissions are limited to 75 pages. Reply submissions are limited to 35 pages. No further submissions on any of these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (March 19, 2020). Submissions should refer to the investigation number (Inv. No. 337-TA-1288) 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, (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. Any non-party wishing to submit comments containing confidential information must serve those comments on the parties to the investigation pursuant to the applicable Administrative Protective Order. A redacted non-confidential version of the document must also be filed with the Commission and served on any parties to the investigation within two business days of 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 has also determined to extend the target date for completion of this investigation to August 28, 2023.

The Commission vote for this determination took place on July 6, 2023.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR Part 210).

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: July 6, 2023