UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of	
CERTAIN HIGH-PERFORMANCE GRAVITY-FED WATER FILTERS AND PRODUCTS CONTAINING THE SAME	**Investigation No. 337-TA-1294**

NOTICE OF A COMMISSION DETERMINATION TO REVIEW IN PART A FINAL INITIAL DETERMINATION FINDING A VIOLATION OF SECTION 337; REQUEST FOR WRITTEN SUBMISSIONS ON ISSUES UNDER REVIEW AND ON REMEDY, THE PUBLIC INTEREST, AND BONDING; EXTENSION OF THE 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 of section 337. 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 determined to grant Respondents' motion for leave to file a notice of supplemental authority and to extend the target date for completion of this investigation to September 19, 2023.

FOR FURTHER INFORMATION CONTACT: Panyin A. Hughes, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3042. 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, telephone (202) 205-1810.

SUPPLEMENTARY INFORMATION: On January 31, 2022, the Commission instituted this investigation based on a complaint filed by Brita LP ("Brita") of Neuchatel NE, Switzerland. 87 FR 4913 (Jan. 31, 2022). The complaint, as supplemented, 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 high-performance gravity-fed water filters and products containing the same by reason of infringement of claims 1-6, 20, 21, 23, and 24 of U.S. Patent No. 8,167,141 ("the '141 patent"). *Id.* The Commission's notice of investigation named nine respondents: Mavea LLC of West

Linn, Oregon and Brita GmbH of Taunusstein, Switzerland (collectively, "the Mavea Respondents"); Ecolife Technologies, Inc. of City of Industry, California and Qingdao Ecopure Filter Co., Ltd. of Shandong Province, China (collectively, "the Aqua Crest Respondents"); Kaz USA, Inc. and Helen of Troy Limited, both of El Paso, Texas (collectively, "PUR Respondents"); Zero Technologies, LLC of Trevose, Pennsylvania; Culligan International Co. of Rosemont, Illinois (collectively, "ZeroWater Respondents"); and Vestergaard Frandsen Inc. of Baltimore, Maryland ("LifeStraw"). *Id.* The Office of Unfair Import Investigations is not participating in this investigation. *Id.*

On May 3, 2022, the ALJ issued an ID granting a motion to terminate the investigation as to the Mavea Respondents based upon settlement. Order No. 13 (May 3, 2022), *unreviewed by* Comm'n Notice (May 24, 2022).

On June 1, 2022, the ALJ issued an ID granting a motion to terminate the investigation as to claims 20, 21, and 24 of the '141 patent based upon withdrawal of the allegations in the complaint as to these claims. Order No. 19 (June 1, 2022), *unreviewed by* Comm'n Notice (June 21, 2022).

On June 2, 2022, the ALJ held a *Markman* hearing. The ALJ issued a *Markman* Order construing the claim terms in dispute on July 20, 2022. Order No. 30 (July 20, 2022).

On September 22, 2022, the ALJ issued an ID granting a motion to terminate the investigation as to the Aqua Crest Respondents based upon withdrawal of the allegations in the complaint as to these respondents. Order No. 43 (Sept. 22, 2022), *unreviewed by* Comm'n Notice (Oct. 11, 2022).

The ALJ held an evidentiary hearing from August 17-19, August 22-23, and October 13, 2022, and received post-hearing briefs thereafter.

On February 28, 2023, the ALJ issued the final ID finding a violation of section 337. The ID found that "because of importation stipulations of all Accused Products," the importation requirement under 19 U.S.C. 1337(a)(1)(B) is satisfied. ID at 12-13. The ID also found that Brita successfully proved that all of the Accused Products infringe the asserted claims of the '141 patent (claims 1-6 and 23). *Id.* at 69-105. The ID further found that Respondents failed to show by clear and convincing evidence that the asserted claims are invalid for lack of written description (*Id.* at 169-204), enablement (*Id.* at 205-250), anticipation (*Id.* at 153-169), or for reciting ineligible subject matter under 35 U.S.C. 101 (*Id.* at 250-269). Finally, the ID found that Brita proved the existence of a domestic industry that practices the '141 patent as required by 19 U.S.C. 1337(a)(2). *Id.* at 105-117, 269-285.

The ID included the ALJ's recommended determination on remedy and bonding ("RD"). The RD recommended, should the Commission find a violation, issuance of a limited exclusion order against all respondents and cease and desist orders against the PUR Respondents and LifeStraw. ID/RD at 258-291. The RD also recommended imposing a bond in the amount of one hundred percent (100%) of entered value for PUR's and ZeroWater's infringing products

imported during the period of Presidential review and $6 per unit for infringing LifeStraw products imported during the period of Presidential review. *Id.* at 291-295.

On March 13, 2023, Respondents and Brita filed respective petitions for review of the ID. On March 21, 2023, the parties filed responses to the petitions.

On May 24, 2023, Respondents moved for leave to file notice of supplemental authority regarding their petition for review. Specifically, Respondents seek to submit the recent U.S. Supreme Court decision in *Amgen Inc. v. Sanofi*, No. 21-757 (May 18, 2023), as being directly relevant to the lack of enablement of the asserted claims in this investigation. The Commission has determined to grant the motion and accept the filing.

Having reviewed the record of the investigation, including the final ID, the parties' submissions to the ALJ, the petitions for review, and the responses thereto, the Commission has determined to review in part the final ID. Specifically, the Commission has determined to review the following findings: (1) construction of the claim term "filter usage lifetime claimed by a manufacturer or seller of the filter," (2) written description, (3) enablement, (4) section 101, (5) anticipation, and (6) the economic prong of the domestic industry requirement.

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) Discuss whether the construction of the claim term "filter usage lifetime claimed by a manufacturer or seller of the filter" to mean "[t]he total number of gallons of water that a manufacturer or seller has validated can be filtered before the filter is replaced," (Order No. 30 at 14), impermissibly deviates from the plain language of the claims. Further, discuss whether the foregoing construction requires the reading of one or more limitations from the specification into the claim in order to find the limitation not invalid for indefiniteness. *See, e.g.*, '141 patent at col. 26:14–15.

(2) Discuss the effect of the recent Supreme Court decision, *Amgen Inc. v. Sanofi*, No. 21-757 (May 18, 2023), on the ID's enablement and written description findings.

(3) Discuss whether a person of ordinary skill in the art would understand how to use filter types other than carbon block (e.g., mixed media, hollow fibers, membranes, nonwovens, depth media, nanoparticles and nanofibers, and ligands (JX-0022 at 25:9-12, 26:30-37)) to achieve a FRAP factor below 350 as of the priority date of the '141 patent.

(4) Discuss the predictability of the technology at issue and, in particular, how predictably these other filter types were expected to perform in terms of the FRAP factor as compared to the carbon block arrangement described in the specification as of the priority date of the '141 patent.

(5) Discuss whether a person of ordinary skill in the art as of the priority date of the '141 patent could have readily manipulated the FRAP factor variables of volume **V**, average filtration unit time **f**, effluent lead concentration $\mathbf{c_e}$, and lifetime **L** for any of the other filter materials named in the specification to achieve FRAP factor below 350. For example, if the manufacturer were to reduce only the volume **V** of a given filter, or if the manufacturer or seller were to claim a longer lifetime **L** for a given filter, would that correspondingly reduce the FRAP factor without affecting (or at least unpredictably affecting) the other variables? See JX-022 at 26:41-49, Figs. 21-23.

(6) If it was possible to predictably determine the FRAP factor for non-carbon block filter types as of the priority date of the '141 patent, explain why it took Brita ten years and 7,326 hours of research and development to design a nonwoven filter that practices the '141 patent. *See* ID at 213 n.77; Tr. (Freeman) at 1562:18-1563:6. Is Brita's research and development effort with respect to its non-woven filter DI products indicative of the experimental time and effort needed to develop filters other than the carbon block arrangement described in the specification?

The parties are invited to brief only these discrete questions. 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. In particular, the Commission requests that the parties respond to the statements on the public interest received from the various third parties.

In addition, the Commission requests specific briefing to address the following questions relevant to the public interest considerations in this investigation, and responses are encouraged to include evidence in support of their statements:

(1) Please identify whether any reasonable substitutes for the Accused Products are available to consumers and whether they are capable of meeting any public health and welfare concerns raised by any remedial relief in this investigation. Is or would there be sufficient supply of any such reasonable substitutes for the Accused Products?

(2) Are the identified reasonable substitutes capable of filtering Per- and polyfluoroalkyl substances (PFAS) chemicals in drinking water and how effective are they in doing so in relation to the accused products' capability of filtering PFAS in drinking water?

(3) Do the identified reasonable substitutes meet or exceed the following standards: NSF P231/US EPA (bacteria and parasites); NSF 53 (pesticides, herbicides, lead and other heavy metals); NSF 42 (chlorine); NSF 473 (PFAS); and NSF 401 (emerging chemical contaminants)? How does this compare to the accused products' performance with respect to these standards? Please discuss the impact, if any, on the public health and welfare of water filters not meeting these standards and please submit and discuss any studies, data, or other evidence that shows an impact on the public health and welfare.

(4) Is there any production of like or directly competitive products in the United States and how would such production be impacted by any remedial relief?

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: 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.

In its initial submission, Complainant is also requested to identify the remedy sought and to submit proposed remedial orders for the Commission's consideration. Complainant is 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 14, 2023. Reply submissions must be filed no later than the close of business on July 21, 2023. No further submissions on these issues will be permitted unless otherwise ordered by the Commission. Opening submissions are limited to 60 pages. Reply submissions are limited to 30 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-1294) 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 determined to extend the target date for completion of this investigation from June 28, 2023 to September 19, 2023.

The Commission vote for this determination took place on June 28, 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: June 28, 2023