

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

In the Matter of

**CERTAIN RAISED GARDEN BEDS
AND COMPONENTS THEREOF**

Investigation No. 337-TA-1334

**NOTICE OF A COMMISSION DETERMINATION TO REVIEW IN PART
A FINAL INITIAL DETERMINATION FINDING A VIOLATION OF SECTION 337;
REQUEST FOR WRITTEN SUBMISSIONS 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 a final initial determination on violation of section 337 (the “Final ID”) issued by the presiding administrative law judge (“ALJ”) finding a violation of section 337 by reason of misappropriation of trade secrets and unfair competition based on false advertising under the Lanham Act. The Commission requests written 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.

FOR FURTHER INFORMATION CONTACT: Edward S. Jou, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3316. 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 on October 19, 2022, based on an amended complaint (the “Complaint”) filed by Vego Garden, Inc. of Houston, Texas (the “Complainant” or “Vego Garden”). 87 FR 63527-28 (Oct. 19, 2022). The Complaint alleges 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, and in the sale of, certain raised garden beds and components thereof by reason of misappropriation of trade secrets and unfair competition, the threat or effect of which is to destroy or substantially injure a domestic industry. *Id.* at 63527.

The Commission's notice of investigation named five respondents, *see id.*, and the name of one of the respondents was corrected pursuant to an amended complaint. *See* 88 FR 2637-38 (Jan. 17, 2023) (amending complaint and notice of investigation). The five named respondents, as amended, are: Huizhou Green Giant Technology Co., Ltd. ("Green Giant") of Guangdong, China; Utopban International Trading Co., Ltd. d/b/a Vegega ("Utopban International") of Rosemead, California; Utopban Limited ("Utopban") of Hong Kong, China; Forever Garden of El Monte, California; and VegHerb, LLC d/b/a Frame It All ("VegHerb") of Cary, North Carolina. *See id.* at 2638. The Office of Unfair Import Investigations ("OUII") is also a party in this investigation. *Id.*

The investigation was terminated as to Utopban International based on withdrawal of the complaint's allegations. Order No. 9 (Jan. 30, 2023), *unreviewed by* Comm'n Notice (Feb. 27, 2023). The investigation was terminated as to Forever Garden and VegHerb based on settlement agreements. Order No. 11 (Feb. 23, 2023) (VegHerb) and Order No. 12 (Feb. 23, 2023) (Forever Garden), *both unreviewed by* Comm'n Notice (Mar. 23, 2023).

An evidentiary hearing was held on May 22-25, 2023, and the ALJ issued the Final ID on September 8, 2023, finding violations of section 337 by reason of misappropriation of trade secrets and unfair competition based on false advertising under the Lanham Act. The ALJ also issued a recommended determination ("RD") on September 8, 2023. The RD recommended the issuance of limited exclusion orders for Green Giant and Utopban and a cease and desist order for Utopban. The RD further recommended that a 100% bond be set during the Presidential review period.

Respondents Green Giant and Utopban filed a petition for review of the Final ID on September 20, 2023. Complainant Vego Garden filed a response in opposition to the petition on September 28, 2023. OUII filed a response in opposition to the petition on October 2, 2023.

Having reviewed the record of the investigation, including the Final ID, the parties' submissions to the ALJ, the petition for review and responses thereto, the Commission has determined to review the Final ID in part. Specifically, the Commission has determined to review the ID's findings with respect to: (1) the Commission's statutory authority to investigate unfair acts under section 337(a)(1)(A) involving extraterritorial conduct, including the alleged trade secret misappropriation and false advertising under the Lanham Act; (2) the ID's findings of trade secret misappropriation with respect to the product development research trade secret and the product manufacturing trade secret; and (3) all of the ID's findings with respect to domestic industry (*i.e.*, the existence of a domestic industry and injury to the domestic industry) (ID at 103-136). The Commission has determined not to review the remaining findings in the ID.

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 and identify any record evidence or arguments that were presented to the ALJ describing or documenting the customer feedback, market research, and cost analysis that was alleged to be part of the product development research trade secret.

- (2) Discuss and identify any record evidence or arguments that were presented to the ALJ showing dissemination outside of Vego Garden of the customer feedback, market research, and cost analysis alleged to be part of the product development research trade secret and the acquisition or use of such information by Respondents.
- (3) When was the product development research trade secret allegedly misappropriated? Discuss and identify any record evidence or arguments that were presented to the ALJ describing or documenting the state of Vego Garden's customer feedback, market research, and cost analysis relating to its 8-inch product development at the time of the alleged misappropriation. *See, e.g.,* Final ID 77-78.
- (4) Discuss and identify any record evidence or arguments that were presented to the ALJ showing whether the product manufacturing trade secret was developed, in whole or in part, in the United States. In your response to this question, please address the claimed research and development costs for this trade secret, Mr. Xiong's testimony regarding the development of the bending machine, and the identity and location of the named inventor on the Chinese patent application that is alleged to describe the bending machine. *See* Final ID at 52-53 (citing research and development costs for bending machine); Tr. (Xiong) at 62:14-21 (describing design of bending machine); JX-0021 (Chinese patent application).
- (5) Discuss and identify any record evidence or arguments that were presented to the ALJ explaining the relationship between the alleged research and development costs for the asserted product development research and product manufacturing trade secrets and the asserted domestic industry expenditures. *See* Final ID at 35 (research and development costs for 8-inch product), 52-53 (research and development costs for bending machine), 108-19 (asserted domestic industry expenditures).
- (6) Discuss and identify any record evidence or arguments that were presented to the ALJ supporting or contradicting the ID's determination to allocate the entirety of Vego Garden's farm purchase and 2022 expenses to the domestic industry. *See* Final ID at 114. When responding to this issue, please address Mr. Xiong's testimony describing different uses of the farm property. *See* Tr. (Xiong) at 36:12-21 (research and development and marketing), 41:19-25 (office space).
- (7) Discuss and identify any record evidence or arguments that were presented to the ALJ regarding the accuracy and reliability of the ID's allocations of rental expenses and "non-real-estate, non-payroll R&D expenses" to the domestic industry. *See* Final ID at 114-15.
- (8) Discuss and identify any record evidence or arguments that were presented to the ALJ regarding the expenses that are reflected in the \$7.3 million in expenses cited by Mr. Xiong at the hearing. *See* Tr. (Xiong) at 41:1-42:3; CDX-0003.
- (9) Discuss and identify any record evidence or arguments that were presented to the ALJ regarding the alleged injury to the domestic industry that can be attributed to the alleged misappropriation of the product development research trade secret.

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 respondent(s) 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.

In its initial submission, Complainant is also requested to identify the remedy sought and Complainant and OUII are requested 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 January 23, 2024. Reply submissions must be filed no later than the close of business on January 30, 2024. Opening submissions are limited to 50 pages. Reply submissions are limited to 25 pages. 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-1334") 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 simultaneously with any confidential filing and must be served in accordance with Commission Rule 210.4(f)(7)(ii)(A) (19 CFR 210.4(f)(7)(ii)(A)). 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 January 9, 2024.

This action is taken under the authority of 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: January 9, 2024