

*In the Matter of*

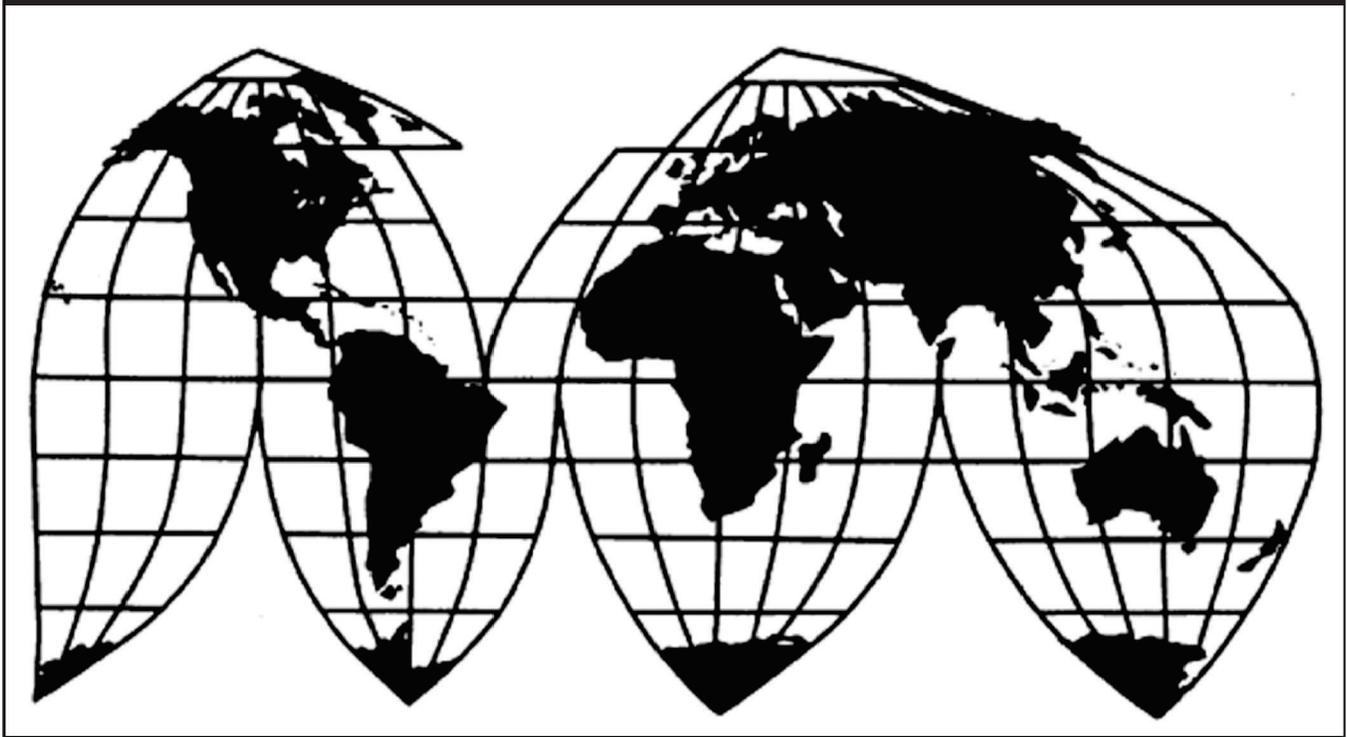
**CERTAIN POCKET LIGHTERS**

Investigation No. 337-TA-1142

Publication 5262

February 2022

**U.S. International Trade Commission**



Washington, DC 20436

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

## **COMMISSIONERS**

**David S. Johanson, Chairman**  
**Rhonda K. Schmidlein, Commissioner**  
**Jason E. Kearns, Commissioner**  
**Randolph J. Stayin, 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](http://www.usitc.gov)

*In the Matter of*

## CERTAIN POCKET LIGHTERS

Investigation No. 337-TA-1142



**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**Washington, D.C.**

**In the Matter of**

**CERTAIN POCKET LIGHTERS**

**Investigation No. 337-TA-1142**

**NOTICE OF COMMISSION DETERMINATION TO ISSUE  
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:** Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708-4716. 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:** On February 12, 2019, the Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (“section 337”), based on a complaint filed by BIC Corporation (“Complainant”) of Shelton, Connecticut. *See* 84FR 3486-87 (Feb. 12, 2019). The complaint, as supplemented, alleges a violation of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain pocket lighters by reason of infringement of U.S. Trademark Registration Nos. 1,761,622 and 2,278,917. *See id.* The notice of investigation names numerous respondents, including Milan Import Export Company, LLC (“Milan”) of San Diego, California; Wellpine Company Limited of Hong Kong, China; and Zhuoye Lighter Manufacturing Co., Ltd. of Foshan City, China (collectively, “Defaulting Respondents”). *See id.* The Office of Unfair Import Investigations is also a party to the investigation. *See id.*

The Commission previously terminated other respondents based on settlement and entry of a consent order. *See* Order No. 21 (Oct. 30, 2019), *unreviewed*, Comm’n Notice (Nov. 25, 2019). The Commission also terminated an unserved respondent based on the withdrawal of the

complaint allegations as to that respondent. *See* Order No. 23 (Dec. 18, 2019), *unreviewed*, Comm'n Notice (Jan. 16, 2020).

The Commission further found each of the Defaulting Respondents in default. *See* Order No. 13 (June 6, 2019), *unreviewed*, Comm'n Notice (July 8, 2019); Order No. 14 (June 6, 2019), *unreviewed*, Comm'n Notice (July 8, 2019); Order No. 15 (June 18, 2019), *aff'd with modification*, Comm'n Notice (July 10, 2019). On February 12, 2020, the ALJ issued an ID granting Complainant's motion for summary determination of violation of section 337 by the Defaulting Respondents.

On June 22, 2020, the Commission issued a notice determining to affirm the ID and terminating the investigation. *See* 85 FR 38389-90 (June 26, 2020). The Commission also determined to issue a GEO prohibiting the unlicensed entry of certain pocket lighters that infringe Complainant's asserted trade dress and a CDO directed to defaulting respondent Milan. *See id.* The GEO, however, inadvertently omits a provision requiring Complainant to file a yearly written statement with the Commission attesting that Complainant continues to use the asserted trade dress in commerce in the United States, that the asserted trade dress has not been abandoned, cancelled, or rendered invalid or unenforceable, and that Complainant continues to satisfy the domestic industry requirement.

The Commission has determined to issue a corrected GEO including the reporting requirement.

The Commission's vote on this determination took place on October 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).

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: October 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, **Yoncha Kundupoglu, Esq.**, and the following parties as indicated, on **October 27, 2020**.



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

**On Behalf of Complainant BIC Corporation:**

Jordan L. Coyle, Esq.  
**ORRICK, HERRINGTON & SUTCLIFFE, LLP**  
Columbia Center  
1152 15<sup>th</sup> Street, NW  
Washington, DC 20005  
Email: jcoyle@orrick.com

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

**Respondents:**

Milan Import Export company, LLC  
2333 Camino Del Rio S. Suite 120  
San Diego, CA 92108

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

Wellpine Company Limited  
Unit 701 , Grand City Plaza  
No. 1-17 Sai Lau Kok Road, Tsuen Wan,  
N.T., Hong Kong

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

Zhuoye Lighter Manufacturing Co, Ltd.  
No. 2, 3<sup>rd</sup>, New Techological Industrial Zone  
Foshan City, Guangdong  
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 POCKET LIGHTERS**

**Inv. No. 337-TA-1142**

**CORRECTED GENERAL EXCLUSION ORDER**

The United States International Trade Commission (“Commission”) has determined that there is a violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337) (“section 337”), in the unlawful importation, sale for importation, or sale within the United States after importation of certain pocket lighters that include an oblong body which is elliptical in cross-section, a fork which is generally parabolic in cross-section, and/or a hood which is generally parabolic in cross-section, that infringe one or more of U.S. Trademark Registration Nos. 1,761,622 and 2,278,917 (collectively, “the Asserted Trade Dress Marks”).<sup>1</sup>

Having reviewed the record of this investigation, including the written submissions of the parties, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined pursuant to 19 U.S.C. § 1337(d)(2), that a general exclusion from entry for consumption is necessary to prevent circumvention of an exclusion order limited to products of named persons or entities and because there is a pattern of violation of section 337 and it is difficult to identify the source of infringing products. Accordingly, the Commission has determined to issue a general exclusion order prohibiting the unlicensed entry of pocket lighters that include an oblong body which is elliptical in cross-

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<sup>1</sup> Copies of the registration certificates for the Asserted Trade Dress Marks are attached as Exhibits 1 and 2.

section, a fork which is generally parabolic in cross-section, and/or a hood which is generally parabolic in cross-section, that infringe the Asserted Trade Dress Marks.

The Commission has also determined that the public interest factors enumerated in 19 U.S.C. § 1337(d)(1) do not preclude the issuance of the general exclusion order. The Commission has further determined that a bond of one hundred (100) percent of the entered value will be required during the period of Presidential review.

Accordingly, the Commission hereby **ORDERS** that:

1. Pocket lighters that include an oblong body which is elliptical in cross-section, a fork which is generally parabolic in cross-section, and/or a hood which is generally parabolic in cross-section, that infringe one or more of the Asserted Trade Dress Marks (“covered articles”) are excluded from entry for consumption into the United States, entry for consumption from a foreign trade zone, or 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 Asserted Trade Dress Marks are abandoned, canceled, or rendered invalid or unenforceable.
2. Notwithstanding paragraph 1 of this Order, covered articles are entitled to entry into the United States for consumption, entry for consumption from a foreign-trade zone, or 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 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 Production (“CBP”) in advance of the date of the entry, pursuant to procedures CBP establishes.

3. At the discretion of CBP and pursuant to procedures that it establishes, persons seeking to import pocket lighters that include an oblong body which is elliptical in cross-section, a fork which is generally parabolic in cross-section, and/or a hood which is generally parabolic in cross-section 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.
4. This Order does not exempt infringing articles from seizures under the trademark laws enforced by CBP, most notably 19 U.S.C. § 1526(e) and 19 U.S.C. § 1595a(c)(2)(C) for a violation of 15 U.S.C. § 1124.
5. Complainant BIC Corporation (“BIC”) shall file a written statement with the Commission, made under oath, each year on the anniversary of the issuance of this Order stating: (i) whether BIC continues to use each of the Asserted Trade Dress Marks in commerce in the United States in connection with pocket lighters

that include an oblong body which is elliptical in cross-section, a fork which is generally parabolic in cross-section, and/or a hood which is generally parabolic in cross-section; (ii) whether any of the Asserted Trade Dress Marks has been abandoned, canceled, or rendered invalid or unenforceable; and (iii) whether BIC 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 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.



Lisa R. Barton  
Secretary to the Commission

Issued: October 27, 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, **Yoncha Kundupoglu, Esq.**, and the following parties as indicated, on **October 27, 2020**.



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

**On Behalf of Complainant BIC Corporation:**

Jordan L. Coyle, Esq.  
**ORRICK, HERRINGTON & SUTCLIFFE, LLP**  
Columbia Center  
1152 15<sup>th</sup> Street, NW  
Washington, DC 20005  
Email: jcoyle@orrick.com

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**Respondents:**

Milan Import Export company, LLC  
2333 Camino Del Rio S. Suite 120  
San Diego, CA 92108

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

Wellpine Company Limited  
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No. 1-17 Sai Lau Kok Road, Tsuen Wan,  
N.T., Hong Kong

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

Zhuoye Lighter Manufacturing Co, Ltd.  
No. 2, 3<sup>rd</sup>, New Techological Industrial Zone  
Foshan City, Guangdong  
China

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

# **EXHIBIT 1**

7670382



# THE UNITED STATES OF AMERICA

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

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office

March 06, 2018

THE ATTACHED U.S. TRADEMARK REGISTRATION 1,761,622 IS CERTIFIED TO BE A TRUE COPY WHICH IS IN FULL FORCE AND EFFECT WITH NOTATIONS OF ALL STATUTORY ACTIONS TAKEN THEREON AS DISCLOSED BY THE RECORDS OF THE UNITED STATES PATENT AND TRADEMARK OFFICE.

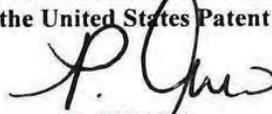
REGISTERED FOR A TERM OF 10 YEARS FROM *March 30, 1993*  
2nd RENEWAL FOR A TERM OF 10 YEARS FROM *March 30, 2013*  
SECTION 8 & 15

SAID RECORDS SHOW TITLE TO BE IN:

*BIC CORPORATION*

*A CONNECTICUT CORPORATION*

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

  
P. SWAIN  
Certifying Officer



Int. Cl.: 34

Prior U.S. Cl.: 8

Reg. No. 1,761,622

**United States Patent and Trademark Office** Registered Mar. 30, 1993

**TRADEMARK  
PRINCIPAL REGISTER**



BIC CORPORATION (NEW YORK CORPORATION)  
500 BIC DRIVE  
MILFORD, CT 06460

FOR: CIGARETTE LIGHTERS NOT MADE OF PRECIOUS METAL, IN CLASS 34 (U.S. CL. 8).

FIRST USE 10-25-1973; IN COMMERCE 10-25-1973.

THE LINING SHOWN IN THE DRAWING IS FOR SHADING PURPOSES ONLY AND IS NOT A FEATURE OF THE MARK.

THE DRAWING SHOWS A LIGHTER HAVING AN OBLONG BODY WHICH IS ELLIPTICAL IN CROSS-SECTION; A FORK WHICH IS GENERALLY PARABOLIC IN CROSS-SECTION; AND A HOOD WHICH IS GENERALLY PARABOLIC IN CROSS-SECTION.

SEC. 2(F).

SER. NO. 73-808,159, FILED 6-21-1989.

CRAIG K. MORRIS, EXAMINING ATTORNEY



# **EXHIBIT 2**

7670382



# THE UNITED STATES OF AMERICA

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

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office

March 06, 2018

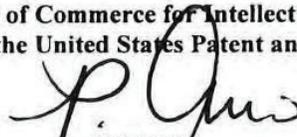
THE ATTACHED U.S. TRADEMARK REGISTRATION 2,278,917 IS  
CERTIFIED TO BE A TRUE COPY WHICH IS IN FULL FORCE AND  
EFFECT WITH NOTATIONS OF ALL STATUTORY ACTIONS TAKEN  
THEREON AS DISCLOSED BY THE RECORDS OF THE UNITED STATES  
PATENT AND TRADEMARK OFFICE.

REGISTERED FOR A TERM OF *10* YEARS FROM *September 21, 1999*  
*1st* RENEWAL FOR A TERM OF *10* YEARS FROM *September 21, 2009*  
SECTION 8 & 15

SAID RECORDS SHOW TITLE TO BE IN:

*BIC CORPORATION*  
*A CONNECTICUT CORPORATION*

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

  
P. SWAIN  
Certifying Officer



BIC-ITC-0000038

Int. Cl.: 34

Prior U.S. Cls.: 2, 8, 9 and 17

Reg. No. 2,278,917

United States Patent and Trademark Office

Registered Sep. 21, 1999

**TRADEMARK  
PRINCIPAL REGISTER**



BIC CORPORATION (NEW YORK CORPORATION)  
500 BIC DRIVE  
MILFORD, CT 06460

FOR: CIGARETTE LIGHTERS NOT MADE OF PRECIOUS METAL, IN CLASS 34 (U.S. CLS. 2, 8, 9 AND 17).

FIRST USE 2-0-1995; IN COMMERCE 2-0-1995.

OWNER OF U.S. REG. NO. 1,761,622.  
THE LINING SHOWN IN THE DRAWING IS FOR SHADING PURPOSES ONLY AND IS NOT A FEATURE OF THE MARK. THE DRAWING

SHOWS A LIGHTER HAVING AN ABLONG BODY WHICH IS ELLIPTICAL IN CROSS-SECTION; A FORK WHICH IS GENERALLY PARABOLIC IN CROSS-SECTION; AND A HOOD WHICH IS GENERALLY PARABOLIC IN CROSS-SECTION.

THE MARK CONSTITUTES THE CONFIGURATION OF THE PRODUCT, AS DEPICTED IN THE DRAWING.

SEC. 2(F).

SER. NO. 75-424,826, FILED 1-28-1998.

JOHN E. MICHOS, EXAMINING ATTORNEY



**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**Washington, D.C.**

**In the Matter of**

**CERTAIN POCKET LIGHTERS**

**Investigation No. 337-TA-1142**

**NOTICE OF COMMISSION FINAL DETERMINATION OF A VIOLATION OF SECTION 337; ISSUANCE OF A GENERAL EXCLUSION ORDER AND A CEASE AND DESIST ORDER; TERMINATION OF THE INVESTIGATION**

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

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to affirm an initial determination (“ID”) of the presiding administrative law judge (“ALJ”) granting the motion of BIC Corporation (“BIC” or “Complainant”) for summary determination of a violation of section 337 by respondents Milan Import Export Company, LLC (“Milan”); Wellpine Company Limited (“Wellpine”); and Zhuoye Lighter Manufacturing Co., Ltd. (“Zhuoye”) (collectively, “the Defaulting Respondents”). The Commission has also determined to issue a general exclusion order (“GEO”) barring entry of certain pocket lighters including an oblong body which is elliptical in cross-section, a fork which is generally parabolic in cross-section, and/or a hood which is generally parabolic in cross-section, that infringe Complainant’s asserted trade dress. The Commission has further determined to issue a cease and desist order (“CDO”) directed to respondent Milan. The investigation is terminated.

**FOR FURTHER INFORMATION CONTACT:** Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708-4716. 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:** On February 12, 2019, the Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (“section 337”), based on a complaint filed by Complainant BIC of Shelton, Connecticut. *See* 84 *Fed. Reg.* 3486-87 (Feb. 12, 2019). The complaint, as supplemented, alleges a violation of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain pocket lighters by reason of infringement of U.S. Trademark Registration Nos. 1,761,622 and 2,278,917. *See id.* The notice of investigation names numerous respondents, including Milan of San Diego, California; Wellpine of Hong

Kong; and Zhuoye of Foshan City, China (collectively, “Defaulting Respondents”). *See id.* The Office of Unfair Import Investigations (“OUII”) is also a party to the investigation. *See id.*

The Commission previously terminated other respondents based on settlement and entry of a consent order. *See* Order No. 21 (Oct. 30, 2019), *unreviewed*, Comm’n Notice (Nov. 25, 2019). The Commission also terminated an unserved respondent based on the withdrawal of the complaint allegations as to that respondent. *See* Order No. 23 (Dec. 18, 2019), *unreviewed*, Comm’n Notice (Jan. 16, 2020).

The Commission further found each of the Defaulting Respondents in default. *See* Order No. 13 (June 6, 2019), *unreviewed*, Comm’n Notice (July 8, 2019); Order No. 14 (June 6, 2019), *unreviewed*, Comm’n Notice (July 8, 2019); Order No. 15 (June 18, 2019), *aff’d with modification*, Comm’n Notice (July 10, 2019).

On November 14, 2019, Complainant filed a motion for summary determination of a violation of section 337 by the Defaulting Respondents. On December 16, 2019, OUII filed a response in support of Complainant’s motion. On February 12, 2020, the ALJ issued an ID granting Complainant’s motion for summary determination of violation of section 337 by the Defaulting Respondents. No petition for review of the ID was filed.

On April 22, 2020, the Commission determined to review the ID in part with respect to the ID’s findings on the economic prong of the domestic industry requirement. *See* 85 Fed. Reg. 23528-29 (Apr. 28, 2020). The Commission’s notice also requested written submissions on remedy, the public interest, and bonding. *See id.* On May 8, 2020, Complainant and OUII submitted written submissions, and on May 15, 2020, Complainant submitted a reply submission, in response to the Commission’s notice. No other submissions were received.

As explained in the Commission’s Opinion issued concurrently herewith, the Commission has determined to affirm the ID’s findings with respect to the economic prong of the domestic industry requirement and, thus, the ID’s finding of a violation of section 337. The Commission has also determined that the appropriate remedy in this investigation is: (1) a GEO prohibiting the unlicensed entry of certain pocket lighters including an oblong body which is elliptical in cross-section, a fork which is generally parabolic in cross-section, and/or a hood which is generally parabolic in cross-section, that infringe Complainant’s asserted trade dress, pursuant to section 337(d)(2) (19 U.S.C. 1337(d)(2)); and (2) a CDO directed to defaulting respondent Milan, pursuant to section 337(f)(1) (19 U.S.C. 1337(f)(1)). The Commission has further determined that the bond during the period of Presidential review pursuant to section 337(j) (19 U.S.C. 1337(j)) shall be in the amount of 100 percent of the entered value of the imported articles that are subject to the GEO and/or CDO. Still further, the Commission has determined that the public interest factors enumerated in subsections 337(d)(1) and (f)(1) (19 U.S.C. 1337(d)(1), (f)(1)) do not preclude the issuance of the GEO and CDO.

The Commission vote for this determination took place on June 22, 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', with a stylized flourish at the end.

Lisa R. Barton  
Secretary to the Commission

Issued: June 22, 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, **Yoncha Kundupoglu, Esq.**, and the following parties as indicated, on **June 22, 2020**.



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

**On Behalf of Complainant BIC Corporation:**

Jordan L. Coyle, Esq.  
**ORRICK, HERRINGTON & SUTCLIFFE, LLP**  
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**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**Washington, DC**

**In the Matter of**

**CERTAIN POCKET LIGHTERS**

**Inv. No. 337-TA-1142**

**GENERAL EXCLUSION ORDER**

The United States International Trade Commission (“Commission”) has determined that there is a violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337) (“section 337”), in the unlawful importation, sale for importation, or sale within the United States after importation of certain pocket lighters that include an oblong body which is elliptical in cross-section, a fork which is generally parabolic in cross-section, and/or a hood which is generally parabolic in cross-section, that infringe one or more of U.S. Trademark Registration Nos. 1,761,622 and 2,278,917 (collectively, “the Asserted Trade Dress Marks”).<sup>1</sup>

Having reviewed the record of this investigation, including the written submissions of the parties, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined pursuant to 19 U.S.C. § 1337(d)(2), that a general exclusion from entry for consumption is necessary to prevent circumvention of an exclusion order limited to products of named persons or entities and because there is a pattern of violation of section 337 and it is difficult to identify the source of infringing products. Accordingly, the Commission has determined to issue a general exclusion order prohibiting the unlicensed entry of pocket lighters that include an oblong body which is elliptical in cross-

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<sup>1</sup> Copies of the registration certificates for the Asserted Trade Dress Marks are attached as Exhibits 1 and 2.

section, a fork which is generally parabolic in cross-section, and/or a hood which is generally parabolic in cross-section, that infringe the Asserted Trade Dress Marks.

The Commission has also determined that the public interest factors enumerated in 19 U.S.C. § 1337(d)(1) do not preclude the issuance of the general exclusion order. The Commission has further determined that a bond of one hundred (100) percent of the entered value will be required during the period of Presidential review.

Accordingly, the Commission hereby **ORDERS** that:

1. Pocket lighters that include an oblong body which is elliptical in cross-section, a fork which is generally parabolic in cross-section, and/or a hood which is generally parabolic in cross-section, that infringe one or more of the Asserted Trade Dress Marks (“covered articles”) are excluded from entry for consumption into the United States, entry for consumption from a foreign trade zone, or 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 Asserted Trade Dress Marks are abandoned, canceled, or rendered invalid or unenforceable.
2. Notwithstanding paragraph 1 of this Order, covered articles are entitled to entry into the United States for consumption, entry for consumption from a foreign-trade zone, or 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 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 Production (“CBP”) in advance of the date of the entry, pursuant to procedures CBP establishes.

3. At the discretion of CBP and pursuant to procedures that it establishes, persons seeking to import pocket lighters that include an oblong body which is elliptical in cross-section, a fork which is generally parabolic in cross-section, and/or a hood which is generally parabolic in cross-section 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.
4. This Order does not exempt infringing articles from seizures under the trademark laws enforced by CBP, most notably 19 U.S.C. § 1526(e) and 19 U.S.C. § 1595a(c)(2)(C) for a violation of 15 U.S.C. § 1124.
5. 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).

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

7. 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". The signature is stylized and cursive.

Lisa R. Barton  
Secretary to the Commission

Issued: June 22, 2020

# **EXHIBIT 1**

7670382



# THE UNITED STATES OF AMERICA

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

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office

March 06, 2018

THE ATTACHED U.S. TRADEMARK REGISTRATION 1,761,622 IS CERTIFIED TO BE A TRUE COPY WHICH IS IN FULL FORCE AND EFFECT WITH NOTATIONS OF ALL STATUTORY ACTIONS TAKEN THEREON AS DISCLOSED BY THE RECORDS OF THE UNITED STATES PATENT AND TRADEMARK OFFICE.

REGISTERED FOR A TERM OF 10 YEARS FROM *March 30, 1993*  
2nd RENEWAL FOR A TERM OF 10 YEARS FROM *March 30, 2013*  
SECTION 8 & 15

SAID RECORDS SHOW TITLE TO BE IN:

*BIC CORPORATION*

*A CONNECTICUT CORPORATION*

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

  
P. SWAIN  
Certifying Officer



Int. Cl.: 34

Prior U.S. Cl.: 8

Reg. No. 1,761,622

**United States Patent and Trademark Office** Registered Mar. 30, 1993

**TRADEMARK  
PRINCIPAL REGISTER**



BIC CORPORATION (NEW YORK CORPORATION)  
500 BIC DRIVE  
MILFORD, CT 06460

FOR: CIGARETTE LIGHTERS NOT MADE OF PRECIOUS METAL, IN CLASS 34 (U.S. CL. 8).

FIRST USE 10-25-1973; IN COMMERCE 10-25-1973.

THE LINING SHOWN IN THE DRAWING IS FOR SHADING PURPOSES ONLY AND IS NOT A FEATURE OF THE MARK.

THE DRAWING SHOWS A LIGHTER HAVING AN OBLONG BODY WHICH IS ELLIPTICAL IN CROSS-SECTION; A FORK WHICH IS GENERALLY PARABOLIC IN CROSS-SECTION; AND A HOOD WHICH IS GENERALLY PARABOLIC IN CROSS-SECTION.

SEC. 2(F).

SER. NO. 73-808,159, FILED 6-21-1989.

CRAIG K. MORRIS, EXAMINING ATTORNEY



# **EXHIBIT 2**

7670382



# THE UNITED STATES OF AMERICA

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

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office

March 06, 2018

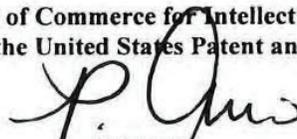
THE ATTACHED U.S. TRADEMARK REGISTRATION 2,278,917 IS  
CERTIFIED TO BE A TRUE COPY WHICH IS IN FULL FORCE AND  
EFFECT WITH NOTATIONS OF ALL STATUTORY ACTIONS TAKEN  
THEREON AS DISCLOSED BY THE RECORDS OF THE UNITED STATES  
PATENT AND TRADEMARK OFFICE.

REGISTERED FOR A TERM OF *10* YEARS FROM *September 21, 1999*  
*1st* RENEWAL FOR A TERM OF *10* YEARS FROM *September 21, 2009*  
SECTION 8 & 15

SAID RECORDS SHOW TITLE TO BE IN:

*BIC CORPORATION*  
*A CONNECTICUT CORPORATION*

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

  
P. SWAIN  
Certifying Officer



BIC-ITC-0000038

Int. Cl.: 34

Prior U.S. Cls.: 2, 8, 9 and 17

Reg. No. 2,278,917

United States Patent and Trademark Office

Registered Sep. 21, 1999

**TRADEMARK  
PRINCIPAL REGISTER**



BIC CORPORATION (NEW YORK CORPORATION)  
500 BIC DRIVE  
MILFORD, CT 06460

FOR: CIGARETTE LIGHTERS NOT MADE OF PRECIOUS METAL, IN CLASS 34 (U.S. CLS. 2, 8, 9 AND 17).

FIRST USE 2-0-1995; IN COMMERCE 2-0-1995.

OWNER OF U.S. REG. NO. 1,761,622.  
THE LINING SHOWN IN THE DRAWING IS FOR SHADING PURPOSES ONLY AND IS NOT A FEATURE OF THE MARK. THE DRAWING

SHOWS A LIGHTER HAVING AN ABLONG BODY WHICH IS ELLIPTICAL IN CROSS-SECTION; A FORK WHICH IS GENERALLY PARABOLIC IN CROSS-SECTION; AND A HOOD WHICH IS GENERALLY PARABOLIC IN CROSS-SECTION.

THE MARK CONSTITUTES THE CONFIGURATION OF THE PRODUCT, AS DEPICTED IN THE DRAWING.

SEC. 2(F).

SER. NO. 75-424,826, FILED 1-28-1998.

JOHN E. MICHOS, EXAMINING ATTORNEY



**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served via EDIS upon the Commission Investigative Attorney, **Yoncha Kundupoglu, Esq.**, and the following parties as indicated, on **June 22, 2020**.



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

**On Behalf of Complainant BIC Corporation:**

Jordan L. Coyle, Esq.  
**ORRICK, HERRINGTON & SUTCLIFFE, LLP**  
Columbia Center  
1152 15<sup>th</sup> Street, NW  
Washington, DC 20005  
Email: jcoyle@orrick.com

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

**Respondents:**

Milan Import Export company, LLC  
2333 Camino Del Rio S. Suite 120  
San Diego, CA 92108

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

Wellpine Company Limited  
Unit 701 , Grand City Plaza  
No. 1-17 Sai Lau Kok Road, Tsuen Wan,  
N.T., Hong Kong

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

Zhuoye Lighter Manufacturing Co, Ltd.  
No. 2, 3<sup>rd</sup>, New Techological Industrial Zone  
Foshan City, Guangdong  
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 POCKET LIGHTERS**

**Inv. No. 337-TA-1142**

**CEASE AND DESIST ORDER**

**IT IS HEREBY ORDERED THAT** Milan Import Export Company, LLC of San Diego, California, cease and desist from conducting any of the following activities in the United States: importing, selling, offering for sale, marketing, advertising, distributing, transferring (except for exportation), soliciting United States agents or distributors and aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of pocket lighters that include an oblong body which is elliptical in cross-section, a fork which is generally parabolic in cross-section, and/or a hood which is generally parabolic in cross-section, that infringe one or more of U.S. Trademark Registration Nos. 1,761,622 and 2,278,917 (collectively, “the Asserted Trade Dress Marks”) in violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337).<sup>1</sup>

**I. Definitions**

As used in this order:

- (A) “Commission” shall mean the United States International Trade Commission.
- (B) “Complainant” shall mean BIC Corporation of Shelton, Connecticut.

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<sup>1</sup> Copies of the registration certificates for the Asserted Trade Dress Marks are attached as Exhibits 1 and 2.

- (C) “Respondent” shall mean Milan Import Export Company, LLC of San Diego, California.
- (D) “Person” shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority-owned or controlled subsidiaries, successors, or assigns.
- (E) “United States” shall mean the fifty States, the District of Columbia, and Puerto Rico.
- (F) The terms “import” and “importation” refer to importation for entry for consumption under the Customs laws of the United States.
- (G) The term “covered products” shall mean pocket lighters that include an oblong body which is elliptical in cross-section, a fork which is generally parabolic in cross-section, and/or a hood which is generally parabolic in cross-section, that infringe one or more of the Asserted Trade Dress Marks. Covered products shall not include articles for which a provision of law or license avoids liability for infringement.

## **II. Applicability**

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by section III, *infra*, for, with, or otherwise on behalf of, Respondent.

### **III. Conduct Prohibited**

The following conduct of Respondent in the United States is prohibited by this Order.

Until such date as the Asserted Trade Dress Marks are abandoned, canceled, or rendered invalid or unenforceable, Respondent shall not:

- (A) import, sell for importation, or sell after importation into the United States covered products;
- (B) market, distribute, offer for sale, or otherwise transfer (except for exportation) imported covered products;
- (C) advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

### **IV. Conduct Permitted**

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the Asserted Trade Dress Marks licenses or authorizes such specific conduct.

### **V. Reporting**

For purposes of this requirement, the reporting periods shall commence on January 1 of each year and shall end on the subsequent December 31. The first report required under this section shall cover the period from the date of issuance of this order through December 31, 2020. This reporting requirement shall continue in force until such time as Respondent has truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of covered products that it has (i) imported and/or (ii) sold in the United States after importation during the reporting period, and (b) the quantity in units and value in U.S. dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

When filing written submissions, Respondent must file the original document electronically on or before the deadlines stated above and submit eight (8) true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-1142") in a prominent place on the cover pages 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). If Respondent desires to submit a document to the Commission in confidence, it must file the original and a public version of the original with the Office of the Secretary and must serve a copy of the confidential version on Complainant's counsel.<sup>2</sup>

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.

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<sup>2</sup> Complainant must file a letter with the Secretary identifying the attorney to receive reports and bond information associated with this Order. The designated attorney must be on the protective order entered in the investigation.

210.4(f) are currently waived, pending resolution of the COVID-19 crisis. 85 Fed. Reg. 15798 (March 19, 2020).

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

## **VI. Record-Keeping and Inspection**

(A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.

(B) For the purposes of determining or securing compliance with this Order and for no other purpose, subject to any privilege recognized by the federal courts of the United States, and upon reasonable written notice by the Commission or its staff, duly authorized representatives of the Commission shall be permitted access and the right to inspect and copy, in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, in detail and in summary form, that must be retained under subparagraph VI(A) of this Order.

## **VII. Service of Cease and Desist Order**

Respondent is ordered and directed to:

(A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees

who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;

(B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this Order, a copy of the Order upon each successor; and

(C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this Order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII (C) shall remain in effect until such date as the Asserted Trade Dress Marks are abandoned, canceled, or rendered invalid or unenforceable.

#### **VIII. Confidentiality**

Any request for confidential treatment of information obtained by the Commission pursuant to section V of this Order should be made in accordance with section 201.6 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 201.6). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

#### **IX. Enforcement**

Violation of this order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.75), including an action for civil penalties under section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(f)), as well as any other action that the Commission deems appropriate. In determining whether Respondent is in violation of this order, the Commission may infer facts adverse to Respondent if it fails to provide adequate or timely information.

## **X. Modification**

The Commission may amend this Order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

## **XI. Bonding**

The conduct prohibited by section III of this order may be continued during the sixty-day period in which this Order is under review by the United States Trade Representative, as delegated by the President (70 Fed. Reg. 43251 (Jul. 21, 2005)), subject to Respondent posting of a bond in the amount of one hundred (100) percent of the entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by section IV of this Order. Covered products imported on or after the date of issuance of this Order are subject to the entry bond as set forth in the exclusion order issued by the Commission and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* 19 C.F.R. § 210.68. The bond and any accompanying documentation are to be provided to and approved by the Commission prior to the commencement of conduct that is otherwise prohibited by section III of this Order. Upon the Secretary's acceptance of the bond, (a) the Secretary will serve an acceptance letter on all parties, and (b) Respondent must serve a copy of the bond and accompanying documentation on Complainant's counsel.<sup>3</sup>

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<sup>3</sup> *See* Footnote 1.

The bond is to be forfeited in the event that the United States Trade Representative approves this Order (or does not disapprove it within the review period), unless (i) the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or (ii) Respondent exports or destroys the products subject to this bond and provides certification to that effect that is satisfactory to the Commission.

This bond is to be released in the event (i) the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved (or not disapproved) by the United States Trade Representative, (ii) the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or (iii) Respondent exports or destroys the products subject to this bond and provides certification to that effect that is satisfactory to the Commission, upon service on Respondent of an order issued by the Commission based upon application therefor made by Respondent to the Commission.

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', with a stylized flourish at the end.

Lisa R. Barton  
Secretary to the Commission

Issued: June 22, 2020

# **EXHIBIT 1**

7670382



# THE UNITED STATES OF AMERICA

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

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office

March 06, 2018

THE ATTACHED U.S. TRADEMARK REGISTRATION 1,761,622 IS CERTIFIED TO BE A TRUE COPY WHICH IS IN FULL FORCE AND EFFECT WITH NOTATIONS OF ALL STATUTORY ACTIONS TAKEN THEREON AS DISCLOSED BY THE RECORDS OF THE UNITED STATES PATENT AND TRADEMARK OFFICE.

REGISTERED FOR A TERM OF 10 YEARS FROM *March 30, 1993*  
2nd RENEWAL FOR A TERM OF 10 YEARS FROM *March 30, 2013*  
SECTION 8 & 15

SAID RECORDS SHOW TITLE TO BE IN:

*BIC CORPORATION*

*A CONNECTICUT CORPORATION*

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

  
P. SWAIN  
Certifying Officer



Int. Cl.: 34

Prior U.S. Cl.: 8

Reg. No. 1,761,622

**United States Patent and Trademark Office** Registered Mar. 30, 1993

**TRADEMARK  
PRINCIPAL REGISTER**



BIC CORPORATION (NEW YORK CORPORATION)  
500 BIC DRIVE  
MILFORD, CT 06460

FOR: CIGARETTE LIGHTERS NOT MADE OF PRECIOUS METAL, IN CLASS 34 (U.S. CL. 8).

FIRST USE 10-25-1973; IN COMMERCE 10-25-1973.

THE LINING SHOWN IN THE DRAWING IS FOR SHADING PURPOSES ONLY AND IS NOT A FEATURE OF THE MARK.

THE DRAWING SHOWS A LIGHTER HAVING AN OBLONG BODY WHICH IS ELLIPTICAL IN CROSS-SECTION; A FORK WHICH IS GENERALLY PARABOLIC IN CROSS-SECTION; AND A HOOD WHICH IS GENERALLY PARABOLIC IN CROSS-SECTION.

SEC. 2(F).

SER. NO. 73-808,159, FILED 6-21-1989.

CRAIG K. MORRIS, EXAMINING ATTORNEY



# **EXHIBIT 2**

7670382



# THE UNITED STATES OF AMERICA

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

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office

March 06, 2018

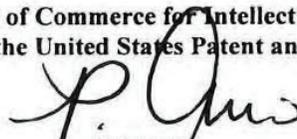
THE ATTACHED U.S. TRADEMARK REGISTRATION 2,278,917 IS CERTIFIED TO BE A TRUE COPY WHICH IS IN FULL FORCE AND EFFECT WITH NOTATIONS OF ALL STATUTORY ACTIONS TAKEN THEREON AS DISCLOSED BY THE RECORDS OF THE UNITED STATES PATENT AND TRADEMARK OFFICE.

REGISTERED FOR A TERM OF *10* YEARS FROM *September 21, 1999*  
*1st* RENEWAL FOR A TERM OF *10* YEARS FROM *September 21, 2009*  
SECTION 8 & 15

SAID RECORDS SHOW TITLE TO BE IN:

*BIC CORPORATION*  
*A CONNECTICUT CORPORATION*

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

  
P. SWAIN  
Certifying Officer



BIC-ITC-0000038

Int. Cl.: 34

Prior U.S. Cls.: 2, 8, 9 and 17

Reg. No. 2,278,917

United States Patent and Trademark Office

Registered Sep. 21, 1999

**TRADEMARK  
PRINCIPAL REGISTER**



BIC CORPORATION (NEW YORK CORPORATION)  
500 BIC DRIVE  
MILFORD, CT 06460

FOR: CIGARETTE LIGHTERS NOT MADE OF PRECIOUS METAL, IN CLASS 34 (U.S. CLS. 2, 8, 9 AND 17).

FIRST USE 2-0-1995; IN COMMERCE 2-0-1995.

OWNER OF U.S. REG. NO. 1,761,622.  
THE LINING SHOWN IN THE DRAWING IS FOR SHADING PURPOSES ONLY AND IS NOT A FEATURE OF THE MARK. THE DRAWING

SHOWS A LIGHTER HAVING AN ABLONG BODY WHICH IS ELLIPTICAL IN CROSS-SECTION; A FORK WHICH IS GENERALLY PARABOLIC IN CROSS-SECTION; AND A HOOD WHICH IS GENERALLY PARABOLIC IN CROSS-SECTION.

THE MARK CONSTITUTES THE CONFIGURATION OF THE PRODUCT, AS DEPICTED IN THE DRAWING.

SEC. 2(F).

SER. NO. 75-424,826, FILED 1-28-1998.

JOHN E. MICHOS, EXAMINING ATTORNEY



**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served via EDIS upon the Commission Investigative Attorney, **Yoncha Kundupoglu, Esq.**, and the following parties as indicated, on **June 22, 2020**.



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

**On Behalf of Complainant BIC Corporation:**

Jordan L. Coyle, Esq.  
**ORRICK, HERRINGTON & SUTCLIFFE, LLP**  
Columbia Center  
1152 15<sup>th</sup> Street, NW  
Washington, DC 20005  
Email: jcoyle@orrick.com

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

**Respondents:**

Milan Import Export company, LLC  
2333 Camino Del Rio S. Suite 120  
San Diego, CA 92108

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

Wellpine Company Limited  
Unit 701 , Grand City Plaza  
No. 1-17 Sai Lau Kok Road, Tsuen Wan,  
N.T., Hong Kong

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

Zhuoye Lighter Manufacturing Co, Ltd.  
No. 2, 3<sup>rd</sup>, New Techological Industrial Zone  
Foshan City, Guangdong  
China

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

**PUBLIC VERSION**

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

**In the Matter of  
CERTAIN POCKET LIGHTERS**

**Inv. No. 337-TA-1142**

**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 (“section 337”) based on trade dress infringement by Milan Import Export Company, LLC (“Milan”); Wellpine Company Limited (“Wellpine”); and Zhuoye Lighter Manufacturing Co., Ltd. (“Zhuoye”) (collectively, “the Defaulting Respondents”). The Commission has also determined to issue a general exclusion order (“GEO”) against infringing articles and a cease and desist order (“CDO”) against defaulting respondent Milan. The Commission has further determined to set a bond during the period of Presidential review in the amount of one hundred (100) percent of the entered value of the infringing articles. This opinion sets forth the Commission’s reasoning in support of its determination. The Commission adopts the findings of the presiding Administrative Law Judge (“ALJ”) that are not inconsistent with this opinion.

**I. BACKGROUND**

**A. Procedural History**

On February 12, 2019, the Commission instituted this investigation under section 337 based on a complaint filed by BIC Corporation (“BIC” or “Complainant”) of Shelton, Connecticut. *See* 84 Fed. Reg. 3486-87 (Feb. 12, 2019). The complaint, as supplemented, alleges a violation of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain pocket lighters by

## PUBLIC VERSION

reason of infringement of certain registered trade dress, namely, U.S. Trademark Registration Nos. 1,761,622 (“the ’622 Trade Dress”) and 2,278,917 (“the ’917 Trade Dress”) (collectively, “the Asserted Trade Dress”). *See id.* The complaint also alleges the existence of a domestic industry. The notice of investigation names six respondents: Arrow Lighter, Inc. d/b/a MK Lighter, Inc. and MK Lighter Company of City of Industry, California (“Arrow” or “MK”)<sup>1</sup>; Benxi Fenghe Lighter Co., Ltd. of Benxi, China (“Benxi”); Excel Wholesale Distributors Inc. of College Point, New York (“Excel”); Milan of San Diego, California; Wellpine of Hong Kong; and Zhuoye of Foshan City, China. *See id.* The Office of Unfair Import Investigations is also a party to the investigation. *See id.*

The Commission previously terminated respondents Arrow and Excel based on settlement and entry of a consent order. *See* Order No. 21 (Oct. 30, 2019), *unreviewed*, Comm’n Notice (Nov. 25, 2019). The Commission also terminated an unserved respondent, Benxi, based on the withdrawal of the complaint with respect to that respondent. *See* Order No. 23 (Dec. 18, 2019), *unreviewed*, Comm’n Notice (Jan. 16, 2020).

Furthermore, the Commission found each of the Defaulting Respondents in default. *See* Order No. 13 (June 6, 2019), *unreviewed*, Comm’n Notice (July 8, 2019) (Wellpine); Order No. 14 (June 6, 2019), *unreviewed*, Comm’n Notice (July 8, 2019) (Milan); Order No. 15 (June 18, 2019), *aff’d with modification*, Comm’n Notice (July 10, 2019) (Zhuoye).

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<sup>1</sup> BIC explains that Zhuoye manufactures MK lighters, Wellpine supplies MK lighters to Arrow, and that Arrow sells these lighters in the United States. *See* Complainant’s Br. at 20 (defined *infra* note 4); *see also* MSDV at 10-11 (citing undisputed facts) (defined *infra* note 2). BIC also refers to “Arrow” as “MK” in its reply submission to the Commission. *See* Complainant’s Reply at 1 (defined *infra* note 5).

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On November 14, 2019, Complainant filed a motion for summary determination of a violation of section 337 by the Defaulting Respondents.<sup>2</sup> On December 16, 2019, the Commission Investigative Attorney (“IA”) filed a response in support of Complainant’s motion.<sup>3</sup>

On February 12, 2020, the ALJ issued a combined initial determination (“ID”) and recommended determination (“RD”) on remedy and bonding. The ID grants summary determination of a violation of section 337 by the Defaulting Respondents. *See* ID at 1-35. The RD recommends that the Commission: (1) issue a GEO against infringing articles; (2) issue a CDO against Milan; and (3) set a bond during the period of Presidential review at one hundred (100) percent of the entered value of infringing articles. *See* RD at 35-50. No party filed a petition for review of the ID.

On April 22, 2020, the Commission determined to review the ID in part with respect to the ID’s findings on the economic prong of the domestic industry requirement. *See* 85 Fed. Reg. 23528-29 (Apr. 28, 2020). The Commission’s notice also requested written submissions on remedy, the public interest, and bonding. *See id.* On May 8, 2020, Complainant and the IA submitted written submissions,<sup>4</sup> and on May 15, 2020, Complainant submitted a reply submission<sup>5</sup> in response to the Commission’s notice. No other submissions were received.

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<sup>2</sup> *See* Complainant’s Motion for Summary Determination of Violation as to Defaulting Respondents, as corrected on December 9, 2019 (hereinafter, “MSDV”).

<sup>3</sup> *See* Commission Investigative Staff’s Response to Complainant’s Motion for Summary Determination of Violation as to Defaulting Respondents (Dec. 16, 2019).

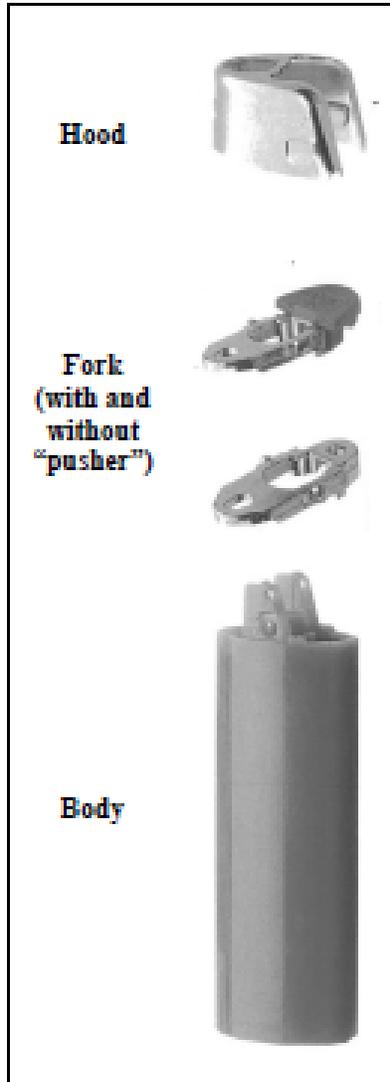
<sup>4</sup> Complainant’s Initial Submission on the Issues of Remedy, Public Interest, and Bonding (May 8, 2020) (hereinafter, “Complainant’s Br.”); Brief of the Office of Unfair Import Investigations on Remedy, the Public Interest, and Bonding (May 8, 2020) (hereinafter, “IA’s Br.”).

<sup>5</sup> Complainant’s Reply Submission on the Issues of Remedy, Public Interest and Bonding (May 15, 2020) (hereinafter, “Complainant’s Reply”).

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**B. The Asserted Trade Dress**

The products at issue in this investigation are pocket lighters that include an oblong body with an elliptical cross-section, a fork that is generally parabolic in cross-section, and a hood that is generally parabolic in cross-section. *See* 84 Fed. Reg. at 3487; *see also* ID at 5 (showing image illustrating the individual parts as reproduced below):

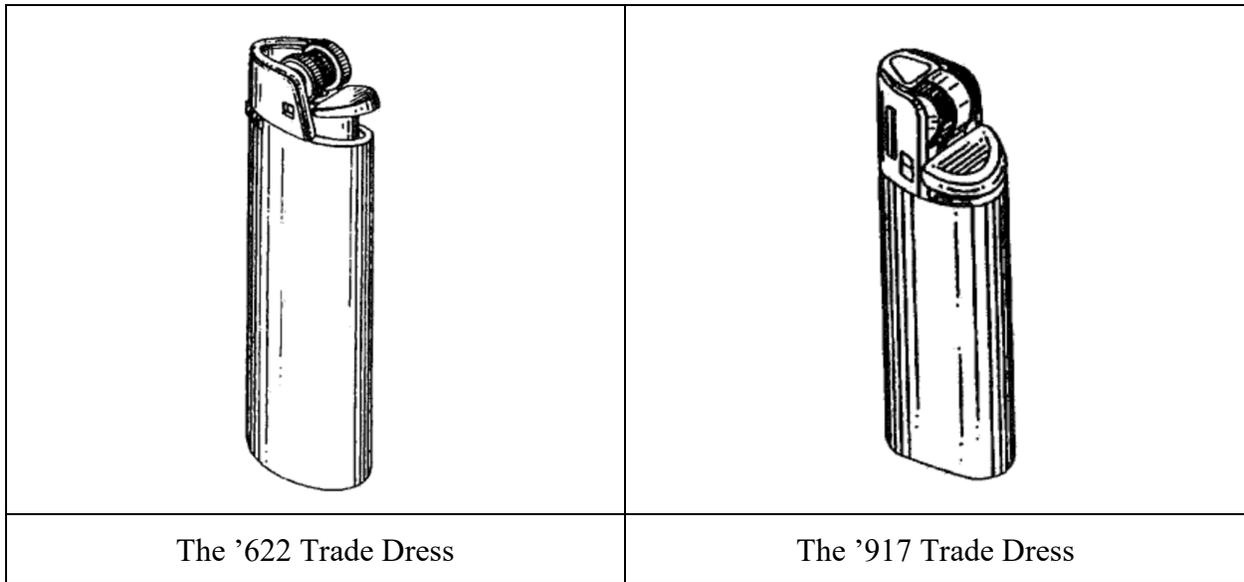


The Asserted Trade Dress is directed to “cigarette lighters not made of precious metals.” *See* ID at 5-6 (citing MSDV, Exs. 9-10). The only difference between the two asserted

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registrations is that the '917 Trade Dress includes a child-resistant guard over the spark wheel.

*See id.* at 7.



*See ID* at 6-7 (showing drawings for the Asserted Trade Dress, reproduced above).

**C. The Domestic Industry Products**

The domestic industry product is the BIC Classic Lighter, also known as the “Maxi” or “J26” model as illustrated below.



*See ID* at 9-10.

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**D. The Accused Products**

The accused products (reproduced below) include certain pocket lighters that are:

(1) sold for importation into the United States, imported into the United States, and sold in the United States after importation by respondents Zhuoye and Wellpine, namely, the ZY-7G Grip Series; the ZY-5 Medium Grip Series; the ZY-8G Mini Grip Series; the ZY-30E MK Dura; the ZY-7G MT Metal Flint (silver & gold); and (2) manufactured, imported, and sold by respondent Milan under the TUTU brand name. *See ID at 8-9.*

<b>ZY-7G Grip Series</b>	<b>ZY-5G Medium Grip Series</b>	<b>ZY-8G Mini Grip Series</b>
 A blue, textured, ergonomic lighter with a silver top and a red button. The 'MK' logo is visible on the front.	 A blue, textured, ergonomic lighter with a silver top and a red button. The 'MK' logo is visible on the front.	 A blue, textured, ergonomic lighter with a silver top and a red button. The 'MK' logo is visible on the front.

<b>ZY-30E MK Dura</b>	<b>ZY-7G MT Metal Flint</b>	<b>Milan TUTU Lighters</b>
 A yellow, textured, ergonomic lighter with a silver top and a red button. The 'MK' logo is visible on the front.	 Two metal flint lighters, one silver and one gold, with a textured finish.	 A display of multiple lighters in various colors (yellow, blue, green, white, black) with red buttons, arranged in a black tray. The letters 'TU' are printed on the front of the tray.

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### II. LEGAL STANDARDS

#### A. Standard on Review

Commission Rule 210.45(c) provides that “[o]n 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” and that “[t]he Commission also may make any findings or conclusions that in its judgment are proper based on the record in the proceeding.” See 19 C.F.R. § 210.45(c). In addition, as explained in *Certain Polyethylene Terephthalate Yarn and Products Containing Same*, “[o]nce the Commission determines to review an initial determination, the Commission reviews the determination under a *de novo* standard.” Inv. No. 337-TA-457, Comm’n Op., 2002 WL 1349938, \*5 (June 18, 2002) (citations omitted). This is “consistent with the Administrative Procedure Act which provides that once an initial agency decision is taken up for review, ‘the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.’” *Id.* (citing 5 U.S.C. § 557(b)).

#### B. Summary Determination Standard

Under Commission Rule 210.18, 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 a summary determination as a matter of law.” 19 C.F.R. § 210.18(b).

“[I]n deciding a motion for summary judgment, ‘the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.’” *Liebel-Flarsheim Co. v. Medrad, Inc.*, 481 F.3d 1371, 1377 (Fed. Cir. 2007) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). “The summary judgment movant has the initial responsibility of

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identifying the legal basis of its motion, and of pointing to those portions of the record that it believes demonstrate the absence of a genuine issue of material fact.” *Novartis Corp. v. Ben Venue Labs., Inc.*, 271 F.3d 1043, 1046 (Fed. Cir. 2001) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

**C. Violation of Section 337(a)(1)(C)**

Section 337(a)(1)(C) provides that the Commission has authority to investigate and adjudicate unfair trade practices relating to “[t]he importation into the United States, the sale for importation, or the sale within the United States after importation . . . of articles that infringe a valid and enforceable [registered] United States trademark.” 19 U.S.C. § 1337(a)(1)(C). Thus, a violation of section 337(a)(1)(C) requires a showing of: (1) importation; (2) infringement of a valid and enforceable registered trademark; and (3) an industry in the United States relating to the articles protected by the asserted trademark. *See* 19 U.S.C. § 1337(a)(1)(C), (a)(2), and (a)(3).

**D. Domestic Industry**

To prevail on a claim involving a registered trademark or a registered trade dress, a complainant must also show that “an industry in the United States, relating to the articles protected by the . . . trademark . . . concerned, exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2). Section 337(a)(3) provides that a domestic “industry . . . shall be considered to exist . . . with respect to the articles protected by the . . . trademark . . .” if there is:

- (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).

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The Commission has clarified in the past that its decisions as to the existence of a domestic industry are not based on the amount of an investment divorced from the circumstances of a particular case. Rather, the Commission evaluates the significance or substantiality of domestic industry expenditures “based on a proper contextual analysis in the relevant timeframe such as in the context of” the complainant’s or its licensee’s “operations, the marketplace, or the industry in question.” *Certain Solid State Storage Drives, Stacked Electronics Components, and Products Containing Same*, Inv. No. 337-TA-1097, Comm’n Op., 2018 WL 4300500, at \*18 (June 29, 2018). The Commission has also explained that this contextual analysis can reflect “a number of factors and approaches.” *Certain Magnetic Data Storage Tapes and Cartridges Containing the Same*, Inv. No. 337-TA-1012, Comm’n Op., 2018 WL 8648372, at \*75 (Apr. 2, 2018). The Commission has “sought to place 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.” *Certain Carburetors and Products Containing Such Carburetors*, Inv. No. 337-1123, Comm’n Op. at 18 (Oct. 28, 2019) (“*Carburetors*”). Section 337(a)(3) does not require a minimum monetary expenditure, nor does it obligate the complainant “to define or quantify the industry itself in absolute mathematical terms.” *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm’n Op., 2008 WL 2139143, \*14 (May 16, 2008).

### III. DISCUSSION AND ANALYSIS

In granting BIC’s motion for summary determination, the ID finds that a domestic industry exists and that a violation of section 337 has occurred. *See* ID at 16-35. As noted

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previously, the Commission determined to review the ID's findings with respect to the economic prong of the domestic industry requirement. *See* 85 Fed. Reg. at 23528.

### A. Domestic Industry

The Commission finds that the ID correctly determines that Complainant BIC satisfies the economic prong of the domestic industry requirement.<sup>6</sup> *See* ID at 29-35. Specifically, we find that Complainant's uncontested investments, proffered for consideration under subsections 337(a)(3)(A) (plant and equipment) and 337(a)(3)(B) (employment of labor or capital), are both quantitatively and qualitatively significant. *See* ID at 29-35; *see also Lelo Inc. v. ITC*, 786 F.3d 879, 883 (Fed. Cir. 2015) (holding that a quantitative analysis involves "determin[ing] whether there is a 'significant' increase or attribution by virtue of the [complainant's] asserted commercial activity in the United States").

As to BIC's plant investments proffered under subsection 337(a)(3)(A), the ID notes, and the Commission agrees, that "BIC owns facilities in Milford, Connecticut, that manufacture the

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<sup>6</sup> Commissioner Kearns does not join this statement nor the Commission's discussion of 337(a)(3)(A). The domestic industry products are manufactured in the United States using parts that are injection molded by BIC at its domestic facility in Milford, CT, as well as numerous other components. ID at 19-20; Complainant's Motion for Summary Determination That It Satisfies the Domestic Industry Requirement (Sept. 12, 2019) at 9. The record does not indicate the extent to which these other components are sourced overseas, but given that BIC's arguments regarding the economic prong do not claim that they are domestically sourced, it is a reasonable inference that at least some of these components are of foreign origin. In such a situation, Commissioner Kearns believes the statute and Commission precedent require a contextual analysis that looks at the relative importance of the domestic and foreign expenditures or investments. This can be done through such methods as a value-added analysis or a comparison of domestic investments to total sales values, *see, e.g., Carburetors*, Comm'n Op. at 18-19, and these types of analyses are likely to be critical to his assessment of domestic industry in such situations. The record here, however, does not contain sufficient information for such an analysis under subsection 337(a)(3)(A). While it well may be true that BIC's investments in plant and equipment in the United States are significant, he cannot make that finding on this record. He thus takes no position on whether BIC satisfies the economic prong of the domestic industry requirement under subsection 337(a)(3)(A). As discussed in fn. 9 below, he finds the economic prong is satisfied under subsection 337(a)(3)(B).

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BIC Classic Lighter.” *See* ID at 29. Specifically, the ID finds that “BIC’s Milford plant is [ ] square feet and was appraised at a market value of [ ] in 2016.” *See id.* at 30 (citing Milani<sup>7</sup> Expert Report at 19). In addition, the ID determines, “in 2017, BIC invested [ ] of the plant.” *See id.* (citing Milani Expert Report at 18-19; Vensel<sup>8</sup> Decl. at ¶ 13). The ID further finds that “BIC also presented un rebutted evidence of other capital expenditures for improvement of the Milford plant amounting to [ ] in 2017 and [ ] in 2018.” *See id.* (citing Milani Expert Report at 45-46). Still further, the ID finds significant a plant investment of [ ] of ancillary building rent claimed by BIC with the primary purpose of supporting manufacture of the BIC Classic Lighter. *See id.*

With regard to the investments in equipment proffered under subsection 337(a)(3)(A), the ID finds that BIC has established the following: (1) “evidence of an [ ] investment in equipment used to manufacture and package the BIC Classic Lighter from 2015-2018”; (2) “unrebutted evidence of [ ] in expenditures for spare parts and service for the equipment used to directly produce the BIC Classic Lighter”; and (3) “investments total[ing] [ ] in [expenses for equipment that supports the manufacture of the protected lighters].” *See id.* at 31 (citing Milani Expert Report at 25-28).

After considering BIC’s [ ] plant and equipment investments within the context of the company’s operations, the industry, and the marketplace for the protected articles, the Commission finds BIC’s domestic plant and equipment investments significant. These

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<sup>7</sup> BIC retained Michael K. Milani as an expert to provide opinions regarding the economic prong of the domestic industry requirement. *See* Ex. 3 to Complainant’s Motion for Summary Determination That It Satisfies the Domestic Industry Requirement (Sept. 12, 2019).

<sup>8</sup> Carl M. Vensel is Director of Finance for BIC.

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investments led to the manufacture of over [ ] BIC Classic Lighters in the United States during a three-year period. *Id.* at 29. In 2018, [ ] of all units produced at the Milford plant were BIC Classic Lighters protected by the Asserted Trade Dress. *Id.* at 30. Moreover, a substantial majority of all domestic sales of the protected articles comes from BIC’s domestic investments with respect to these products. *Id.* at 32 (“[ ] of BIC Classic Lighters sold in the United States are manufactured at BIC’s facility in Connecticut” and that “BIC’s Milford plant constitutes the entire disposable pocket lighter manufacturing industry in the United States.”).

The Commission further finds that the ID correctly determines that “BIC has likewise demonstrated by reliable evidence a significant domestic employment of labor and capital relating to protected articles” under subsection 337(a)(3)(B).<sup>9</sup> *See id.* at 33. The ID notes that the predominant share—[ ], specifically—of BIC’s claimed U.S. labor expenses are attributable to the BIC Classic Lighter and that “the labor at BIC’s Milford plant supplied [a substantial majority, *i.e.*,] [ ] of all BIC Classic Lighters sold in the United States in 2018.” *Id.* at 35. The ID further finds that BIC’s [ ] “labor expenses for the Milford plant are significant when compared to BIC’s worldwide investments in labor.” *Id.* at 34. BIC’s domestic labor costs for the domestic industry products accounted for at least [ ] of

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<sup>9</sup> Commissioner Kearns joins in the finding that Complainant has satisfied the economic prong based on a significant domestic employment of labor relating to protected articles under subsection 337(a)(3)(B) under his own analysis. As discussed in fn. 6 above, he believes that a proper contextual analysis in this investigation requires some comparison between domestic and foreign expenditures. Here, as discussed in the text *infra*, the record shows that BIC incurred at least [ ] of its worldwide labor costs in the United States (and this figure is an understatement as the foreign labor costs include costs for products other than the BIC Classic Lighter). He finds that this provides a sufficient contextual analysis to support a finding of significance. He takes no position with respect to employment of capital or the remainder of the ID’s discussion of this subsection.

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its worldwide labor costs, *id.* at 35, and this figure is likely an understatement because the worldwide costs used as the denominator are for all products, not just the BIC Classic Lighter. The ID further finds that “the labor expenses claimed by BIC [which amount to a total of [ ] in 2017 and 2018,] are qualitatively significant because . . . the Milford plant is the only manufacturer of disposable pocket lighters in the United States, and the vast majority of BIC’s labor expenses at the Milford plant are attributable to the BIC Classic Lighter.” *See id.* at 34 (citing Milani Expert Report at 32-33, 35-36).

Thus, the Commission has determined to affirm the ID’s finding that Complainant satisfies the domestic industry requirement under subsections 337(a)(3)(A)-(B).

### **B. Remedy**

In a section 337 proceeding, the Commission has “broad discretion in selecting the form, scope, and extent of the remedy.” *See Viscofan, S.A. v. United States Int’l Trade Comm’n*, 787 F.2d 544, 548 (Fed. Cir. 1986). In this investigation, the ALJ recommended that the Commission: (1) issue a GEO against infringing articles; (2) issue a CDO against respondent Milan; and (3) set a bond during the period of Presidential review in the amount of 100 percent of the entered value of the infringing products.

#### **1. General Exclusion Order**

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

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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).<sup>10</sup>

The Commission agrees with the ALJ’s recommendation to issue a GEO against infringing products. Specifically, undisputed, reliable, probative, and substantial evidence supports the ID’s conclusion that Complainant demonstrated a violation of section 337 by the Defaulting Respondents. In addition, the Commission agrees with the ID’s findings that the requirements of section 337(d)(2) are met and that a GEO is warranted in this investigation.

### a) Circumvention of Remedial Orders

The Commission finds that the RD correctly determines that a GEO is necessary to prevent circumvention of the Commission’s remedial orders. *See* RD at 40-44. For example, the RD finds that “Zhuoye and Wellpine are the same entity doing business under at least six names.” *See id.* at 42-43 (citing MSDV, Exs. 42, 47, 50; *Certain Ground Fault Circuit Interrupters & Prods. Containing Same*, Inv. No. 337-TA-739, Comm’n Op. at 88-89, 2012 WL 2394435, \*56 (June 8, 2012) (issuing a GEO where “some respondents and other potential manufacturers have a propensity and ability to change names and corporate forms”); *Certain Elec. Skin Care Devices, Brushes & Chargers Therefor, & Kits Containing the Same*, Inv. No. 337-TA-959, Comm’n Op., 2017 WL 8683854, \*9 (Feb. 13, 2017) (“*Electric Skin Care Devices*”) (issuing a GEO to prevent circumvention by “respondents [that] operate under

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<sup>10</sup> Because certain respondents appeared and participated in the investigation, section 337(d)(2), not section 337(g)(2), governs the Commission’s analysis of whether to issue a GEO. *See Certain Mobile Device Holders & Components Thereof*, Inv. No. 337-TA-1028, Comm’n Op. at 21-22 (Mar. 22, 2018); *Certain Sildenafil or any Pharmaceutically Acceptable Salt Thereof, Such as Sildenafil Citrate & Products Containing Same*, USITC Inv. No. 337-TA-489, Comm’n Op. at 4-5 & n.5 (July 26, 2004) (“*Sildenafil*”) (“We see no difference between th[e] standard [under section 337(d)(2)] and the ‘substantial, reliable, and probative evidence’ standard of section 337(g)(2).”) (citing 5 U.S.C. § 556).

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multiple names and distribute the subject articles through multiple entities”). In addition, as the RD finds, “Zhuoye intends to hide the nature of the activities it performs under different company names, including the Wellpine name.” *See id.* For instance, after the complaint was filed in this investigation, Zhuoye removed references to five corporate names from its website. *See* RD at 42-43; *accord* IA’s Br. at 7; Complainant’s Br. at 8-11. The RD further finds that Wellpine used “at least four different identifiers . . . on U.S. Customs and Border Protection forms.” *See* RD at 43 (citing MSDV, Ex. 54).

Furthermore, the RD determines, and the Commission agrees, that “[a] very large number of foreign suppliers offer [infringing] disposable pocket lighters via e-commerce platforms like Alibaba.com, Amazon.com, and eBay.com.” *See id.* at 36 (citing MSDV, Ex. 97 (Conlan<sup>11</sup> Decl.)). As the RD finds, “[w]hen search terms for authorized BIC products are used, such as BIC model number ‘j26,’ many unauthorized listings are displayed.” *See id.* at 36 (citing MSDV, Ex. 97 at ¶¶ 7-12). For example, the RD finds that “[Benxi], which was never successfully served, continues to offer what appears to be a pocket lighter nearly identical to the protected BIC Classic Lighter.” *See id.* at 39 (citing MSDV, Ex. 39); *accord* IA’s Br. at 7; Complainant’s Br. at 12-17. Furthermore, these foreign suppliers advertise their very large capacity to supply infringing pocket lighters. *See* RD at 39 (noting Benxi’s alleged capacity of 800,000 units per day).

Thus, the Commission finds that the RD correctly concludes that “a [GEO] is necessary to prevent circumvention of exclusion orders limited to named respondents.” *See id.* at 44.

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<sup>11</sup> Sandra M. Conlan is employed by Complainant as a Senior Paralegal & Legal Project Coordinator.

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### b) Pattern of Violation and Difficulty Identifying the Source of the Infringing Goods

The RD also recommends a GEO because Complainant “established a pattern of violation of section 337 by sources that are difficult to identify.” *See* RD at 44. The Commission agrees and determines that the record evidence supports the RD’s findings. The RD correctly finds “unrebutted evidence of a widespread pattern of violation of section 337.” *See id.* Specifically, the RD finds that “[m]illions of infringing pocket lighters have been imported into the United States over a period of years.” *See id.* (citing MSDV, Exs. 12, 54). In addition, the record evidence establishes that the Defaulting Respondents as well as numerous non-parties (*e.g.*, Benxi) sell and/or import infringing pocket lighters into the United States. *See id.* at 45-46 (citing MSDV, Exs. 39, 45-49, 59, 81, 87, 99).

The RD also correctly determines that “identifying the source of infringing pocket lighters is difficult.” *See id.* at 46. For example, the RD finds that “BIC has proffered evidence showing that infringing lighters are routinely sold online without any identification of the manufacturer or importer.” *See id.* (citing MSDV, Exs. 33, 37, 53, 55; *Certain Toner Cartridges & Components Thereof*, Inv. No. 337-TA-740, Comm’n Op. at 7-8, 2011 WL 13352062, \*3 (Oct. 5, 2011); *Sildenafil*, Comm’n Op. at 7-8); *accord* IA’s Br. at 8; Complainant’s Br. at 19-20. Furthermore, the evidence shows that “suppliers for infringing products are easily and quickly replaced.” *See* RD at 46 (citing MSDV, Ex. 13).

Thus, based on the evidence discussed above, the Commission has determined to issue a GEO pursuant to section 337(d)(2). 19 U.S.C. § 1337(d)(2).

### 2. Cease and Desist Order

Section 337(f)(1) provides that in addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue a cease and desist order as a remedy for violation of section

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337. *See* 19 U.S.C. § 1337(f)(1). The Commission generally issues a CDO when the evidence shows that a respondent maintains a “commercially significant” inventory of imported infringing products in the United States, or has significant domestic operations that could undercut the remedy provided by an exclusion order. *See, e.g., Electric Skin Care Devices*, 2017 WL 8683854, at \*16.

The RD recommends issuance of a CDO against defaulting respondent Milan (domestic respondent) but not against Zhuoye or Wellpine (foreign respondents). *See* RD at 48. The RD finds that “[t]he only record evidence of Zhuoye and Wellpine products being sold in the United States are sales through respondents Arrow and Excel . . . [which] settled out of this investigation” and were allowed to sell their existing inventory. *See id.* (citing MSDV, Ex. 8).

Complainant requests CDOs against foreign defaulters Zhuoye and Wellpine, arguing that there are commercially significant inventories in the United States of products manufactured by Zhuoye and sold by Wellpine to Arrow for importation into the United States, which are held in Arrow’s inventories, and that while a settlement agreement between BIC and Arrow and Excel allowed Arrow and Excel to sell their existing inventories of MK products only, it did not allow them to sell any inventory of Zhuoye or Wellpine products. *See* Complainant’s Br. at 30. In addition, Complainant presents supplementary evidence in its reply submission, arguing that “MK, Zhuoye and Wellpine operate as one company such that the Commission should issue CDOs as to Zhuoye and Wellpine.” *See* Complainant’s Reply at 8.<sup>12</sup>

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<sup>12</sup> As discussed *supra* note 1, BIC refers to “Arrow” as “MK” in its reply submission to the Commission. *See* Complainant’s Reply at 1.

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The Commission has determined to issue a CDO against Milan but not against Zhuoye or Wellpine.<sup>13, 14, 15</sup> As the RD finds, “Milan has imported at least three shipping containers of its infringing lighters . . . [which] could amount to more than 3 million lighters.” *See* RD at 48 (citing MSDV, Ex. 15). The RD further finds that “Milan’s infringing products are currently being offered for sale in the United States.” *See id.* (citing MSDV, Exs. 81, 87); *accord* IA’s Br. at 9-10; Complainant’s Br. at 28-29.

With respect to Zhuoye and Wellpine, however, BIC argues that they sell their imported products in the United States through Arrow and Excel. Arrow and Excel were terminated from the investigation based on a consent order and settlement with BIC. *See* Order No. 21. The Settlement Agreement authorizes Arrow and Excel to continue to sell their existing inventories of the subject pocket lighters. Specifically, the public version of the Settlement Agreement states: “Arrow may liquidate its existing inventory of Restricted Arrow Products over a period of 12 months beginning on the Effective Date” and “Excel may liquidate its existing inventory of Restricted Excel Products over a period of 18 months beginning on the Effective Date.” Order No. 21 (public version), Ex. C, Settlement Agreement at ¶ 6, *unreviewed*, Comm’n Notice (Nov.

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<sup>13</sup> The Commission has found Milan in default under Commission Rule 210.16 for failure to timely respond to the complaint and notice of investigation (“NOI”), failure to respond to the ALJ’s orders after its untimely response to the complaint and NOI, failure to respond to BIC’s motion for a show cause order and for an ID finding Milan in default, and failure to show good cause to avoid default under either 19 C.F.R. § 210.16(a) or 19 C.F.R. § 210.17. *See* Order No. 14 (June 6, 2019), *unreviewed*, Comm’n Notice (July 8, 2019). The Commission found Zhuoye in default under Commission Rule 210.17(e), based on its failure to respond to ALJ orders after its counsel withdrew from representation, although it had filed a timely response to the complaint and NOI. *See* Order No. 15 (June 18, 2019) (Zhuoye), *aff’d with modification*, Comm’n Notice (July 10, 2019). The Commission found Wellpine in default under Commission Rule 210.16 for failure to respond to the complaint and NOI and for failure to respond to the show cause order. *See* Order No. 13 (June 6, 2019), *unreviewed*, Comm’n Notice (July 8, 2019). As discussed above, the Commission has found a violation of section 337(a)(1)(C) by Milan, Zhuoye, and Wellpine based on substantial, reliable, and probative evidence as a predicate for the issuance of a GEO under section 337(d)(2).

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<sup>14</sup> In Commissioner Schmidtlein’s view, BIC’s requests for CDOs against Wellpine and Milan are governed by section 337(g)(1), rather than section 337(f)(1). Specifically, Wellpine and Milan did not respond to the complaint or otherwise appear in the investigation, and the other conditions of subsections (A) through (E) of section 337(g)(1) are met with respect to the requested CDOs. See Order No. 13 (finding Wellpine in default under Commission Rule 210.16), *unreviewed*, Comm’n Notice (July 8, 2019); Order No. 14 (June 6, 2019) (finding that Milan failed to show “why it should not be held in default, either **for failure to respond to the complaint** under 19 C.F.R. § 210.16(a) or as a sanction for failing to participate in the investigation after filing a written response to the complaint under 19 C.F.R § 210.17”) (emphasis added), *unreviewed*, Comm’n Notice (July 8, 2019). In prior investigations, Commissioner Schmidtlein has explained her view that absent public interest considerations to the contrary the “shall, upon request, issue” language in section 337(g)(1) does not grant the Commission discretion to decline to issue a requested CDO when the conditions of subsections (A) through (E) are satisfied. See *Certain Industrial Automation Systems and Components Thereof Including Control Systems, Controllers, Visualization Hardware, Motion and Motor Control Systems, Networking Equipment, Safety Devices, and Power Supplies*, Inv. No. 337-TA-1074, Comm’n Op., Dissenting Views of Commissioner Schmidtlein (Apr. 23, 2019); *Certain Water Filters and Components Thereof*, Inv. No. 337-TA-1126, Comm’n Op. at 10, n.1 (Nov. 12, 2019). Consistent with that view, Commissioner Schmidtlein finds that the Commission is required to issue the requested CDOs against Wellpine and Milan.

With respect to Zhuoye, Commissioner Schmidtlein agrees that section 337(f) governs because Zhuoye responded to the complaint and appeared in the investigation before defaulting. See Order No. 15 (June 18, 2019) (finding Zhuoye in default under Commission Rule 210.17(h)), *aff’d with modification*, Comm’n Notice (July 10, 2019) (finding Zhuoye in default under Commission Rule 210.17(e)). However, when the presence of infringing domestic inventory or domestic operations is asserted as the basis for a CDO under section 337(f)(1), Commissioner Schmidtlein does not adopt the view that the inventory or domestic operations needs to be “commercially significant” in order to issue the CDO. See, e.g., *Certain Magnetic Tape Cartridges and Components Thereof*, Inv. No. 337-TA-1058, Comm’n Op. at 65, n.24 (Mar. 25, 2019); *Certain Table Saws Incorporating Active Injury Mitigation Technology & Components Thereof*, Inv. No. 338-TA-965, Comm’n Op., 2017 WL 1476193, \*4 n.2 (Feb. 1, 2017). In Commissioner Schmidtlein’s view, the presence of some infringing domestic inventory or domestic operations, regardless of commercial significance, provides a basis to issue a CDO. *Id.* Because the record fails to show that Zhuoye maintains domestic inventory or operates in the U.S., Commissioner Schmidtlein concurs with not issuing a CDO against Zhuoye.

<sup>15</sup> Commissioner Karpel concurs that the Commission’s authority to issue CDOs in this investigation is pursuant to section 337(f) with respect to Milan and Zhuoye, not section 337(g)(1). However, for the reasons noted in *Certain Powered Cover Plates*, Inv. No. 337-TA-1124, Comm’n Op. at 22-23 n.20 (June 11, 2020), Commissioner Karpel does not consider the Commission’s determination to issue a GEO under section 337(d)(2) to direct that the requested CDOs with respect to Milan and Zhuoye be considered under section 337(f)(1). Rather, she considers section 337(f) is the appropriate authority in this investigation because the criteria for issuance of CDOs under section 337(g)(1)(A)-(E) are not met as to these respondents. As detailed in footnote 13, Milan, Wellpine, and Zhuoye were each found in default. However,

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25, 2019). The Settlement Agreement defines “Restricted Arrow Products” on page 1 of the agreement as follows:

WHEREAS, Arrow has imported into the United States and/or sold after importation into the United States within the meaning of 19 U.S.C. § 1337(a)(1)(C) the MK Grip Series (ZY-7G aka ZY-7G MK Grip), MK Medium Grip Series (ZY-5G aka ZY-SG MK Medium), MK Mini Grip Series (ZY-8G aka ZY -80 MK Mini), MK Dura-Lite (ZY-30E), and ZY-70 MT (Metal Flint Gold and Silver) products (collectively, the “Restricted Arrow Products”).

*Id.* Similarly, the Settlement Agreement defines “Restricted Excel Products” on pages 1-2 of the agreement as follows:

WHEREAS, Excel has sold after importation into the United States within the meaning of 19 U.S.C. § 1337(a)(1)(C) the MK Grip Series (ZY-MK Grip aka MKL-2), MK Mini Grip Series (ZY-MK Grip Mini aka MKL-5), and MK Metal flint (aka MKL-8 (metal gold flint) and MKL-9 (metal silver flint)) products (collectively, the “Restricted Excel Products”)

*Id.* The models recited as “Restricted Arrow Products” and “Restricted Excel Products” are identical to the accused products of the Zhuoye and Wellpine that have been adjudicated in this investigation. *See supra* Section I(D). Likewise, the Consent Order Stipulation and the Consent Order encompass these same subject articles. *See* MSDV, Ex. 8 (Stipulation at ¶ 4)

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subsection 337(g)(1)(C) is not met with respect to Milan or Zhuoye as each filed a response to the complaint and notice of investigation (albeit Milan’s response was untimely). With respect to Wellpine, the requirements of section 337(g)(1)(A)-(E) are met. Wellpine was named in the complaint and it was served with the complaint and notice of investigation on February 7, 2019. Order No. 13 (June 6, 2019), *unreviewed*, Comm’n Notice (July 8, 2019). The ALJ issued a show cause order ordering Wellpine to show cause why it should not be held in default for failing to respond to the complaint and notice of investigation. *See id.* (citing Order No. 7 (Apr. 16, 2019)). Wellpine did not respond to the show cause order. *Id.* These findings satisfy subsections 337(g)(1)(A)-(D). Complainant requested a CDO limited to Wellpine, thus satisfying subsection 337(g)(1)(E). Given that subsections 337(g)(1)(A)-(E) are satisfied and Complainant requested a CDO directed to Wellpine as to which a violation has been found, the statute directs the Commission to issue the requested CDO, subject to consideration of the public interest. The public interest factors as detailed in Section III(C) do not support a finding that the remedial orders in this investigation would be contrary to the public interest. Accordingly, Commissioner Karpel would issue a CDO against Wellpine under section 337(g)(1).

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(listing Arrow and Excel model numbers and stating: “This Stipulation is not limited to products with these model numbers; instead, this Stipulation encompasses these pocket lighters and any other Arrow or Excel pocket lighters that have an oblong body which is elliptical in cross-section; a fork which is generally parabolic in cross-section; and a hood which is generally parabolic in cross-section.”); Consent Order ¶¶ 3, 7 (Nov. 25, 2019) (defining scope of the order and noting the parties’ agreement to a procedure for the disposition of U.S. inventories in the settlement agreement). Because the disposition of the inventories held in the United States by Arrow and Excel<sup>16</sup> is authorized by BIC under the terms of the Consent Order and Settlement Agreement, these authorized inventories cannot serve as the basis of a CDO.

Complainant’s position that MK or Arrow is the same entity as Zhuoye and Wellpine is inconsistent with its position that Arrow and Excel, which have settled out of the investigation, are allowed to sell their existing inventory of MK products but not Zhuoye/Wellpine products. *See also* MSDV, Ex. 8 (Stipulation at ¶ 4) (“This Stipulation is not limited to products with these model numbers; instead, this Stipulation encompasses these pocket lighters and any other Arrow or Excel pocket lighters that have an oblong body which is elliptical in cross-section; a fork which is generally parabolic in cross-section; and a hood which is generally parabolic in cross-

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<sup>16</sup> The confidential version of the Settlement Agreement provides numerical estimates of the existing inventories. Specifically, the Confidential Settlement Agreement states that “Arrow currently has in inventory (stored in a United States warehouse) approximately [ ] units of the Restricted Arrow Products.” *See* Order No. 21 (confidential version), Ex. D (Confidential Settlement Agreement) at 1. As discussed above, Restricted Arrow Products are defined as “MK Grip Series (ZY-7G aka ZY-7G MK Grip), MK Medium Grip Series (ZY-5G aka ZY-SG MK Medium), MK Mini Grip Series (ZY-8G aka ZY-8G MK Mini), MK Dura-Lite (ZY-30E), and ZY-7G MT (Metal Flint Gold and Silver) products.” *Id.* The Confidential Settlement Agreement states that “Excel currently has in inventory (stored in a United States warehouse) approximately [ ] units of the Restricted Excel Products.” *Id.* at 2. As discussed above, Restricted Excel Products are defined as “MK Grip Series (ZY-MK Grip aka MKL-2), MK Mini Grip Series (ZY-MK Grip Mini aka MKL-5), and MK Metal flint (aka MKL-8 (metal gold flint) and MKL-9 (metal silver flint)) products.” *Id.* at 1-2.

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section.”). Moreover, the Settlement Agreement authorizes Arrow and Excel to dispose of their inventories of the subject products without any reference to a restriction or segregation of Zhuoye/Wellpine products within their inventories. *See id.* Thus, the Commission finds that even if Arrow and Excel have commercially significant inventories in the United States that were manufactured by Zhuoye and sold for importation by Wellpine as discussed above, BIC has authorized sales of these products in the Settlement Agreement as reflected in the Consent Order and Consent Order Stipulation.

Accordingly, the Commission has determined to issue a CDO against defaulting respondent Milan but not against Zhuoye or Wellpine.

### C. Public Interest

Before issuing a GEO and/or CDO, the Commission must “consider[] 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.” *See* 19 U.S.C. § 1337(d)(1), (f)(1). “[T]he statute does not require the Commission to determine that a remedial order would advance the public interest factors but rather requires the Commission to consider whether issuance of such an order will adversely affect the public interest factors.” *Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm’n Op., 2015 WL 5000874, \*9 (June 26, 2015) (“*Loom Kits*”) (citation omitted).<sup>17</sup>

With respect to the first public interest factor, the Commission finds that excluding the infringing products would not adversely affect the public health and welfare. To the contrary, it

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<sup>17</sup> The Commission did not direct the ALJ to take evidence or hear arguments with respect to the public interest in this investigation.

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would “eliminat[e] products from the United States market that are not subjected to the same safety and quality assurance protocols as BIC’s pocket lighters.” *See* Complainant’s Br. at 31; *accord* IA’s Br. at 12 (discussing evidence showing that “the infringing pocket lighters can pose a safety hazard”) (citing MSDV, Ex. 27).

Nor does the record evidence suggest any adverse effect on the second (competitive conditions in the U.S. economy), third (production of like or directly competitive articles), or fourth (United States consumers) public interest factors. *See* IA’s Br. at 11-12; Complainant’s Br. at 31 (“The pocket lighters market has a diverse field of participants offering products that directly compete with the accused products.”); *id.* (“[T]he issuance of the requested relief may benefit the production of pocket lighters in the United States inasmuch as BIC assembles the domestic industry pocket lighter in Connecticut.”); *id.* at 32 (“U.S. consumers will continue to have numerous available options for pocket lighters . . . . Further, BIC has granted Arrow and Excel a period of time to liquidate their current inventory, further blunting any potential effect on consumers.”).

Thus, based on the record of this investigation, the Commission has determined that the public interest factors do not preclude the issuance of the remedial orders discussed above.

### **D. Bond During Period of Presidential Review**

During the 60-day period of Presidential review under section 337(j), “articles directed to be excluded from entry under subsection (d) . . . shall . . . be entitled to entry under bond prescribed by the Secretary in an amount determined by the Commission to be sufficient to protect the complainant from any injury.” *See* 19 U.S.C. § 1337(j)(3). “The Commission typically sets the bond based on the price differential between the imported infringing product and the domestic industry article or based on a reasonable royalty. However, where the

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available pricing or royalty information is inadequate, the bond may be set at one hundred (100) percent of the entered value of the infringing product.” *Loom Kits*, Comm’n Op., 2015 WL 5000874, \*11 (citations omitted). The Commission has set a 100 percent bond in investigations where respondents have defaulted and provided no discovery regarding pricing, precluding any reliable determination of an appropriate bond amount. *See id.* at \*12.

The RD recommends a bond of 100 percent during the period of Presidential review. *See RD* at 49-50. The Commission agrees. As the RD notes, “the record lacks any reasoned basis for determining that a bond below 100 percent will adequately protect BIC.” *See id.* at 50; *accord IA’s Br.* at 13 (“Respondents Zhuoye, Wellpine, and Milan defaulted which precluded meaningful discovery into pricing. . . . In addition, there is no evidence of an established royalty rate for the Asserted Trade Dress Marks because BIC has never licensed them.”); *Complainant’s Br.* at 32-33 (same).

Thus, the Commission has determined to set the bond during the period of Presidential review in the amount of 100 percent of the entered value of the infringing articles.

#### IV. CONCLUSION

For the reasons set forth herein, the Commission determines that complainant BIC has established a violation of section 337 by the Defaulting Respondents based on infringement of the Asserted Trade Dress. Accordingly, the investigation is terminated with a finding of a violation of section 337. The Commission determines that the appropriate remedy is a GEO directed against infringing pocket lighters that include an oblong body which is elliptical in cross-section, a fork which is generally parabolic in cross-section, and/or a hood which is generally parabolic in cross-section, and a CDO directed against respondent Milan. The Commission further determines that the public interest does not preclude this remedy and that the

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bond during the period of Presidential review is set in the amount of one hundred (100) percent on the entered value of the infringing articles.

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', enclosed within a large, stylized oval flourish.

Lisa R. Barton  
Secretary to the Commission

Issued: July 13, 2020

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **OPINION** has been served via EDIS upon the Commission Investigative Attorney, **Yoncha Kundupoglu, Esq.**, and the following parties as indicated, on **July 13, 2020**.



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

**On Behalf of Complainant BIC Corporation:**

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**ORRICK, HERRINGTON & SUTCLIFFE, LLP**  
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Email: jcoyle@orrick.com

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

**Respondents:**

Milan Import Export company, LLC  
2333 Camino Del Rio S. Suite 120  
San Diego, CA 92108

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

Wellpine Company Limited  
Unit 701 , Grand City Plaza  
No. 1-17 Sai Lau Kok Road, Tsuen Wan,  
N.T., Hong Kong

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

Zhuoye Lighter Manufacturing Co, Ltd.  
No. 2, 3<sup>rd</sup>, New Techological Industrial Zone  
Foshan City, Guangdong  
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 POCKET LIGHTERS**

**Investigation No. 337-TA-1142**

**NOTICE OF COMMISSION DETERMINATION TO REVIEW IN PART  
AN INITIAL DETERMINATION GRANTING COMPLAINANT’S MOTION  
FOR SUMMARY DETERMINATION OF A VIOLATION OF SECTION 337;  
SCHEDULE FOR FILING WRITTEN SUBMISSIONS**

**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 an initial determination (“ID”) of the presiding administrative law judge (“ALJ”) granting complainant’s motion for summary determination of section 337 violation by certain defaulting respondents. The Commission also requests written submissions from the parties, interested government agencies and other interested persons, under the schedule set forth below, on remedy, the public interest, and bonding.

**FOR FURTHER INFORMATION CONTACT:** Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708-4716. 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:** On February 12, 2019, the Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (“section 337”), based on a complaint filed by BIC Corporation of Shelton, Connecticut (“Complainant”). *See 84 Fed. Reg.* 3486-87 (Feb. 12, 2019). The complaint, as supplemented, alleges a violation of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain pocket lighters by reason of infringement of U.S. Trademark Registration Nos. 1,761,622 and 2,278,917. *See id.* The notice of investigation names numerous respondents, including Milan Import Export Company, LLC of San Diego, California; Wellpine Company Limited of Hong Kong; and Zhuoye Lighter Manufacturing Co., Ltd. of Foshan City, China (collectively, “Defaulting Respondents”). *See id.* The Office of Unfair Import Investigations is also a party to the investigation. *See id.*

The Commission previously terminated other respondents based on settlement and entry of a consent order. *See* Order No. 21 (Oct. 30, 2019), *unreviewed*, Comm'n Notice (Nov. 25, 2019). The Commission also terminated an unserved respondent based on the withdrawal of the complaint allegations as to that respondent. *See* Order No. 23 (Dec. 18, 2019), *unreviewed*, Comm'n Notice (Jan. 16, 2020).

The Commission further found each of the Defaulting Respondents in default. *See* Order No. 13 (June 6, 2019), *unreviewed*, Comm'n Notice (July 8, 2019); Order No. 14 (June 6, 2019), *unreviewed*, Comm'n Notice (July 8, 2019); Order No. 15 (June 18, 2019), *aff'd with modification*, Comm'n Notice (July 10, 2019).

On November 14, 2019, Complainant filed a motion for summary determination of a violation of section 337 by the Defaulting Respondents. On December 16, 2019, the Commission Investigative Attorney filed a response in support of Complainant's motion.

On February 12, 2020, the ALJ issued the subject ID granting Complainant's motion for summary determination of violation of section 337 by the Defaulted Respondents. No petition for review of the subject ID was filed.

The Commission has determined to review the ID in part. Specifically, the Commission has determined to review the ID's findings with respect to the economic prong of the domestic industry requirement. At this time, the Commission does not request briefing on the issue under review.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more 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 any 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:** 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 its initial written submission, 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 names of known importers of the products at issue in this investigation.

Initial written submissions, including proposed remedial orders must be filed no later than close of business on May 8, 2020. Reply submissions must be filed no later than the close of business on May 15, 2020. 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 C.F.R. 210.4(f) are currently waived. 85 Fed. Reg. 15798 (March 19, 2020). Submissions should refer to the investigation number ("Inv. No. 337-TA-1142") 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. 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<sup>[1]</sup>, solely for cybersecurity purposes. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on [EDIS](#).

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<sup>[1]</sup> All contract personnel will sign appropriate nondisclosure agreements.

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', written in a cursive style.

Lisa R. Barton  
Secretary to the Commission

Issued: April 22, 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, **Yoncha Kundupoglu, Esq.**, and the following parties as indicated, on **April 22, 2020**.



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

**On Behalf of Complainant BIC Corporation:**

Jordan L. Coyle, Esq.  
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- Via Express Delivery
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**PUBLIC VERSION**

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**Washington, D.C.**

**In the Matter of**

**CERTAIN POCKET LIGHTERS**

**INV. NO. 337-TA-1142**

**INITIAL DETERMINATION GRANTING SUMMARY DETERMINATION OF  
VIOLATION OF SECTION 337 AND RECOMMENDED DETERMINATION ON  
REMEDY AND BOND**

Administrative Law Judge Clark S. Cheney

(February 12, 2020)

**Appearances:**

*For the Complainant BIC Corporation:*

Peter D. Vogl, Christopher J. Cariello, and Briggs M. Wright of Orrick Herrington & Sutcliffe, LLP of New York, New York.

Jordan L. Coyle of Orrick Herrington & Sutcliffe, LLP of Washington, District of Columbia.

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<b>Arrow Resp.</b>	Respondents Arrow Lighter, Inc. d/b/a/ MK Lighter, Inc. and MK Lighter Co., and Guangdong Zhuoye Lighter Manuf Co. Ltd. a/k/a Zhuoye Lighter Manuf Co. Ltd.'s Amended Response to the Complaint of BIC Corporation and Notice of Investigation  Confidential Version EDIS Doc. ID 673255 (Apr. 17, 2019)  Public Version EDIS Doc. ID 673256 (April 17, 2019)
<b>Dep.</b>	Deposition
<b>Milan Resp.</b>	Respondent Milan Import Export Company's Response to the Verified Complaint of BIC Corporation Under Section 337 of the Tariff Act of 1930, as Amended, and to the Notice of Investigation, EDIS Doc. ID 668994 (Mar. 5, 2019)
<b>MSDDI</b>	Complainant's [BIC's] Motion for Summary Determination That It Satisfies the Domestic Industry Requirement  Confidential Version EDIS Doc. ID 688129 (Sept. 12, 2019)  Public Version EDIS Doc. ID 688726 (Sept. 19, 2019)
<b>MSDV</b>	Complainant's [BIC's] Motion for Summary Determination of Violation as to Defaulting Respondents  Confidential Version EDIS Doc. ID 694464 (Nov. 14, 2019)  Public Version EDIS Doc. ID 695262 (Nov. 21, 2019)
<b>Tr.</b>	Transcript
<b>SRV</b>	Commission Investigative Staff's Response to Complainant's Motion for Summary Determination of Violation as to Defaulting Respondents  Confidential Version EDIS Doc. ID 697358 (Dec. 16, 2019)  Public Version EDIS Doc. ID 698887 (Jan. 10, 2020)

**PUBLIC VERSION**

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**Washington, D.C.**

**In the Matter of**

**CERTAIN POCKET LIGHTERS**

**INV. NO. 337-TA-1142**

**INITIAL DETERMINATION GRANTING SUMMARY DETERMINATION OF  
VIOLATION OF SECTION 337 AND RECOMMENDED DETERMINATION ON  
REMEDY AND BOND**

Administrative Law Judge Clark S. Cheney

(February 12, 2020)

Pursuant to the Notice of Investigation, 84 Fed. Reg. 3486 (Feb. 12, 2019), this is the final Initial Determination in the matter of *Certain Pocket Lighters*, Investigation No. 337-TA-1142. See 19 C.F.R. §§ 210.10(b), 210.42(a)(1)(i).

For the reasons stated herein, I have determined a violation of section 337 of the Tariff Act of 1930, as amended, has occurred in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain pocket lighters alleged to infringe U.S. Trademark Registration Nos. 1,761,622 and 2,278,917.

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### I. INTRODUCTION

#### A. Procedural History

On December 6, 2018, complainant BIC Corporation (“BIC”) filed a complaint alleging violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain pocket lighters by reason of infringement of U.S. Trademark Registration No. 1,761,622 (“the ’622 trade dress mark”) and U.S. Trademark Registration No. 2,278,917 (“the ’917 trade dress mark”) (collectively, “the Asserted Trade Dress”). 83 Fed. Reg. 63905 (Dec. 12, 2018).

On February 12, 2019, the Commission instituted this investigation to determine whether there is a violation of subsection (a)(1)(B) of section 337 based on infringement of the Asserted Trade Dress and whether an industry in the United States exists as required by subsection (a)(2) of section 337. 84 Fed. Reg. 3486.

The named respondents were Arrow Lighter, Inc. d/b/a/ MK Lighter, Inc., and MK Lighter Company (“Arrow”); Benxi Fenghe Lighter Co., Ltd., (“Benxi”); Excel Wholesale Distributors Inc. (“Excel”); Milan Import Export Company, LLC (“Milan”); Wellpine Company Limited (“Wellpine”); and Zhuoye Lighter Manufacturing Co., Ltd. (“Zhuoye”). *Id.* at 2-3.

The Commission investigative staff (“Staff”) is a party to this investigation.

Respondents Arrow and Excel were terminated from this investigation based on a settlement and a stipulation to the entry of a consent order. Order No. 21; Consent Order (Nov. 26, 2019) (EDIS Doc. ID 695496); Notice of Comm’n Decision Not to Review an ID Granting an Unopposed Joint Motion for Partial Termination of the Investigation as to Certain Respondents Based on a Consent Order; Issuance of a Consent Order (Nov. 26, 2019) (EDIS Doc. ID 695494).

There is no evidence that Respondent Benxi was served with the complaint, and Benxi did not appear or participate in this investigation. On December 18, 2019, I granted BIC’s unopposed

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motion to withdraw the complaint as to Benxi and terminate that portion of the investigation involving Benxi. Order No. 23.

The three remaining respondents—Zhuoye, Wellpine, and Milan—defaulted after participating to varying degrees in the investigation. Order No. 13 (June 6, 2019) (EDIS Doc. IDs 677970) (finding Wellpine in default), *not reviewed*, (July 8, 2019) (EDIS Doc. ID 680348); Order No. 14 (June 6, 2019) (EDIS Doc. ID 677968) (finding Milan in default), *not reviewed*, (July 8, 2019) (EDIS Doc. ID 680350); Order No. 15 (June 18, 2019) (EDIS Doc. ID 678825) (finding Zhuoye in default), *affirmed with modification*, (July 10, 2019) (EDIS Doc. ID 680826).

Pending before me are two unopposed motions for summary determination filed by BIC. The first, filed on September 19, 2019, sought a determination that BIC satisfied the domestic industry requirement. Motion Docket No. 1142-014 (EDIS Doc. ID 688726) (“MSDDI”). The second, filed on November 14, 2019, with my leave, *see* Order No. 20, was directed at the remaining issues of violation. Motion Docket No. 1142-20 (EDIS Doc. ID 694464) (“MSDV”).

### **B. The Parties**

#### **1. Complainant BIC Corporation**

Complainant BIC is a Connecticut corporation, with its principle place of business located at 1 BIC Way, Shelton, Connecticut 06864. Complaint at ¶ 11. BIC is the owner of the Asserted Trade Dress in this investigation. *See* ’622 trade dress mark at cover; ’917 trade dress mark at cover.

#### **2. Terminated Participating Respondents Arrow and Excel**

Arrow is a California corporation having a principal place of business at 13942 E. Valley Blvd., City of Industry, California, 91746. Complaint at ¶ 25; Respondents Arrow Lighter, Inc. d/b/a/ MK Lighter, Inc. and MK Lighter Co., and Guangdong Zhuoye Lighter Manuf Co. Ltd.

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a/k/a Zhuoye Lighter Manuf Co. Ltd.'s Amended Response to the Complaint of BIC Corporation and Notice of Investigation at ¶ 25 (Apr. 17, 2019) (EDIS Doc. ID 673255) (“Arrow Resp.”).

Arrow imports pocket lighters from defaulted respondent Wellpine (discussed below) and sells those lighters in the United States. *Id.* at ¶ 25; Arrow Resp. Conf. Ex. 1 at ¶ 2.

Excel is a New York corporation having a principal place of business at 15-13 132nd Street, College Point, NY 11356. Respondent Excel Wholesale Distributors, Inc.'s Answer to Complaint and Notice of Investigation at ¶ 31 (Feb. 28, 2019) (EDIS Doc. ID 668759). Excel buys the accused products from Arrow and sells them to retailers, rack jobbers, and distributors in the United States. Commission Investigative Staff's Response to Complainant's Motion for Summary Determination of Violation as to Defaulting Respondents (Dec. 16, 2019) (EDIS Doc. ID 697358) (“SRV”) at Ex. A (Excel Resp. to Staff's 1st Rogs at JX-395C:0008).

### 3. **Defaulting Respondents Zhuoye and Wellpine**

Zhuoye is a Chinese company having a principal place of business at No. 2 3rd, New Technological Industrial Zone, Xingtan Town, Shunde District, Foshan City, Guangdong, China. Complaint at ¶ 26; Arrow Resp. at ¶ 26. Zhuoye manufactures pocket lights and sells them for importation into the United States. Arrow Resp. at ¶¶ 26, 58; Complainant's [BIC's] Motion for Summary Determination of Violation as to Defaulting Respondents (Nov. 14, 2019) (EDIS Doc. ID 694464) (“MSDV”) at Ex. 12 (BIC-Arrow Jt. Stip. at ¶¶ 8-9). The record indicates lighters pass from Zhuoye in China to defaulted respondent Wellpine, as discussed in more detail herein. *See* Arrow Resp. at ¶ 27; MSDV Ex. 12 (BIC-Arrow Jt. Stip. at ¶¶ 3, 8-9).

Wellpine is a Hong Kong company having a principal place of business at Unit 701, Grand City Plaza, No. 1-17 Sai Lau Kok Road, Tsuen Wan, N.T., Hong Kong. Complaint at ¶ 27; MSDV Ex. 12 (BIC-Arrow Jt. Stip. at ¶ 3). Wellpine sells for importation into, imports

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into, and sells pocket lighters in, the United States. Complaint at ¶¶ 47-48, Exs. 13-14 thereto; MSDV Ex. 12 (BIC-Arrow Jt. Stip. at ¶ 3). As will be discussed later, Zhuoye and Wellpine are branches of the same entity. Terminated respondent Arrow obtains lighters from Wellpine. *See* Arrow Resp. Conf. Ex. 1 at ¶ 2.

### 4. Defaulting Respondent Milan

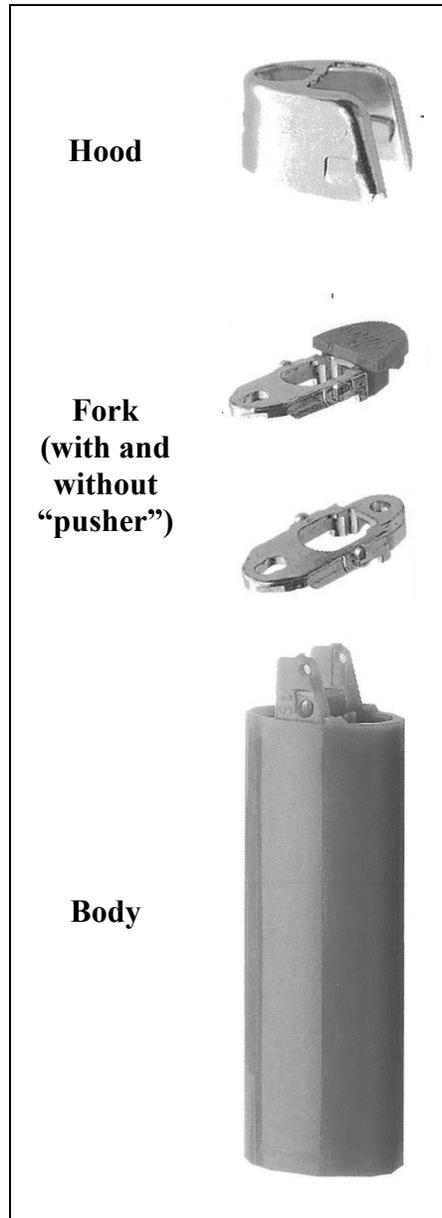
Milan is a California limited liability company having a principal place of business at 2333 Camino del Rio South, Suite 120, San Diego, California, 92108. Respondent Milan Import Export Company's Response to the Verified Complaint of BIC Corporation Under Section 337 of the Tariff Act of 1930, as Amended, and to the Notice of Investigation at ¶ 20 (Mar. 5, 2019) (EDIS Doc. ID 668994) ("Milan Resp."). Milan manufactures accused products in China and imports them, or sells accused products after importing them, into the United States. Complaint at ¶¶ 20, 45-46, Exs. 11-12 thereto; Milan Resp. at ¶¶ 45, 55-56. Milan does not have a known relationship to the other respondents.

### C. Background on Lighter Parts

At this point, some explanation of the composition of a pocket lighter is in order. For present purposes, it can be said pocket lighters generally have three main components: a body, which contains the internal components; a hood, which shields the flame from the air currents; and

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a fork/pusher assembly, which actuates a valve to release fuel when depressed by a user. These elements are illustrated below individually:



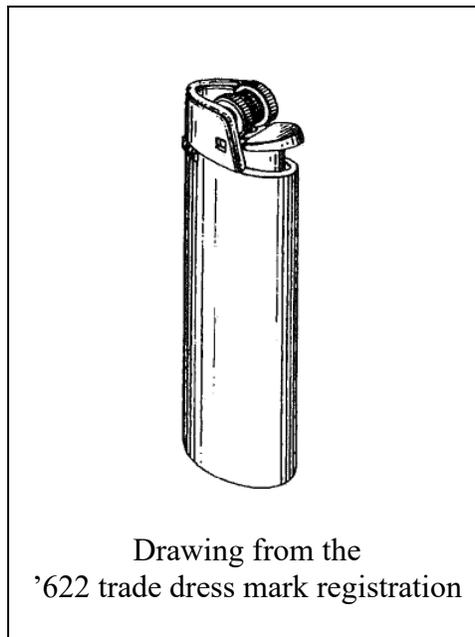
**D. The BIC Asserted Trade Dress**

The intellectual property at issue in this investigation is Registered U.S. Trademark Nos. 1,761,622 (“the ’622 trade dress mark”) and 2,278,917 (“the ’917 trade dress mark”), both of which are directed to the trade dress for cigarette lighters not made of precious metals. Complaint

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at Exs. 1-2 (trade dress mark registrations); MSDV Exs. 9-10 (trade dress mark registrations); *see also Trademark Manual of Examining Procedure*, § 1202.02, October 2018 (“Registration of Trade Dress”).

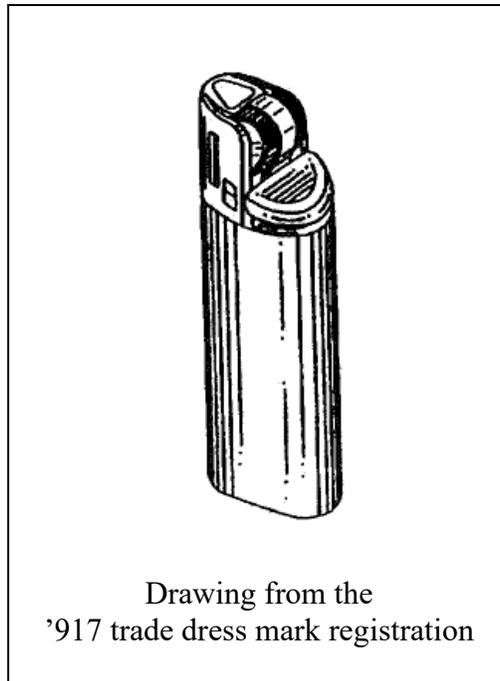
The '622 trade dress mark is directed to cigarette lighters not made of precious metal and shows a drawing, reproduced below, of “a lighter having an oblong body which is elliptical in cross-section; a fork which is generally parabolic in cross-section; and a hood which is generally parabolic in cross section.” '622 trade dress mark. The application leading to the '622 trade dress mark was filed on June 21, 1989, and the mark issued on March 30, 1993. *Id.*



The '917 trade dress mark is directed to cigarette lighters not made of precious metal and shows a drawing, reproduced below, of “a lighter having an ablong [sic] body which is elliptical in cross-section; a fork which is generally parabolic in cross-section; and a hood which is generally parabolic in cross-section.” MSDV Ex. 10. The registration for the '917 trade dress mark also indicates that “[t]he mark constitutes the configuration of the product, as depicted in the drawing.”

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*Id.* The application leading to the '917 trade dress mark was filed on January 28, 1998, and the mark issued on September 21, 1999. *Id.*



The only difference between the two asserted marks is that the drawings of the '917 trade dress mark show a child-resistant guard over the spark wheel. Nothing in this investigation turns on that difference.

**E. The Pocket Lighters at Issue**

The products at issue in this investigation are pocket lighters that include an oblong body with an elliptical cross-section, a fork that is generally parabolic in cross-section, and a hood that is generally parabolic in cross-section. Notice of Investigation at 2.

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**1. Accused Pocket Lighters**

**a) Terminated Respondents Arrow and Excel and Defaulting Respondents Zhuoye and Wellpine**

BIC alleges the pocket lighters illustrated below infringe the Asserted Trade Dress and are sold for importation into the United States, imported into the United States, and sold in the United States after importation by respondents Arrow, Excel, Zhuoye, and Wellpine.<sup>1</sup> MSDV Ex. 12 (BIC-Arrow Joint Stip.) at ¶¶ 3-4, 6, 8, 13; SRV Ex. C (BIC-Excel Import Stip.) at ¶ 3.

<b>ZY-7G Grip Series</b>	<b>ZY-5G Medium Grip Series</b>	<b>ZY-8G Mini Grip Series</b>	<b>ZY-30E MK Dura</b>	<b>ZY-7G MT Metal Flint (silver &amp; gold)</b>
				

**b) Defaulting Respondent Milan**

BIC also alleges that defaulting respondent Milan manufactures infringing pocket lighters under the TUTU brand name in China, sells those lighters for importation, imports them into the United States, and sells them in the United States after importation. Complaint at ¶¶ 20, 55, Ex.

<sup>1</sup> Pursuant to the settlement agreement between BIC and respondents Arrow and Excel, BIC agreed that previously accused products bearing model numbers ZY-A9 (*aka* ZY-218-A9), named the MK 3-in-1 Multi-Function Lighter, did not infringe the Asserted Trade Dress. Order No. 21 at Exh. C (8th and 19th Whereas Clauses).

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11 (photographs), Ex. 12 (physical samples); Milan Resp. at ¶ 45 (admitting Ex. 11 of complaint depicts Milan’s TUTU lighters). In its response to the complaint, Milan admitted to manufacturing the accused TUTU lighters in China and selling them for importation into the United States. Milan Resp., ¶¶ 55 (manufacture in China), 56 (importation and sale for importation into the United States). Milan’s TUTU branded lighters are pictured below:



Complaint, Ex. 11.

**2. The Domestic Industry BIC Classic Pocket Lighters**

BIC claims that its BIC Classic Lighter, also known as the “Maxi” or “J26” model (“BIC Classic Lighter”), illustrated below, embodies the Asserted Trade Dress. Complaint at ¶¶ 35, 85-86, and Ex. 8 (physical sample); Complainant’s [BIC’s] Motion for Summary Determination That It Satisfies the Domestic Industry Requirement at 10-12 (Sept. 12, 2019)

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(EDIS Doc. ID 688129) (“MSDDI”); *see also* MSDDI Ex. G (Dep. Tr. of Jeffrey P. Kupson (July 18, 2019)) (“Kupson Tr.”) at 36:3-7 (J26 is model number designation).



MSDV at 7.

As shown below, the BIC Classic Lighter has an oblong body which is elliptical in cross-section, a fork which is generally parabolic in cross-section, and a hood which is generally parabolic in cross-section:

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Trade Dress Element	BIC Classic Lighter Detail
<p><b>“an oblong body which is elliptical in cross-section”</b></p>	 <p>Body: Contains the Fuel; polyacetal</p>
<p><b>“a fork which is generally parabolic in cross-section”</b></p>	 <p>Pusher: Pad for depressing fork to activate valve; polyamide          Fork: Lifts Jet allowing Fuel release; zinc          Fork/Pusher Subassembly</p>
<p><b>“a hood which is generally parabolic in cross-section”</b></p>	 <p>Hood: Windshield; steel</p>

SRV Ex. B.

BIC has manufactured a number of versions of the BIC Classic Lighter, but the record reflects that all iterations have an oblong body with an elliptical cross-section, a parabolic fork, and a parabolic hood. Kupson Tr. at 88:15-89:7, *see also id.* 41:3-45:6 (discussing prior versions of the current J26 pocket lighter, beginning with first iteration introduced in 1973); MSDDI Ex. 25 (Kupson Decl.) at ¶ 8 (BIC has sold lighters with the same fundamental design as the J26 continuously for 45 years).

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### II. JURISDICTION & IMPORTATION

No party has contested the Commission's subject matter jurisdiction over this investigation. Section 337 of the Tariff Act prohibits the importation and sale of articles that infringe a valid and enforceable trade dress mark if an industry exists in the United States relating to articles protected by the mark. 19 U.S.C. §§ 1337(a)(1)-(2); *Certain Footwear Products*, 337-TA-936, Comm'n Op. at 12, *vacated on other grounds, Converse, Inc. v. Int'l Trade Comm'n*, 909 F.3d 1110 (Fed. Cir. 2018); *Certain Digital Multimeters, and Products with Multimeter Functionality*; Inv. No. 337-TA-588, Order No. 22 at 5, *not reviewed*, Notice of Comm'n Determination Not to Review an ID Granting Summary Determination on Violation (Feb. 12, 2008) (EDIS Doc. ID . 292150). BIC's complaint states a cause of action under section 337. I have determined the Commission has jurisdiction over the subject matter of this investigation.

No party has contested the Commission's *in rem* jurisdiction over the accused products. Accordingly, I have determined the Commission has in rem jurisdiction over all products accused under the Asserted Trade Dress. *See* 19 U.S.C. § 1337 (d).

No party has contested personal jurisdiction. By participating in the investigation, Zhuoye, Arrow Excel consented to personal jurisdiction. *See Certain cutting Tools for Flexible Plastic Conduit and Components Thereof*, 337-TA-344, Initial Determination at 4, *not reviewed*, Comm'n Determination Not to Review an Initial Determination Finding a Violation of Section 337, (October 28, 1993), USITC Pub. No. 2719 (Jan. 1994); *see also* Order No. 21 Ex. A at ¶ 3 (Arrow and Excel Consent Order Stipulation). The Commission has personal jurisdiction over Milan because it is a company located within the United States. *See* 19 U.S.C. § 1333(b); *U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 246 (D.C. Cir. 2005) ("section 333(b) of the Tariff Act of 1930 authorizes nationwide service of process"); *Certain Miniature Hacksaws*, Inv. No. 337-TA-237, Initial Determination at 4, 1986 WL 379287 (October 15, 1986), *unreviewed in*

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*pertinent part*, USITC Pub. No. 1948. Wellpine has imported millions of pocket lighters into the United States over multiple years. MSDV Ex. 54. Wellpine’s intentional and systematic contacts with the United States give the Commission personal jurisdiction over Wellpine. *See Certain Minoxidil Powder, Salts & Compositions for Use in Hair Treatment*, 337-TA-267, Order No. 9 (Aug. 6, 1987) (“establishing that a foreign respondent has made two or more shipments of a product to the United States would be adequate to subject it to the jurisdiction of this agency.”). The Commission therefore has personal jurisdiction over all parties.

### III. LEGAL PRINCIPLES

#### A. Summary Determination

Commission Rule 210.18 governs motions for summary determination:

The determination sought by the moving party 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 a summary determination as a matter of law.

19 C.F.R. § 210.18(b).

#### B. Trade Dress Infringement

To establish infringement of a registered trade dress mark under the Lanham Act, BIC must prove that (i) it has a valid and legally protectable mark; (ii) it owns the mark; and (iii) unauthorized use of the mark causes a likelihood of confusion among consumers as to the source of the goods. *Converse, Inc. v. Int’l Trade Comm’n*, 909 F.3d 1110, 1116 (Fed. Cir. 2018). To prove likelihood of confusion, the owner of the asserted trademark must demonstrate that consumers would likely confuse the alleged infringer’s mark with the asserted mark. *Swagway, LLC v. Int’l Trade Comm’n*, 934 F.3d 1332, 1338 (Fed. Cir. 2019). Likelihood of confusion may be determined using the factors set out in *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357 (C.C.P.A. 1973). Those factors include the following:

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- (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.
- (2) The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.
- (3) The similarity or dissimilarity of established, likely-to-continue trade channels.
- (4) The conditions under which and buyers to whom sales are made, *i.e.* “impulse” vs. careful, sophisticated purchasing.
- (5) The fame of the prior mark (sales, advertising, length of use).
- (6) The number and nature of similar marks in use on similar goods.
- (7) The nature and extent of any actual confusion.
- (8) The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.
- (9) The variety of goods on which a mark is or is not used (house mark, “family” mark, product mark).
- (10) The market interface between applicant and the owner of a prior mark.
- (11) The extent to which applicant has a right to exclude others from use of its mark on its goods.
- (12) The extent of potential confusion, *i.e.*, whether *de minimis* or substantial.
- (13) Any other established fact probative of the effect of use.

*Swagway*, 934 F.3d at 1338-39. However, not all of the *DuPont* factors will apply in every case; only those factors which are supported by evidence in the record need to be considered. *Id.* at 1339. Each factor may be accorded different weight depending on the relevant circumstances. *Id.* at 1340. The ultimate likelihood of confusion determination is a legal determination based upon factual underpinnings. *Id.* at 1338; *Converse*, 909 F.3d at 1132 (ALJ’s detailed findings under the *DuPont* factors are findings of fact to which Federal Circuit owes deference); *In re I.AM.Symbolic, LLC*, 866 F.3d 1315, 1322 (Fed. Cir. 2017).

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### C. Incontestable Trade Dress

The owner of a registered trade dress mark shall have an incontestable right to use the mark if the mark has been in continuous use for five consecutive years after the date of registration. 15 U.S.C. § 1065; *see In re Chippendales USA, Inc.*, 622 F.3d 1346, 1349 at fn.1 (Fed. Cir. 2010). The registration for an incontestable mark is treated as conclusive evidence of the validity of the mark, as well as its registration, ownership, and the exclusive right of the owner to use the mark in commerce. 15 U.S.C. § 1115(b). Once a mark has achieved incontestable status under 15 U.S.C. § 1065, it is entitled to the benefits of § 1115(b), which precludes all but a limited number of specific challenges to a mark's validity or enforceability, such as fraudulent procurement of the mark or abandonment of its use. *Chippendales*, 622 F.3d at 1353.

### D. Domestic Industry

For a complaint based on infringement of a registered trade dress mark, a violation of section 337 can be found only if an industry relating to articles protected by the trade dress exists in the United States or is in the process of being established. 19 U.S.C. § 1337(a)(2). This domestic industry requirement of section 337 is often described as having an economic prong and a technical prong. *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 707 F.3d 1295, 1298 (Fed. Cir. 2013); *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, USITC Pub. No. 4120, Comm'n Op. at 12-14 (Dec. 2009). The complainant bears the burden of establishing that the domestic industry requirement is satisfied. *John Mezzalingua Assocs., Inc. v. Int'l Trade Comm'n*, 660 F.3d 1322, 1331 (Fed. Cir. 2011).

#### 1. Economic Prong

Section 337(a)(3) sets forth the following economic criteria for determining the existence of a domestic industry in such investigations:

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(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). Given that the statutory criteria are listed in the disjunctive, satisfaction of any one of them will be sufficient to meet the economic prong of the domestic industry requirement. *See Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376, USITC Pub. 3003, Comm'n Op. at 15 (Nov. 1996).

### 2. Technical Prong

In section 337 investigations based on registered trade dress, the technical prong of the domestic industry requirement is satisfied when the complainant establishes that it is practicing or exploiting the trade dress at issue. *See* 19 U.S.C. § 1337(a)(2) and (3); *Certain Energy Drink Products*, Inv. No. 337-TA-678, Order No. 34 (Initial Determination) at 12 (Mar. 30, 2010), *not reviewed*, Comm'n Determination Not to Review an Initial Determination of Violation of Section 337 (May 14, 2010).

## IV. INFRINGEMENT OF THE ASSERTED TRADE DRESS

To establish infringement of a trade dress mark under the Lanham Act, BIC must prove that (i) the '622 and '917 trade dress marks are valid and legally protectable; (ii) BIC owns the marks; and (iii) the accused products' appearance results in a likelihood of confusion. *See Converse, Inc. v. Int'l Trade Comm'n*, 909 F.3d 1110, 1116 (Fed. Cir. 2018).

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### **A. The Asserted Trade Dress Is Incontestably Valid**

If a registered trade dress mark has been in continuous use for five consecutive years after registration and is still in use in commerce, it is generally incontestable. *See* 15 U.S.C. § 1065. The '622 trade dress mark was registered on March 30, 1993, and the '917 trade dress mark was registered on September 21, 1999. The uncontested record shows that every iteration of the BIC Classic Lighter that BIC has sold since 1973 has had the same oblong body with elliptical cross-section, the same parabolic fork, and the same parabolic hood. SRV Ex. E (Kupson Tr.) at 88:15-89:7. Based on that evidence, I find that all iterations of the BIC Classic Lighter sold since 1973 embody the Asserted Trade Dress. Thus, the '622 mark has been in continuous use for 26 years, and the '917 mark has been in continuous use for 20 years. *Id.* at 41:3-45:6, 88:15-89:7 (discussing all iterations of the J26 pocket lighter from 1973 to date); MSDV Ex. 25 (Kupson Decl.) at ¶ 8 (BIC has sold lighters embodying the Asserted Trademarks for 45 years). As a result, the '622 and '917 trade dress marks have attained incontestable status. *See* 15 U.S.C. § 1065. Additionally, the record reflects no evidence in support of the defenses or defects set forth in 15 U.S.C. § 1115(b) that may be asserted against incontestable marks.

Based on the evidence above, I have determined the registration and use of the Asserted Trade Dress conclusively demonstrate the validity and legal protectability of the marks.

### **B. BIC Owns the Asserted Trade Dress**

There is no dispute that the '622 and '917 trade dress marks are owned by BIC. The marks are registered in BIC's name. '622 trade dress mark at cover; '917 trade dress mark at cover. I therefore find that BIC owns the Asserted Trade Dress.

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**C. The Accused Lighters Are Likely to Cause Confusion with BIC’s Asserted Trade Dress**

To prevail in its summary determination motion, BIC must show that the accused products’ appearance results in a likelihood of confusion among consumers as to the source of those goods. As discussed above, *supra* Section III.B, whether a likelihood of confusion exists is determined using the factors set out in *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357 (C.C.P.A. 1973), though only those factors supported by the record need be considered.

**1. Zhuoye, Wellpine, Arrow, and Excel Accused Products**

As explained in Section I.D.1.a *supra*, defaulting respondents Zhuoye and Wellpine, and terminated respondents Arrow and Excel, either sell for importation, import, or sell after importation, into the United States the following accused products:

<b>ZY-7G Grip Series</b>	<b>ZY-5G Medium Grip Series</b>	<b>ZY-8G Mini Grip Series</b>	<b>ZY-30E MK Dura</b>	<b>ZY-7G MT Metal Flint (silver &amp; gold)</b>
				

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### a) Trade Dress Similarity and Similarity of Goods (*DuPont* Factors 1 & 2)

I find that the Zhuoye, Wellpine, Arrow, and Excel accused products are pocket lighters not made of precious metals. Thus, they are similar goods to the lighters disclosed in the Asserted Trade Dress. The Zhuoye, Wellpine, Arrow, and Excel accused lighters have an oblong body with an elliptical cross section, as disclosed in the Asserted Trade Dress. Likewise, I find that the fork and hood of those accused products are generally parabolic in cross section, as in the Asserted Trade Dress. The greater the similarity between the trademark owner's and the alleged infringer's products, the greater the likelihood of confusion. *Alliance for Good Gov't v. Coal. for Better Gov't*, 901 F.3d 498, 512 (5th Cir. 2018). Given the overwhelming similarity of these accused products and the Asserted Trade Dress, the first two *DuPont* factors favor finding a likelihood of confusion.

### b) Similar Trade Channels (*DuPont* Factor 3)

Overlap between the outlets for, and consumers of, similar products increases the potential for confusion. *See Alliance for Good Gov't*, 901 F.3d at 512. Here, the record demonstrates that both the accused pocket lighters and the protected BIC Classic Lighters are primarily purchased from convenience stores, grocery stores, and discount retailers like Walmart. SRV Ex. G (Hanover Market Study) at BIC-ITC-0003366, 0003434-35. The lighters from respondents Zhuoye, Wellpine, Arrow, and Excel reach the end-user through retailers, rack jobbers, and distributors. SRV Ex. A (Excel Resp. to Staff's 1st Rogs) at JX-395C:0008; MSDV Ex. 68 (Arrow MK Sales). I find that these accused products are sold in the same channels of commerce as the BIC products embodying the Asserted Trade Dress, and therefore *DuPont* factor 3 also favors a finding of infringement.

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### c) **Similar Condition of Sales (*DuPont* Factor 4)**

I find that the accused Zhuoye, Wellpine, Arrow, and Excel pocket lighters are low-cost items that consumers are more likely to purchase on impulse than after careful consideration. The accused products are sold to retailers for approximately [REDACTED] per lighter. SRV Ex. A (Excel Resp. to Staff's 1st Rogs) at JX-395C:0008. The BIC Classic Lighter sells at wholesale for approximately [REDACTED] per unit. SRV Ex. H (Dep. Tr. of Michael K. Milani (Aug. 13, 2019) ("Milani Tr.)) at 182:6-8. Lighter users spend about \$25 per year on disposable pocket lighters. SRV Ex. G at BIC-ITC-0003366. Casual purchasers of small items are often more easily confused than sophisticated consumers of higher priced complex goods. *See Fla. Int'l Univ. Bd. of Trustees v. Fla. Nat'l Univ., Inc.*, 830 F.3d 1242, 1256 (11th Cir. 2016). Because both the authorized and unauthorized goods are low-cost items not rigorously scrutinized by consumers, *DuPont* factor 4 also favors a finding of a likelihood of confusion.

### d) **Fame of Complainant's Trade Dress (*DuPont* Factor 5)**

The BIC Classic Lighter is nearly ubiquitous. It has been on the market in the United States for 45 years, with almost 90% of all pocket lighter users reporting that they have used a BIC lighter in the past 3 months. Complaint at ¶¶ 4-5, 13, 36. Social media pages for the BIC Classic Lighter draw substantial attention from the public, with over 1.4 million Facebook followers and nearly 100,000 Instagram followers. *Id.* at ¶ 14.

Additionally, the Museum of Modern Art ("MoMa") in New York has displayed the BIC Classic Lighter as one example of an iconic design of the 20th Century. *Id.* at ¶ 16; *see* MSDDI Ex. 4 at ¶ 7. I find that the design of the BIC Classic Lighter, which embodies the Asserted Trade

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Dress, is famous and highly distinctive. *DuPont* factor 5 thus favors a finding of a likelihood of confusion.

**e) Potential & Actual Confusion  
(*DuPont* Factors 7 & 12)**

The record contains a market survey showing that consumers are likely to confuse the accused Zhuoye, Wellpine, Arrow, and Excel pocket lighters with the BIC Classic Lighter. MSDV Ex. 23 at 17. I find this evidence supports a conclusion of likely consumer confusion.

I also find there has been actual confusion in the market. In one instance, a retailer told a customer that MK lighters—accused products manufactured by Zhuoye, transferred to Wellpine, imported and distributed by Arrow, and sold to retailers by Excel—were BIC lighters. MSDV Ex. 26. In another instance, a customer believed the MK lighter she purchased was a BIC lighter. MSDV Ex. 27. Therefore, *DuPont* factors 7 and 12 also favor a finding of consumer confusion.

Considering the undisputed evidence, I find that *DuPont* factors 1-5, 7, and 12 favor a finding that the accused Zhuoye, Wellpine, Arrow, and Excel pocket lighters are likely to cause confusion with the Asserted Trade Dress.

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**2. Milan Accused Products**

Defaulting respondent Milan sells for importation, imports, and/or sells after importation, into the United States the following accused product:



Complaint, Ex. 11.

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The Milan lighters have an elliptical cross-section but for one subtle difference: one of the vertices of the ellipse—at the nose of the hood— has been flattened. *Id.*

**a) Trade Dress Similarity and Similarity of Goods  
(DuPont Factors 1 & 2)**

I find that the Milan accused products are pocket lighters not made of precious metals. Thus, they are similar goods to the lighters disclosed in the Asserted Trade Dress.

The Milan accused lighters have an oblong body with a nearly elliptical cross-section. I find the record contains unrebutted evidence that consumers are likely to perceive the Milan lighters as having an elliptical cross-section at the time of purchase. For example, Milan’s online marketing depicts the lighters from an angle at which the slight variation from an elliptical cross section is not apparent:

SMOKING ACCESSORIES VAPORIZER & E-JUICE DISPENSARY HERBAL PRODUCTS INCENSE & CANDLE GENERAL MERCHANDISE

[Home](#) » [TuTu Safety Flat Sided Disposable Lighters 50pk](#)

### TuTu Safety Flat Sided Disposable Lighters 50pk



Product Code: Lighters170  
Availability: In Stock

Price: \$25.99  
Ex Tax: \$25.99

Qty:  [Add to Cart](#) - OR - [Add to Wish List](#)  
[Add to Compare](#)

★★★★★ [0 reviews](#) | [Write a review](#)

[Share](#) [Email](#) [Facebook](#) [Twitter](#)

## PUBLIC VERSION

Complaint, Ex. 11; *see also* MSDV. Exs. 44, 81, 87.

Similarly, the slight flattening of one part of the hood and fork in the Milan lighters does not detract them from being “generally parabolic,” as in the Asserted Trade Dress.

The greater the similarity between the trademark owner’s and the alleged infringer’s products, the greater the likelihood of confusion. *Alliance for Good Gov’t v. Coal. for Better Gov’t*, 901 F.3d 498, 512 (5th Cir. 2018). Given the overwhelming similarity of the Milan accused lighters and the Asserted Trade Dress, the first two *DuPont* factors favor finding a likelihood of confusion.

### **b) Similar Trade Channels (*DuPont* Factor 3)**

Overlap between the outlets for, and consumers of, similar products increases the potential for confusion. *See Alliance for Good Gov’t*, 901 F.3d at 512. Here, the record demonstrates that both the accused Milan pocket lighters and the protected BIC Classic Lighters are primarily purchased from convenience stores, grocery stores, and discount retailers like Walmart. SRV Ex. G (Hanover Market Study) at BIC-ITC-0003366, 0003434-35. I find that the Milan accused products are sold in the same channels of commerce as the BIC products embodying the Asserted Trade Dress, and therefore *DuPont* factor 3 also favors a finding of infringement.

### **c) Similar Condition of Sales (*DuPont* Factor 4)**

I find that the accused Milan pocket lighters are low-cost items that consumers are more likely to purchase on impulse than after careful consideration. The BIC Classic Lighter is sold at wholesale for approximately [REDACTED] per unit. SRV Ex. H (Dep. Tr. of Michael K. Milani (Aug. 13, 2019) (“Milani Tr.”)) at 182:6-8. Nothing in the record indicates that the Milan products are sold at a dissimilar price; indeed, the record shows that most users of disposable pocket lighters

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spend less than \$25 per year purchasing lighters. SRV Ex. G at BIC-ITC-0003366. Casual purchasers of small items are often more easily confused than sophisticated consumers of higher priced complex goods. *See Fla. Int'l Univ. Bd. of Trustees v. Fla. Nat'l Univ., Inc.*, 830 F.3d 1242, 1256 (11th Cir. 2016). Because the both the authorized and unauthorized goods are low-cost items not rigorously scrutinized by consumers, *DuPont* factor 4 also favors a finding of a likelihood of confusion.

### **d) Fame of Complainant's Trade Dress (*DuPont* Factor 5).**

The BIC Classic Lighter is nearly ubiquitous. It has been on the market in the United States for 45 years, with almost 90% of all pocket lighter users reporting that they have used a BIC lighter in the past 3 months. Complaint at ¶¶ 4-5, 13, 36. Social media pages for the BIC Classic Lighter draw substantial attention from the public, with over 1.4 million Facebook followers and nearly 100,000 Instagram followers. *Id.* at ¶ 14.

Additionally, the Museum of Modern Art (“MoMa”) in New York has displayed the BIC Classic Lighter as one example of an iconic design of the 20th Century. *Id.* at ¶ 16; *see* MSDDI Ex. 4 at ¶ 7. I find that the design of the BIC Classic Lighter, which embodies the Asserted Trade Dress, is famous and highly distinctive. *DuPont* factor 5 thus favors a finding of a likelihood of confusion.

### **D. Infringement Conclusion**

In light of the foregoing evidence and the record as a whole, I find that the uncontested record demonstrates that the accused pocket lighters are likely to cause confusion with BIC's Asserted Trade Dress. The record also demonstrates that BIC owns the Asserted Trade Dress and that it is incontestably valid. Accordingly, I determine that BIC has demonstrated infringement of the Asserted Trade Dress by the accused pocket lighters.

**V. DOMESTIC INDUSTRY**

**A. Technical Prong**

In a trade dress investigation, the technical prong of the domestic industry requirement is met through the practice of the trade dress with products or packaging. *See Certain Footwear Prods.*, Initial Determination at 119 (not reviewed in pertinent part). As detailed below, BIC satisfies the technical prong of the domestic industry requirement through its manufacture and sale of the BIC Classic Lighter.

The '622 and '917 trade dress marks both relate to cigarette lighters not made of precious metal that have the following three characteristics—

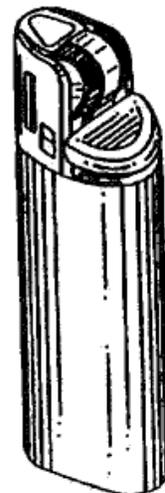
- an oblong body which is elliptical in cross-section;
- a fork which is generally parabolic in cross-section; and
- a hood which is generally parabolic in cross-section.

*See* '622 trade dress mark at 2; '917 trade dress mark at 2. The '622 and '917 trade dress registrations illustrate an oblong body having an elliptical cross-section and a parabolic fork and hood:

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Drawing from the  
'622 trade dress mark registration



Drawing from the  
'917 trade dress mark registration

After a visual examination of the photographic and physical examples of the BIC Classic Lighter in the record, I find that the BIC Classic Lighter embodies the Asserted Trade Dress. First, the overall appearance of the BIC Classic Lighter is the same as the Asserted Trade Dress:

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Additionally, a component-by-component analysis of the BIC Classic Lighter shows it has the particular elements identified in the registrations of the '622 and '917 trade dress marks. Since 1973, every iteration of the BIC Classic Lighter has had the same oblong body with an elliptical cross-section and a parabolic fork and hood. Kupson Tr. At 88:9-89:7. Those elements are illustrated below:

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Trade Dress Element	Detail from Expanded J26
<p><b>“an oblong body which is elliptical in cross-section”</b></p>	 <p>Body: Contains the Fuel; polyacetal</p>
<p><b>“a fork which is generally parabolic in cross-section”</b></p>	 <p>Pusher: Pad for depressing fork to activate valve; polyamide          Fork: Lifts Jet allowing Fuel release; zinc          Fork/Pusher Subassembly</p>
<p><b>“a hood which is generally parabolic in cross-section”</b></p>	 <p>Hood: Windshield; steel</p>

See MSDDI at 9, 11; SRV Ex. B

I find that BIC satisfies the technical prong of the domestic industry requirement through its practice of the Asserted Trade Dress with the BIC Classic Lighter.

**B. Economic Prong**

**1. Plant and Equipment**

BIC owns facilities in Milford, Connecticut, that manufacture the BIC Classic Lighter. MSDDI at 1-2. From January 1, 2015, through September 30, 2018, BIC manufactured over **P** BIC Classic Lighters at its Milford facility. MSDDI Ex. 4 (Vensel Decl.) at ¶10. Injection **U** **B**

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molding equipment within that facility forms the body, base, and pusher of the lighters. MSDDI at 17-18. The molded parts are then combined with other components like the strike wheel using machines that BIC designed and built for that purpose. *Id.* at 18-19. Manufacturing in the Milford facility also optionally includes application of a decorative sleeve or wrap. MSDDI at 1, 19-20; MSDDI Ex. 3 (Milani Expert Rep.) at § 9.1.3, MSDDI Ex. 4 (Vensel Decl.) at ¶ 18. The final lighter assembly is then tested and inspected using special equipment in the Milford plant. MSDDI at 18. In 2018, [REDACTED] of all units produced at the Milford plant were BIC Classic Lighters. MSDDI Ex. 3 at 29-30.

BIC's Milford plant is [REDACTED] square feet and was appraised at a market value of [REDACTED] in 2016. MSDDI Ex. 3 at 19. BIC continues to make capital improvements to the plant. *Id.* at 18. For instance, in 2017, BIC invested [REDACTED] of the plant. *Id.* at 18-19; *see* MSDDI Ex. 4 at ¶ 13. BIC also presented un rebutted evidence of other capital expenditures for improvement of the Milford plant amounting to [REDACTED] in 2017 and [REDACTED] in 2018. MSDDI Ex. 3 at 45-46. BIC arrived at these capital expenditure amounts by allocating its expenditures proportionally to the ratio of BIC Classic Lighters produced at the plant and the total units the plant produced. Based on this evidence, I find that BIC's Milford plant is a significant investment.

BIC also rents ancillary buildings in the same complex, with the primary purpose of supporting manufacture of the BIC Classic Lighter, for a total cost of [REDACTED] in 2018. MSDDI Ex. 3 at 29-30. Allocating that rent proportionally to products produced in the Milford complex, BIC claims [REDACTED] of the ancillary building rent, or [REDACTED], as part of its domestic industry. *Id.* I find the [REDACTED] of ancillary building rent claimed by BIC is also a significant plant investment.

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With respect to equipment, BIC has presented evidence of an [REDACTED] investment in equipment used to manufacture and package the BIC Classic Lighter from 2015-2018. MSDDI Ex. 3 at 25. BIC acknowledges that the machinery in its Milford facility is used for producing BIC Classic Lighters and other products not protected by the Asserted Trade Dress. Accordingly, BIC supports its domestic industry claim with only the proportion of its total equipment expense that may be reasonably allocated for production of the BIC Classic Lighter. BIC's allocation is based on prorating its expenses proportionally to the percentage of protected units that its equipment produced. *Id.* at 26. I find BIC's allocation method is appropriate to the facts of this investigation, and that BIC's [REDACTED] equipment expense is a significant investment.

Using the same allocation methodology, BIC further provided un rebutted evidence of [REDACTED] [REDACTED] in expenditures for spare parts and service for the equipment used to directly produce the BIC Classic Lighter. *Id.* at 26. I find these expenses to be a significant equipment investment.

BIC additionally proved expenses for equipment that supports the manufacture of the protected lighters in important ways. Such evidence includes expenses for forklifts to move materials around the manufacturing facility, for measurement equipment used in quality control, and for tools used to perform periodic maintenance on the injection molding equipment. After allocation, those investments totaled [REDACTED]. *Id.* at 27-28. I find this amount to be a significant equipment investment.

Staff addressed only BIC's most conservative calculations for plant and equipment expenses in its summary determination brief, excluding, for example, BIC's expenses relating to placing decorative sleeves on BIC Classic Lighters. Commission Investigative Staff's Response to Complainant's Motion for Summary Determination That It Satisfies the Domestic Industry Requirement at 15 (Sept. 30, 2019) (EDIS Doc. ID 689688). Even without considering those

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expenses, Staff concedes that BIC has spent [REDACTED] dollars on plant and equipment to manufacture the BIC Classic Lighter in the United States. *Id.* at 16. Staff further concedes that these amounts may be significant if BIC did not also manufacture the BIC Classic Lighter overseas. *Id.* But Staff takes issue with the fact that BIC did not present evidence comparing its domestic plant and equipment investments to its foreign expenditures, and Staff contends that without such evidence there is a disputed issue of material fact on this point. *Id.*

It is true that the record contains evidence that BIC manufactures some BIC Classic Lighters offshore. But to defeat summary determination, it is not enough to argue that facts about BIC's foreign expenditures *might* be adduced that would create a dispute about the significance of BIC's domestic plant and equipment investments. A party opposing summary determination must come forward with "specific facts" showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Here, no party has presented specific facts about BIC's foreign plant and equipment investments that would call into question the significance of BIC's domestic investments in the same category.

Moreover, arguments about issues "that are irrelevant or unnecessary" to resolve the dispute do not defeat summary determination. *See id.* at 248. On this record, a comparison of BIC's foreign and domestic plant expenses is unnecessary to determine the significance of BIC's industry. *See Certain Optoelectronic Devices*, 337-TA-860, Comm'n Op. at 18-19 (Public Version) (May 9, 2014) (comparing a complainant's domestic expenditures to its foreign expenditures is one factors the Commission may use to evaluate the significance of a domestic industry, but it is not required to consider that factor in every case). It is undisputed that [REDACTED] of BIC Classic Lighters sold in the United States are manufactured at BIC's facility in Connecticut. MSDDI Ex. 3 at OT 15.0. There is no dispute that BIC's Milford plant constitutes the entire

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disposable pocket lighter manufacturing industry in the United States. *See* MSDDI Ex. 4 at ¶ 24 (“BIC operates the only plant in the United States that manufactures disposable pocket lighters.”). There are no other plants producing such goods in the United States. On at least that basis, I find BIC’s plant and equipment investment to be qualitatively significant. Additionally, the vast majority of BIC’s total investment in the Milford plant is directed to products embodying the Asserted Trade Dress. That also supports a finding that BIC’s investment is qualitatively significant. In other words, a major reason for the plant’s existence in the United States is to manufacture protected goods.

As for BIC’s expenses relating to sleeving, I find no reason to discount them from BIC’s claimed domestic industry. The Asserted Trade Dress protects BIC Classic Lighters with sleeves just as much as it protects those without. *See* 19 U.S.C. § 1337(a)(3)(A) (a domestic industry exists if there is a significant investment in plant and equipment with respect to “articles protected by” a trademark).

In sum, I find that the [REDACTED] investment BIC has made in U.S. plant and equipment for manufacturing articles protected by the Asserted Trade Dress is quantitatively and qualitatively significant.

### 2. Labor and Capital

BIC has likewise demonstrated by reliable evidence a significant domestic employment of labor and capital relating to protected articles.

As of December 2017, BIC employed [REDACTED] employees at the Milford plant. MSDDI Ex. 3 at 35. BIC paid those employees a total of [REDACTED] in wages and [REDACTED] in benefits for the 2017 calendar year. *Id.* As of October 18, 2018, the number of employees had grown to [REDACTED].

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*Id.* BIC paid those employees ██████████ in wages and ██████████ in benefits from January 1, 2018, to October 18, 2018. *Id.*

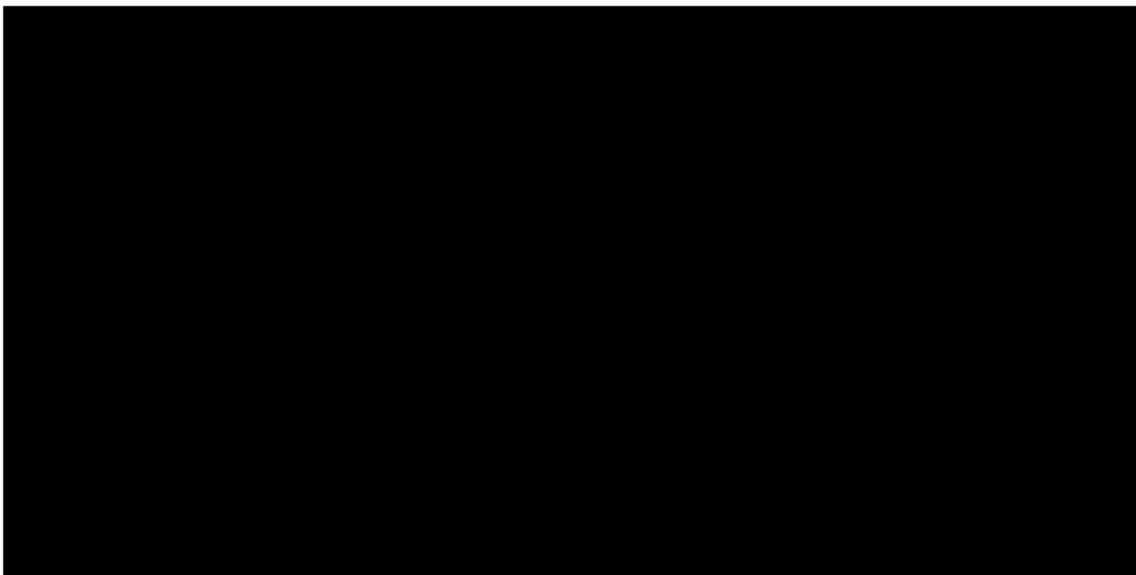
BIC claims only a portion of its total Milford plant labor expense as part of its domestic industry. BIC prorated its labor expenses based on each employee's role in the production of the BIC Classic Lighter as well as on the proportion of total units produced at the plant that are BIC Classic Lighters. MSDDI at 32-33. BIC claims ██████████ in wages and benefits to produce the BIC Classic Lighter at the Milford plant in 2017, and ██████████ in the first three quarters of 2018. MSDDI Ex. 3 at 36. Combined, BIC has demonstrated a total of ██████████ invested in labor for the domestic production of the BIC Classic Lighter in 2017 and 2018.

I find the labor expenses claimed by BIC are qualitatively significant because, as noted above, the Milford plant is the only manufacturer of disposable pocket lighters in the United States, and the vast majority of BIC's labor expenses at the Milford plant are attributable to the BIC Classic Lighter.

Additionally, BIC's labor expenses for the Milford plant are significant when compared to BIC's worldwide investments in labor. BIC incurs ██████████ in labor costs worldwide across five countries to produce its lighter products. MSDDI Ex. 3 at 43-44; MSDDI at 43. BIC incurs ██████████ of its worldwide labor costs in France, ██████████ in the United States, ██████████ in Spain, and ██████████ in China, as shown in the chart below:

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**TABLE 16: Investments in Labor for Domestic Industry Employees at the Milford Facility as a Percentage of Worldwide Lighter Category Employees**



MSDDI at 43.

As can be seen in the chart, approximately [REDACTED] of BIC's claimed U.S. labor expenses are attributable to the BIC Classic Lighter. While not as high as BIC's labor costs in [REDACTED], BIC's U.S. labor expenditures are nevertheless significant; they are greater than the labor costs BIC incurs in most of the countries in which it makes lighters. Furthermore, although some BIC Classic Lighters are made in France, labor at BIC's Milford plant supplied [REDACTED] of all BIC Classic Lighters sold in the United States in 2018. MSDDI Ex. 3 at OT Exhibit 15 (Percentage of U.S. Sales Supplied by the Milford Facility).

I thus find that BIC has demonstrated by reliable evidence that it has made a qualitatively and quantitatively significant employment of labor and capital in a domestic industry that manufactures articles protected by the Asserted Trade Dress.

**VI. RECOMMENDED DETERMINATION ON REMEDY & BOND**

I must issue a recommended determination concerning the appropriate remedy in the event that the Commission finds a violation of section 337 and I must recommend the amount of bond

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to be posted for importation during any Presidential review of the Commission's action. *See* 19 C.F.R. § 210.42(a)(1)(ii).

### A. Findings of Fact Relevant to Remedy and Bond

A very large number of foreign suppliers offer disposable pocket lighters via e-commerce platforms like Alibaba.com, Amazon.com, and eBay.com. *See, e.g.*, MSDV Ex. 97 at ¶¶ 6-8. These offerings appear to infringe the Asserted Trade Dress. For instance, made-in-china.com, an e-commerce marketplace with the tagline “Connecting Buyers with Chinese Suppliers,” lists 174 disposable lighter manufacturers and suppliers. MSDV Ex. 97 at ¶ 12. Alibaba.com has multiple listings for non-BIC lighters that embody the Asserted Trade Dress. Many of those listings use altered photos of BIC lighters or describe the offered products as BIC lighters. *Id.* at ¶¶ 9-11. When search terms for authorized BIC products are used, such as BIC model number “j26,” many unauthorized listings are displayed. *Id.* at ¶¶ 7-12.

For example, a seller on Alibaba.com called “Rotur Lawncare Service” uses the following image in its listing for a product identified as a “J26 BIG LIGHTER”:



MSDV Ex. 33.

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The same image is also used by an Arizona company called “IdeaStage Promotions LLC” on its website selling “BIC Maxi Lighter” and “Custom BIC Lighter” products:



See MSDV Ex. 34 (left), MSDV Ex. 35 (right). Neither seller is authorized by BIC to offer products embodying the Asserted Trade Dress

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Another Alibaba.com seller offers unauthorized “High Quality Gas Maxi B.I.C. Lighters J26”:



MSDV Ex. 36.

Yet another Alibaba.com seller offers unauthorized “Maxi B.I.Ck LIGHTERS J26”:



MSDV Ex. 37.

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The four images above all show products that infringe the Asserted Trade Dress. And each of the four sellers also explicitly referenced BIC's name or model number to market infringing products. The record contains dozens of similar unauthorized offers for sale, and many of those offers do not indicate the manufacturer of the infringing products. *See* MSDV Ex. 40 (search results showing 32 suppliers of “j26 lighter[s]”).

Former respondent Benxi Fenghe Lighters (“Benxi”), which was never successfully served, continues to offer what appears to be a pocket lighter nearly identical to the protected BIC Classic Lighter:



MSDV Ex. 39. Benxi, like many of the suppliers of infringing products discussed above, claims a very large production capacity. *Id.* (claiming capacity of 800,000 pieces per day); *see also* MSDV Exs. 33 (seller claims supply capacity of “10000000 Piece/Pieces per Quarter”), 36 (seller, Hunan Dongyi Electric Co., Ltd., with minimum order quantity of “200000” deliverable in “[a]bout 20 days” and allowing order of up to 1,000,000 units with a “[s]upply [a]bility” of “7000000 Piece/Pieces per [d]ay”), 37 (seller, SkyNet, claiming supply ability of 600,000 lighters

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per week), 38 (seller, Bierhalter & Haueisen GMBH & Co., 100,000 piece minimum order deliverable in 25 days, claimed supply capacity of 7.5M trays of lighters per week).

### **B. General Exclusion Order**

When some respondents default without appearing but other respondents appear and contest the complaint, section 337(d)(2) specifies the conditions for issuing a general exclusion order. *Certain Lighters*, Inv. No. 337-TA-575, Comm’n Op. at 4 (Public Vers.) (Aug. 30, 2007) (EDIS Doc. ID 281618) (“*Lighters*”). A general exclusion order under section 337(d)(2) must rest upon a violation established by substantial, reliable, and probative evidence. *Lighters* at 5.

Under section 337(d)(2), a general exclusion order is warranted when “an exclusion order limited to products of named persons” would be circumvented or when “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) and (B). Satisfaction of either criterion is sufficient for imposition of a general exclusion order. *Certain Cigarettes and Packaging Thereof*, Inv. No. 337 TA-643, Comm’n Op. at 24 (Oct. 1, 2009) (“*Cigarettes*”). The Commission “focus[es] principally on the statutory language itself” when determining whether a general exclusion order is warranted. *Certain Ground Fault Circuit Interrupters and Products Containing Same*, Inv. No. 337-TA-615, Comm’n Op. at 25 (Mar. 26, 2009) (“*Ground Fault Circuit Interrupters P*”).

#### **1. Circumvention of Limited Exclusion Orders**

A limited exclusion order restricts the activities of named respondents but not others. *Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1356-57 (Fed. Cir. 2008). If the evidence shows that named respondents would circumvent a limited exclusion order, a general exclusion order is appropriate. *See Certain Ground Fault Circuit Interrupters & Prod. Containing Same*, Comm’n Opinion, Inv. No. 337-TA-739, Comm’n Op. at 88-89, 2012 WL 2394435 at 56

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(June 8, 2012) (“*Ground Fault Circuit Interrupters II*”) (finding a general exclusion order was appropriate based on evidence that named respondents would circumvent a limited exclusion order by changing their corporate identity). BIC has adduced evidence that a general exclusion order is necessary to prevent the respondents named in this investigation from circumventing a limited exclusion order.

The record contains evidence that named respondents Zhuoye and Wellpine are the same entity doing business under different names, and that Zhuoye misrepresented that relationship in discovery before defaulting in the investigation. Specifically, the record contains dozens of invoices on Wellpine letterhead that list Wellpine’s website address as “zhuoyelighter.com” and Wellpine’s email address as “zhuoye@netvigator.com.” MSDV Ex. 15. Zhuoye uses the same web domain as Wellpine, “zhuoyelighter.com.” MSDV Ex. 42. And, before the complaint was filed in this investigation, Zhuoye’s website expressly listed Wellpine as a “Branch Office” of Zhuoye. MSDV Ex. 42.

Wellpine has imported and sold millions of Zhuoye lighters in the United States, as demonstrated by invoices and Customs declarations. MSDV Ex. 42, 54. Notwithstanding the overwhelming evidence in the record that Zhuoye and Wellpine are the same entity, and that they sell lighters for importation into the United States, Zhuoye submitted an interrogatory response averring that it “has no knowledge as to the details of distribution, importation, and sale of these products in the United States, other than the information on the packaging that references respondent MK Lighter Company.” MSDV Ex. 17 (Zhuoye’s Resps. to Commission Investigative Staff’s First Set of Interrogatories (Nos. 1-7)) at 5-6. The packaging to which Zhuoye refers reveals nothing about Zhuoye and Wellpine. *See* MSDV Ex. 55 (packaging for MK lighters sold by Wellpine to Arrow). Moreover, Zhuoye’s interrogatory response is contradicted by its response

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to the complaint, in which it admits that it knows that Wellpine “does sell pocket lighters for importation into the United States.” Arrow Resp. at ¶ 27. Based on the totality of the record evidence, I find that Zhuoye’s interrogatory response averring it has no knowledge about the details of the distribution, importation, and sale of its lighters in the United States is false. I draw an inference from the submission of this false statement that Zhuoye intends to hide the nature of the activities it performs under different company names, including the Wellpine name.

Other evidence in the record supports the same conclusion. The record contains evidence that named respondents Zhuoye and Wellpine are the same entity doing business under at least six names: (1) Zhuoye Lighter Manufacturing Co., Ltd.; (2) Guangdong Zhuoye Lighter Manufacturing Co., Ltd.; (3) Zhuoye Lighter (Deqing) Manufacturing Co., Ltd.; (4) Zhuoye Lighter (Guangxi) Manufacturing Co., Ltd.; (5) Zhuoye Lighter (Hunan) Manufacturing Co., Ltd.; and (6) Wellpine Company Limited. *See* MSDV Ex. 50, Zhuoye’s Resps. to BIC’s First Set of Requests for Admission, at 65-67 (Apr. 16, 2019) (responses to Request Nos. 108 through 111, admitting Guangdong Zhuoye Lighter Manufacturing Co., Ltd., and Zhuoye Lighter (Deqing) Manufacturing Co., Ltd., are the same entity); MSDV Ex. 42 (Zhuoye website listing Wellpine as a “Branch Office” and the Deqing, Guangxi, and Hunan entities as “Branch Factories”). Guangdong Zhuoye Lighter Manufacturing Co., Ltd., an entity not listed in the notice of investigation, also uses the same web domain as named respondent Zhuoye: “zhuoyelighter.com.” MSDV Ex. 47 (listing “Other Homepage Address: <http://www.zhuoyelighter.com>” for the entity Guangdong Zhuoye Lighter Manufacturing Co., Ltd.).

The record shows that, after the complaint was filed in this investigation, Zhuoye removed website references to the latter five corporate names listed above. *See* MSDV Ex. 50, Zhuoye’s Resps. to BIC’s First Set of Requests for Admission, at 65-67 (Apr. 16, 2019) (responses to

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Request Nos. 108 through 111). Zhuoye's stated reasons for removing the information were again contradictory. On the one hand, Zhuoye admitted that "Zhuoye Lighter (Deqing) Manufacturing Co. Ltd. is Respondent, Guangdong Zhuoye Lighter Manufacturing Co. Ltd.," but on the other hand Zhuoye said it deleted the reference to the Deqing entity "because it is factually untrue: Respondent does not own or operate and is not aware of an entity named: Zhuoye Lighter (Deqing) Manufacturing Co. Ltd." (*Id.* at responses to Request Nos. 110-111). These contradictory statements, and the admitted removal of names from its website after the commencement of litigation, again indicate that Zhuoye intends to hide the nature of the activities it performs under different company names. Such evidence supports a conclusion that if a limited exclusion order were issued against named respondents Zhuoye and Wellpine, the persons or entity behind those names would circumvent such an order using one or more different corporate names. *See Ground Fault Circuit Interrupters II*, Comm'n Op. at 88-89 (issuing a general exclusion order where respondents had a propensity and ability to change names and corporate forms); *Certain Elec. Skin Care Devices, Brushes & Chargers Therefor, & Kits Containing the Same*, Inv. No. 337-TA-959, Comm'n Op. at 15, 17 (Feb. 13, 2017) (issuing a general exclusion order to avoid circumvention by respondents operating under multiple names). A general exclusion order is necessary here to prevent such circumvention.

Additionally, records produced by respondent Arrow show that infringing lighters were imported into the United States using at least four different identifiers for defaulted respondent Wellpine on U.S. Customs and Border Protection forms. *See, e.g.*, MSDV Ex. 54 at ARROW-MK 000727 (showing Box 13 Manufacturer ID as "HKWELCOM25HON"), ARROW-MK 000764 ("HKWELCOM117HON"), ARROW-MK 000816 ("CNWELCOM25HON"), ARROW-MK 000910 ("CNWELCOM117TSU"). Form 7501 is used by Customs to identify merchandise

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entering the commerce of the United States. “The identification of a manufacturer or shipper by a unique code” on that form “is an important enforcement tool.” Customs Directive No. 3550-055 (Nov. 24, 1986), *available at* <https://www.cbp.gov/trade/programs-administration/entry-summary/cbp-form-7501>. Using multiple different identifiers for the same manufacturer may circumvent an exclusion order limited to a uniquely identified manufacturer.

In sum, I find the record contains substantial, reliable, and probative evidence that a general exclusion order is necessary to prevent circumvention of exclusion orders limited to named respondents. *See* 19 U.S.C. § 1337(d)(2)(A). I therefore recommend a general exclusion order issue in this investigation should the Commission find a violation of section 337.

### 2. **Pattern of Violation and Difficulty Identifying the Source of Infringing Goods**

#### a) *Pattern of Violation*

BIC has also established a pattern of violation of section 337 by sources that are difficult to identify, which constitutes an independent basis for issuing a general exclusion order. *Cigarettes*, Comm’n Op. at 24.

First, there is unrebutted evidence of a widespread pattern of violation of section 337 through the importation and sale of lighters that infringe the Asserted Trade Dress. Millions of infringing pocket lighters have been imported into the United States over a period of years. *See* MSDV Ex. 54 (Customs forms showing millions of imported units), Ex. 12 (BIC-Arrow Jt. Stip.). I find those millions of imported articles to demonstrate a pattern of violation of section 337.

Moreover, the actions of the respondents named in this investigation demonstrate a pattern of violation. Three of those respondents contested or attempted to contest the complaint, defaulted, and then continued to engage in a pattern of violation of section 337. For example, respondent Zhuoye appeared in this investigation and made a false statement about its knowledge of the

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importation and sale of its lighters in the United States. *See* MSDV Ex. 17, Zhuoye’s Resps. to Commission Investigative Staff’s First Set of Interrogatories (Nos. 1-7), at 5-6 (Apr. 3, 2019). Shortly thereafter, Zhuoye instructed its counsel to stop participating in this investigation. *See* Order Nos. 12, 15. But after defaulting and removing information about Wellpine from its website, Zhuoye advertised a “current annual capacity well passed 700 million lighters, distributed globally to over 70 countries in Europe, the USA, and Asia.” MSDV Ex. 59; *see also* MSDV Ex. 45-49. I find this evidence demonstrates a pattern of violation of section 337 by Zhuoye and Wellpine.

Similarly, respondent Milan submitted a document admitting that it imports and sells TUTU brand lighters in the United States. Milan Resp. at ¶¶ 20, 55, 56. After the submission, Milan failed to participate in the investigation, did not respond to an order to show cause, and was found in default. The record indicates that Milan lighters continue to be imported and sold in the United States even after Milan became aware of detailed accusations of infringement in this investigation. *See* MSDV Ex. 81, 87. I find Milan’s actions demonstrate a pattern of violation of section 337.

BIC has provided evidence of a pattern of violation of section 337 by non-respondents as well. As described above, the website made-in-china.com lists dozens of vendors offering to sell and import lighters that infringe the Asserted Trade Dress. MSDV Ex. 99. The website Alibaba.com also lists many foreign entities offering to sell and import infringing pocket lighters. The Alibaba.com listings include:

- Hunan Dongyi Electric Co., Ltd., which claims it can supply 7 million pieces per day (MSDV Ex. 36);
- SkyNet, which claims it can supply 1 million lighters per day (MSDV Ex. 37);
- Bierhalter & Haueisen GMBH & Co., which requires a minimum order of 100,000 pieces and claims it can supply 7.5 million trays of lighters per week (MSDV Ex. 38); and

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- Benxi, which claims it can supply 800,000 lighters per day (MSDV Ex. 39).

Based on undisputed record evidence, I find that BIC has presented substantial, reliable, and probative evidence of a pattern of violation of section 337 through the sale and importation into the United States of pocket lighters that infringe the Asserted Trade Dress.

### a) *Difficulty Identifying Source*

I have already discussed record evidence that named respondents Zhuoye and Wellpine are likely to circumvent a limited exclusion order by using alternative corporate names and alternative designations on Customs forms. These same facts support a conclusion that identifying the source of infringing pocket lighters is difficult.

Additionally, BIC has proffered evidence showing that infringing lighters are routinely sold online without any identification of the manufacturer or importer. *See* MSDV Ex. 33 (seller of apparently infringing lighters on Alibaba.com without identification of manufacturer), Ex. 37 (same), Ex. 53 (same); Ex. 55 (Arrow packaging showing brand name MK but with no information identifying Zhuoye or Wellpine as the manufacturer or supplier). This is a classic fact pattern for difficulty in identifying the source of infringing goods. *See Toner Cartridges II* at 11; *Certain Sildenafil or Any Pharmaceutically Acceptable Salt Thereof, such as Sildenafil Citrate, and Prods. Containing Same*, Inv. No. 337-TA-489, Comm'n Op. at 7-8 (July 23, 2004) (Public Vers.) (EDIS Doc. ID 210919). Indeed, a representative for respondent Arrow testified that it had already located a trading company in Hong Kong which could source millions of substitute lighters that embody the same shape as the accused products. MSDV Ex. 13 at 63:1-25. This shows that suppliers for infringing products are easily and quickly replaced. If suppliers for infringing products are quickly replaced, it becomes difficult to find the source of such goods before that source has vanished.

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In sum, BIC has established by substantial, reliable, and probative evidence a pattern of violation of section 337 by sources that are difficult to identify. *See* 19 U.S.C. § 1337(d)(2)(B); *see also Lighters* at 7-9 (finding a general exclusion order is appropriate based on widespread unauthorized online sales and difficulty in identifying the source of infringing lighters). I therefore recommend a general exclusion order issue in this investigation should the Commission find a violation of section 337.

### **C. Limited Exclusion Order**

Section 337(d) provides that “[i]f the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States. . . .” 19 U.S.C. § 1337(d). The undisputed evidence supports a determination that Zhuoye, Wellpine, and Milan have violated section 337, so the condition precedent for limited exclusion orders has been satisfied. Should the commission find a violation and determine not to issue a general exclusion order, I recommend that the Commission issue limited exclusion orders directed to defaulting respondents Zhuoye, Wellpine, and Milan.

### **D. Cease and Desist Order**

Under section 337(f)(1), the Commission may issue a cease and desist order in addition to, or instead of, an exclusion order. *See* 19 U.S.C. § 1337(f)(1). When there is a commercially significant inventory of infringing, imported product in the United States that could be sold after the Commission issues an exclusion order, thereby undercutting that remedy, a cease and desist order may be appropriate. *See, e.g., Certain Magnetic Data Storage and Tapes and Cartridges Containing the Same (II)*, Inv. No. 337-TA-1076, Comm’n Op. at 63 (June 20, 2019) (issuing a limited exclusion order and a cease and desist order where there was evidence of commercially significant domestic inventory of infringing articles); *Certain Toner Cartridges and Components*

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*Thereof*, Inv. No. 337-TA-740, Comm'n Op. at 7-8 (Oct. 5, 2011) (issuing a general exclusion order and cease and desist orders); *see also* S. Rep. No. 100-71, at 131 (1987) (noting amendments to the cease and desist provision in section 337 allow a cease and desist order prohibiting sale of infringing goods "stockpiled during the pendency of an investigation").

Defaulting respondent Milan is located in California. *See* Milan Resp. at ¶ 20, 55. The record indicates that Milan has imported at least three shipping containers of its infringing lighters. Ex. 21, Milan's Letter to Chief Judge Irizarry and Magistrate Judge Kuo, at 2, *Bic Corp. v. Arrow Lighter, Inc.*, No. 18-cv-6922 (E.D.N.Y. May 7, 2019), ECF No. 25. Three containers could amount to more than 3 million lighters. *See, e.g.*, MSDV Ex. 15 at ARROW-MK 000064 (noting 1,175,000 lighters of a different brand were loaded into one container). Milan's infringing products are currently being offered for sale in the United States. MSDV Ex. 81, 87. I therefore find that Milan has a commercially significant inventory of infringing goods in the United States. Because sale of Milan's domestic inventory would frustrate a general exclusion order or a limited exclusion order directed to Milan, I recommend entry of a cease and desist order against Milan to prevent further sale of its infringing goods.

With respect to respondents Zhuoye and Wellpine, I do not recommend issuance of cease and desist orders. The only record evidence of Zhuoye and Wellpine products being sold in the United States are sales through respondents Arrow and Excel. When Arrow and Excel settled out of this investigation, BIC expressly allowed them to sell off their existing inventory of Zhuoye/Wellpine product. MSDV Ex. 8 (Consent Order Stipulation by Arrow Lighter, Inc. d/b/a MK Lighter, Inc. and MK Lighter Company and Excel Wholesale Distributors, Inc.) at ¶ 10. Accordingly, cease and desist orders against Zhuoye and Wellpine appear unnecessary to preserve an effective remedy for BIC.

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### **E. Bond During Presidential Review**

When the Commission determines to issue a remedy, the President has 60 days to determine if the remedy should not take effect for policy reasons. 19 U.S.C. § 1337(j)(2). During that 60-day period, any articles slated for exclusion are entitled to entry under bond at a rate set by the Commission. *See* 19 U.S.C. § 1337(j)(3). The purpose of the bond is to protect the complainant from any injury. *See* 19 C.F.R. § 210.42(a)(1)(ii), § 210.50(a)(3).

When reliable price information is available, the Commission has often set the bond by eliminating the differential between the protected product price and the infringing product price. *See Microsphere Adhesives, Processes for Making Same, and Prods. Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. 2949, Comm'n Op. at 24 (Dec. 8, 1995). In other cases, the Commission has turned to alternative approaches, especially when a reasonable royalty rate could be ascertained. *See, e.g., Certain Integrated Circuit Telecomm. Chips and Prods. Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, USITC Pub. No. 2670, Comm'n Op., 1993 WL 13033517 at \*27-28 (August 1993). A 100 percent bond has been required when no effective alternative existed. *See, e.g., Certain Flash Memory Circuits and Prods. Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 26-27 (July 1997) (imposing a 100 percent bond when price comparison was not practical and the proposed royalty rate was without adequate support in the record).

BIC and Staff both advocate for 100 percent bond because there is no reliable pricing information in the record and there is no established royalty rate for the Asserted Trade Dress. MSDV at 38-39; SRV at 36. As both BIC and Staff note, Zhuoye, Wellpine, and Milan defaulted in the investigation, precluding meaningful discovery into pricing. Although the record reflects some general information about pricing sufficient to ascertain that BIC's goods are sold in a similar stream of commerce to the accused products, *see* SRV Exh.Ex. A (Excel Resp. to Staff's 1st Rogs)

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at JX-395C:0008 (Arrow and Excel pricing); Milani Tr. at 182:6-8 (BIC pricing), such evidence is insufficiently detailed to constitute reliable evidence of pricing to calculate a price differential. And there is no established royalty rate for the Asserted Trade Dress because BIC has never licensed it. Complaint at ¶ 92. *See, e.g., Certain Pumping Bras*, Inv. No. 337-TA-988, Comm’n Op. at 15 (Apr. 7, 2017) (setting Presidential review bond at “100 percent of the entered value of the infringing products” where respondents “defaulted and failed to participate in discovery”).

Because the record lacks any reasoned basis for determining that a bond below 100 percent will adequately protect BIC, I recommend that the Commission enter a bond rate of 100 percent of the value of the accused products during the Presidential review period should it find a violation.

## VII. CONCLUSION

Based on the foregoing, I have determined that a violation of section 337 of the Tariff Act of 1930, as amended, has occurred in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain pocket lighters with respect to U.S. Trademark Registration Nos. 1,761,622 and 2,278,917. Motion Docket Nos. 1142-14 and 1142-20 are hereby granted.

All other motions pending in this investigation, if any, are denied as moot in view of this initial determination.

I hereby certify to the Commission this Initial Determination and the Recommended Determination.

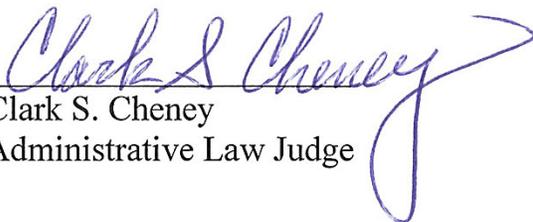
The Secretary shall serve the confidential version of this Initial Determination upon counsel who are signatories to the Protective Order (Order No. 1) issued in this investigation. A public version will be served at a later date upon all parties of record.

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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 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 therein.

Within seven days of the date of this document, the parties must jointly submit a statement to Cheney337@ustic.gov stating whether or not each seeks to have any portion of this document redacted from the public version. Should any party seek to have any portion of this document redacted from the public version thereof, the parties shall attach to the statement a copy of a **joint** proposed public version of this document indicating with red brackets any portion asserted to contain confidential business information.<sup>2</sup> To the extent possible, the proposed redactions should be made electronically, in a PDF of the issued order, using the “Redact Tool” within Adobe Acrobat, wherein the proposed redactions are submitted as “marked” but not yet “applied.” The parties’ submission concerning the public version of this document should not be filed with the Commission Secretary.

**SO ORDERED.**

  
Clark S. Cheney  
Administrative Law Judge

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<sup>2</sup> If the parties submit excessive redactions, they may be required to provide an additional written statement, supported by declarations from individuals with personal knowledge, justifying each proposed redaction and specifically explaining why the information sought to be redacted meets the definition for confidential business information set forth in Commission Rule 201.6(a). 19 C.F.R. § 201.6(a).

**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, **Yoncha Kundupoglu, Esq.**, and the following parties as indicated, on **March 30, 2020**.



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
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