In the Matter of

CERTAIN CENTRIFUGAL TRASH PUMPS

Investigation No. 337-TA-43

USITC PUBLICATION 943

FEBRUARY 1979

United States International Trade Commission / Washington, D.C. 20436

UNITED STATES INTERNATIONAL TRADE COMMISSION

COMMISSIONERS

Joseph O. Parker, Chairman
Bill Alberger, Vice Chairman
George M. Moore
Catherine Bedell
Paula Stern

Kenneth R. Mason, Secretary to the Commission

Address all communications to
Office of the Secretary
United States International Trade Commission
Washington, D.C. 20436

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UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of CERTAIN CENTRIFUGAL TRASH PUMPS	)	Investigation No. 337-TA-43

COMMISSION DETERMINATION AND ORDER

Introduction

The United States International Trade Commission ("Commission") conducted an investigation of certain centrifugal trash pumps allegedly covered by the claims of the United States Letters Patent No. 3,499,388, owned by the complainant, Hale Fire Pump Company of Conshohocken, Pennsylvania, ("Complainant" or "Hale"), pursuant to the authority of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) ("section 337"). The Commission investigated alleged unfair methods of competition and unfair acts in the importation of these centrifugal trash pumps into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which was to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

This Commission determination and order provides for the final disposition of investigation No. 337-TA-43 by the full Commission. The Commission unanimously determined that there is no violation of section 337 with respect to investigation No. 337-TA-43.

The text of the Commission's determination and order appear immediately below and are themselves followed by (1) the procedural history of the

investigation (2) a description of the domestic and imported products which were investigated, and (3) the Commissioners' opinions which explain both the decisional approach for Commission consideration of the issues in this investigation and the rationale for the Commission's decision.

Determination

Having reviewed the record in this investigation including (1) the hearing record developed before the presiding officer from August 15 through August 24, 1978, (2) the recommended determination of the Presiding Officer of October 25, 1978, (3) the exceptions filed by the parties, (4) the record of oral arguments and oral presentations before the Commission in public hearing on December 13, 1978, and (5) the pleadings of the parties, the Commission, on January 11, 1979, unanimously determined that, with respect to investigation No. 337-TA-43, there is no violation of section 337 of the Tariff Act of 1930.

Order

Accordingly, the full Commission orders that --

1. Investigation No. 337-TA-43 be terminated by the issuance and publication of a notice and order of termination of investigation in the Federal Register and by the issuance and publication of this Commission determination and order, and Commissioners' opinions;

2. The Secretary serve a copy of the notice and order of termination of investigation and this Commission determination and order, and Commissioners' opinions upon each party of record to this investigation and upon the United States Department of Health, Education, and Welfare, the United States Department of Justice, and the Federal Trade Commission, and

3. This order may be amended by the Commission at any time.

OPINION OF CHAIRMAN PARKER AND COMMISSIONERS MOORE AND BEDELL

Procedural History

This investigation was instituted on February 14, 1978, by publication of the Commission's notice of investigation in the Federal Register, (43 F.R. 6342), in response to a complaint filed on January 9, 1978, by the Hale Fire Pump Company of Conshohocken, Pennsylvania. Tokai, Ltd., Ataka America, Inc.. C. Itoh & Co., Ltd., and C. Itoh America, Inc., were named by the Commission as respondents allegedly involved in the unauthorized importation and sale in the United States of certain centrifugal trash pumps subject to the Commission's investigation (43 F.R. 6342). All respondents were duly served with the complaint and notice of investigation on February 14, 1978. By Commission order and memorandum opinion of April 14, 1978, published in the Federal Register of April 19, 1978 (43 F.R. 16553), Ataka America, Inc., was terminated as a party respondent to the investigation.

Following due and proper notice of prehearing conference and hearing of July 5, 1978, published in the Federal Register of July 11, 1978 (43 F.R. 29840), a full hearing, pursuant to section 210.41(a) of the Commission's Rules of Practice and Procedure (19 CFR 210.41(a)) was held from August 15, 1978 through August 24, 1978, before the presiding officer for this investigation, Administrative Law Judge Donald K. Duvall, to take evidence and hear argument for the purpose of determining whether there is a violation of Section 337, as was alleged in Hale's complaint. All remaining parties were represented by counsel of record.

On October 25, 1978, the presiding officer, filed with the Commission his recommended determination that the Commission find "no violation" of section 337. Respondents and complainant filed exceptions to the presiding officer's recommended determination pursuant to section 210.54. The Commission investigative attorney, also a party to the Commission's investigation (43 F.R. 6342) and the representative of the public interest in section 337 proceedings, agreed with the presiding officer's recommended determination.

By notice of November 15, 1978, published in the Federal Register of November 20, 1978 (43 F.R. 54145), the Commission announced a public hearing on the presiding officer's recommendation and on relief, bonding, and the public interest. The Commission's public hearing was held on December 13, 1978, and consisted of (1) oral arguments on the presiding officer's recommendation and (2) oral presentations on relief, bonding, and the public interest. All parties filed prehearing briefs concerning the presiding officer's recommendation and written submissions concerning relief, bonding. and the public interest. All parties were represented by counsel of record at the hearing, and all parties presented oral arguments on the presiding officer's recommendation and oral presentations on relief, bonding and the public interest. In addition, all parties submitted posthearing briefs on specific questions posed to them by Commissioners during the December 13 hearing.

Having considered the record of the instant investigation, the Commission, on January 11, 1979, acting in accordance with section 210.55 and meeting in public session pursuant to the provisions of the Government in the Sunshine Act (5 U.S.C. 552b) and the Commission's Rules unanimously determined

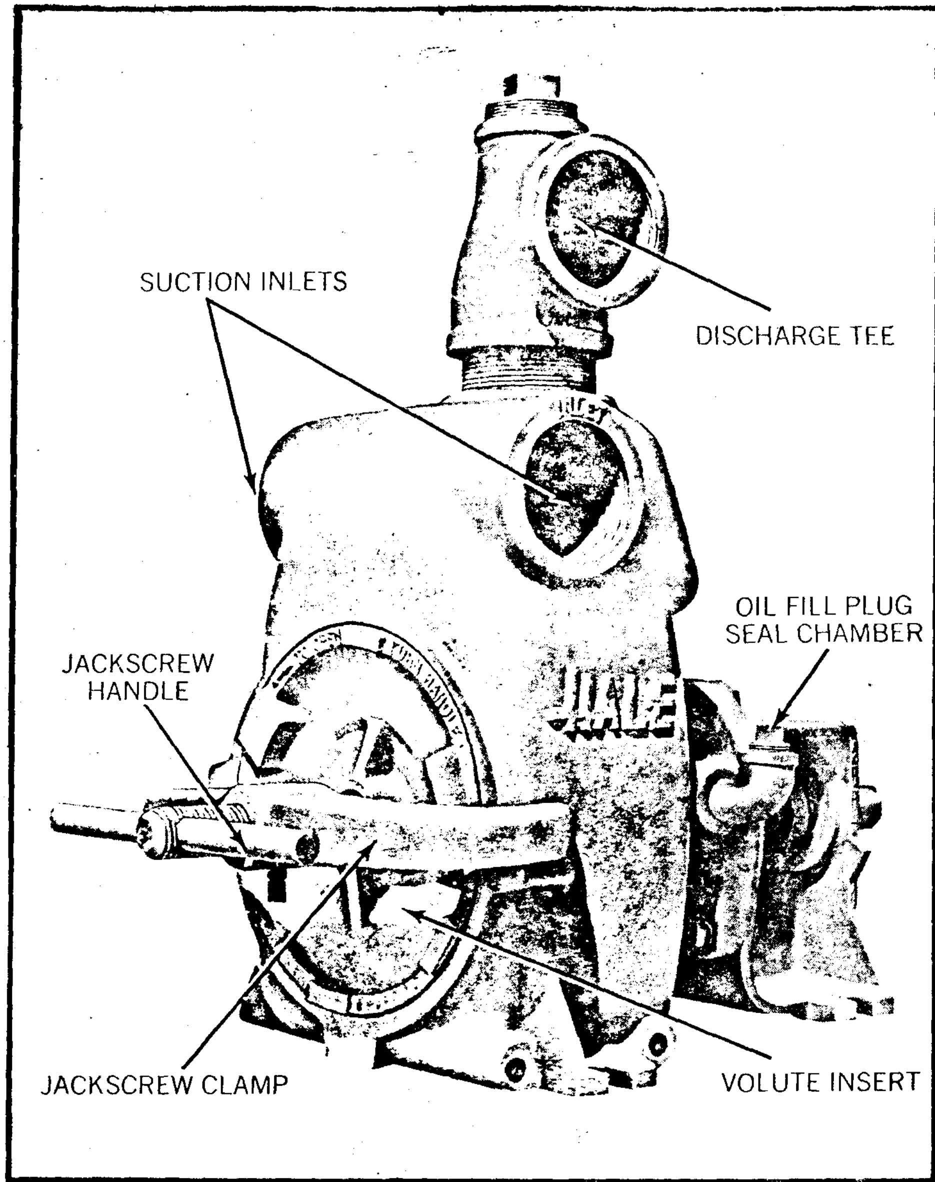
that, with respect to investigation No. 337-TA-43, there is no violation of section 337. The Commission's statutory deadline for concluding this investigation is February 14, 1979, one year after institution of this investigation by public notice in the Federal Register. The issuance of this report by the Commission and publication of a notice and order of termination of investigation in the Federal Register concludes this investigation.

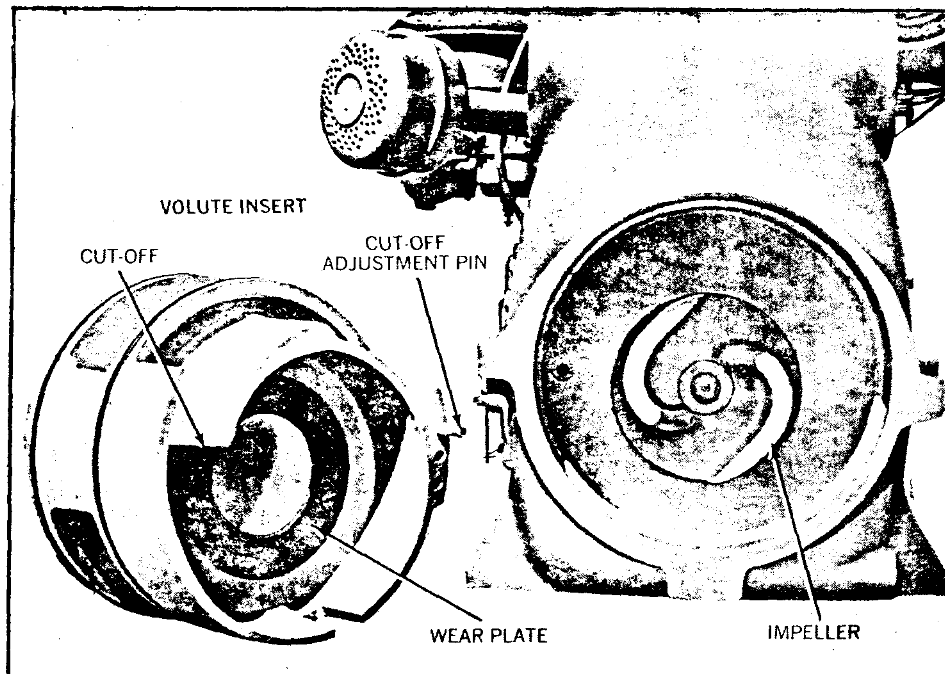
Domestic and Imported Products

Centrifugal trash pumps are used by contractors at construction sites to remove water or other liquids that contain solid debris. These pumps have a tendency to clog from the debris and quick and easy access to the pumps' interior for cleaning is advantageous. (Presiding Officer's Recommended Determination, Finding of Fact ("FF") 8). In the instant investigation, complainant alleged that respondents' pumps infringe certain patented quick and easy access features and certain other patented features of its pump.

The domestic and imported products which were at issue in this investigation are those domestic centrifugal trash pumps which are made in accordance with claims 1 and/or 17 of United States Letters Patent No. 3,499,388 ("the '388 patent"), and those imported centrifugal trash pumps which are allegedly made in accordance with claims 1 and/or 17 of the '388 patent (FF 9, FF 15).

The domestic pump made in accordance with these and other claims of the '388 patent is Hale's 30SA model. Descriptive diagrams, taken from a Hale 30SA brochure (Complainant's Exhibit ("CX") 41, excerpts), which illustrate some of the features of the 30SA pump, follow:


SUCTION INLETS
DISCHARGE TEE
OIL FILL PLUG
SEAL CHAMBER
JACKSCREW
HANDLE
JACKSCREW CLAMP
VOLUTE INSERT


VOLUTE INSERT
CUT-OFF
CUT-OFF
ADJUSTMENT PIN
WEAR PLATE
IMPELLER

The imported pumps, allegedly made in accordance with claims 1 and/or 17 of the '388 patent, are respondents' QP series of centrifugal trash pumps (FF 11). Ataka and Company, Ltd., exported the allegedly infringing pumps to the United States from 1975 through 1977, through its wholly owned subsidiary, Ataka America, Inc., a former respondent to this investigation, subsequently known as Ataka U.S.A. International, Inc. The Ataka companies' entire business in the accused imported pumps was acquired by respondents C. Itoh, Ltd., and C. Itoh America, Inc. (FF 7). Descriptive diagrams which illustrate some of the features of some of the accused imported pumps may be found, for example, at Respondents' Exhibit ("RX") 13 and CX 27.

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of CERTAIN CENTRIFUGAL TRASH PUMPS	INVESTIGATION NO. 337-TA-43

NOTICE OF INVESTIGATION

Notice is hereby given that a complaint was filed with the United States International Trade Commission on January 9, 1977, under Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), on behalf of Hale Fire Pump Co., 708 Springmill Avenue, Conshohocken, Pennsylvania 19428. The complaint alleges that unfair methods of competition and unfair acts exist in the importation of certain centrifugal trash pumps into the United States or in their sale by reason of the alleged coverage of such articles by U.S. Letters Patent No. 3,499,388. The complaint alleges that such unfair methods of competition and unfair acts have the effect or tendency to destroy or substantially injure an industry, efficiently and economically operated, in the United States. The complainant requests that such infringing pumps be permanently excluded from entry into the United States, and that a temporary exclusion order issue to exclude the imported articles during the period of the investigation.

Having considered the complaint, the United States International Trade Commission, on February 9, 1978, ORDERED--

(1) That, pursuant to subsection (b) of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), an investigation be instituted to determine, under subsection (c) whether, on the basis of the allegations set forth in the complaint and the evidence adduced, there is, or is reason to believe there is, a violation of subsection (a) of this section in the unauthorized importation of certain centrifugal trash pumps into the United States, or in the sale thereof, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States. The alleged violations of subsection (a) of this section consists of allegations that the imported pumps infringe U.S. Letters Patent No. 3,499,388;

(2) That, for the purpose of the investigation so instituted, the following persons, alleged to be involved in the unauthorized importation of such article into the United States or in their sale, are hereby named as respondents upon which the complaint and this notice are to be served:

C. Itoh America, Inc.
270 Park Avenue
New York, New York 10017

Ataka America, Inc.
633 Third Avenue
New York, New York 10017

Tokai Manufacturing Co.
Matsusaka City
Mie Prefecture
Japan

C. Itoh & Co., Inc.
4 Nihonbashi-Honcho
2-Chome, Chuo-Ku
C.P.O. Box 136
Tokyo, Japan

(3) That, for the purpose of the investigation so instituted, Judge Myron R. Renick, United States International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, is hereby appointed as presiding officer, and

(4) That, for the purpose of the investigation so instituted, Louis S. Mastriani, United States International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, is hereby appointed Commission investigative attorney.

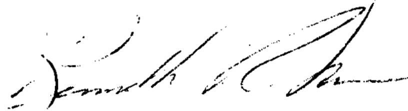
Responses must be submitted by the named respondents in accordance with section 210.21 of the Commission's Rules of Practice and Procedure, as amended (41 F.R. 17710, April 27, 1976). Pursuant to section 201.16(d) and 210.21(a) of the Rules, such responses will be considered by the Commission if received not later than 20 days after the date of service of the complaint. Extensions of time for submitting a response will not be granted unless good and sufficient cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint, and of this notice, and will authorize the presiding officer and the Commission, without further notice to the respondent to find the facts to be as alleged in the complaint and this notice and to enter both a recommended determination and a final determination, respectively, containing such findings.

The complaint, with the exception of confidential information referred to therein, is available for inspection by interested persons

at the Office of the Secretary, United States International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, and in the New York City Office of the Commission, 6 World Trade Center.

By Order of the Commission.



KENNETH R. MASON
Secretary

Issued: February 9, 1978

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of: CERTAIN CENTRIFUGAL TRASH PUMPS	)))))	Investigation No. 337-TA-43

NOTICE OF COMMISSION HEARING ON PRESIDING OFFICER'S
RECOMMENDATION, RELIEF, BONDING AND THE PUBLIC INTEREST

Recommendation of "no violation" issued. In connection with the Commission's investigation, under Section 337 of the Tariff Act of 1930, of alleged unfair methods of competition and unfair acts in the importation and sale of certain centrifugal trash pumps in the United States, the Presiding Officer recommended on October 25, 1978, that the Commission determine that there is no violation of Section 337. The Presiding Officer certified the hearing record to the Commission for its consideration. Copies of the Presiding Officer's recommendation may be obtained by interested persons by contacting the office of the Secretary to the Commission, 701 E Street, N.W., Washington, D.C. 20436, telephone (202) 523-0161.

Commission hearing scheduled. The Commission will hold a hearing beginning at 10:00 a.m., e.s.t., Wednesday, December 13, 1978, in the Commission's Hearing Room (Room 331), 701 E Street, N.W., Washington, D.C. 20436, for two purposes. First, the Commission will hear oral argument on the Presiding Officer's recommendation that there is no violation of Section 337 of the Tariff Act of 1930. Second, the Commission will receive oral

presentations concerning appropriate relief, bonding, and the public interest in the event that the Commission determines that there is a violation of Section 337. These matters are being heard on the same day in order to facilitate the completion of this investigation within time limits under law and to minimize the burden of this hearing upon the parties to the investigation. The procedure for each portion of the hearing follows.

Oral argument on Presiding Officer's recommendation. A party to the Commission's investigation or an interested agency wishing to present to the Commission an oral argument concerning the Presiding Officer's recommendation will be limited to no more than 30 minutes. A party or interested agency may reserve 10 minutes of its time for rebuttal. The oral arguments will be held in this order: complainant, respondents, interested agencies, and Commission investigative staff. Any rebuttals will be held in this order: respondents, complainants, interested agencies, and Commission investigative staff.

Oral presentations on relief, bonding, and the public interest. Following the oral arguments on the Presiding Officer's recommendation, a party to the investigation, an interested agency, a public interest group, or any interested member of the public may make an oral presentation on relief, bonding, and the public interest.

1. Relief. In the event that the Commission were to find a violation of Section 337, it would issue (1) an order which could result in the exclusion from entry of certain centrifugal trash pumps into the United States or (2) an order which could result in requiring respondents to cease and desist from alleged unfair methods of competition or unfair acts in the

importation and sale of these trash pumps. Accordingly, the Commission is interested in what relief should be ordered, if any.

2. Bonding. In the event that the Commission were to find a violation of Section 337 and order some form of relief, that relief would not become final for a 60-day period during which the President would consider the Commission's report. During this period, the certain centrifugal trash pumps would be entitled to enter the United States under a bond determined by the Commission and prescribed by the Secretary of the Treasury. Accordingly, the Commission is interested in what bond should be determined, if any.

3. The public interest. In the event that the Commission were to find a violation of Section 337 and order some form of relief, the Commission must consider the effect of that relief upon the public interest. Accordingly, the Commission is interested in the effect of any exclusion order or cease and desist order upon (1) the public health and welfare, (2) competitive conditions in the United States economy, (3) the production of like or directly competitive articles in the United States, and (4) United States consumers.

A party to the Commission's investigation, an interested agency, a public interest group, or any interested person wishing to make an oral presentation concerning relief, bonding, and the public interest will be limited to no more than 15 minutes. Participants will be permitted an additional 5 minutes each for summation after all presentations have been made. Participants with similar interests may be required to share time. The order of oral presentations will be as follows: complainant, respondents,

interested agencies, public interest groups, other interested members of the public, and Commission investigative staff. Summations will follow the same order.

How to participate in the hearing. If you wish to appear at the Commission's hearing, you must file a written request to appear with the Secretary to the Commission, United States International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, no later than the close of business (5:15 p.m., e.s.t.) on Friday, December 1, 1978. Your written request must indicate whether you wish to present an oral argument concerning the Presiding Officer's recommendation or an oral presentation concerning relief, bonding and the public interest, or both. While only parties to the Commission's investigation, interested agencies, and the Commission investigative staff may present an oral argument concerning the Presiding Officer's recommendation, public interest groups and other interested members of the public are encouraged to make an oral presentation concerning the public interest.

Written submissions to the Commission. The Commission requests that written submissions of two types be filed prior to the hearing in order to focus the issues and facilitate the orderly conduct of the hearing.

1. Briefs on the Presiding Officer's recommendation. Parties to the Commission's investigation, interested agencies, and the Commission Investigative Staff are encouraged to file briefs concerning exceptions to the Presiding Officer's recommendation. Prehearing briefs must be filed with the Secretary to the Commission by no later than the close of business on Friday, December 1, 1978. Briefs must be served on all parties of record to the

investigation on or before the date they are filed with the Secretary. Statements made in briefs should be supported by references to the record. Persons with the same positions are encouraged to consolidate their briefing, if possible.

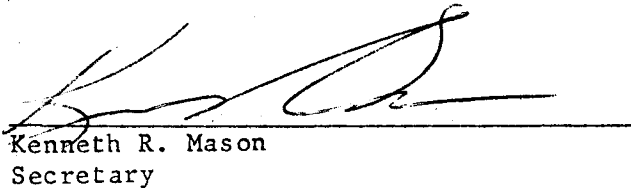
2. Written comments and information concerning relief, bonding, and the public interest. Parties to the Commission's investigation, interested agencies, public interest groups, and any other interested members of the public are encouraged to file written comments and information concerning relief, bonding, and the public interest. These written submissions will be very useful to the Commission in the event it determines that there is a violation of Section 337 and that relief should be granted.

Written comments and information concerning relief, bonding, and the public interest shall be submitted in this order. First, complainant shall file a detailed proposed Commission action, including a proposed determination of bonding, a proposed remedy, and a discussion of the effect of its proposals on 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, with the Secretary to the Commission by no later than the close of business on Friday, November 24, 1978. Second, other parties, interested agencies, public interest groups, and other interested members of the public shall file written comments and information concerning the action which complainant has proposed, any available alternatives, and the advisability of any Commission action in light of the public interest considerations listed above by no later than the close of business on Wednesday, December 6, 1978.

Additional information. The original and nineteen true copies of all written submissions must be filed with the Secretary to the Commission. If you wish to submit a document (or a portion thereof) to the Commission in confidence, you must request *in camera* treatment. Your request should be directed to the Chairman of the Commission and must include a full statement of the reasons for granting *in camera* treatment. The Commission will either accept such submission in confidence, or it will return the submission to you. All nonconfidential written submissions will be open to public inspection at the Secretary's Office.

Notice of the Commission's investigation was published in the *Federal Register* of February 14, 1978 (43 F.R. 6342).

By order of the Commission:



Kenneth R. Mason
Secretary

Issued: November 15, 1978

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the matter of:

CERTAIN CENTRIFUGAL TRASH PUMPS

Investigation No. 337-TA-43

COMMISSION MEMORANDUM OPINION

Procedural History

On March 13, 1978, Ataka America, Inc. (hereinafter "Ataka"), a party respondent to the instant investigation, filed a motion, pursuant to Section 210.51 of the Commission's *Rules of Practice and Procedure* 1/ (hereinafter "CRPP"), that it be terminated as a party respondent to the investigation. 2/ The Presiding Officer, acting in conformity with CRPP sections 210.51(a), (c), and 210.53, 3/ concluded that no violation of section 337 of the Tariff Act of 1930 (hereinafter "Section 337") 4/ exists with respect to respondent Ataka and recommended, by order of March 31, 1978, 5/ that Ataka be terminated as a party respondent. It is the purpose of this Memorandum Opinion to consider the Presiding Officer's recommendation and to rule on Ataka's Motion to Terminate.

1/ 19 C.F.R. 210.51.
2/ Motion Docket No. 43-3.
3/ 19 C.F.R. 210.51(a), (c) and 210.53.
4/ 19 U.S.C. 1337.
5/ See Order Recommending Termination, issued March 31, 1978.

Determination and Order

Having considered Ataka's Motion to Terminate (Motion Docket No. 43-3) and supporting documents, (2) the transcript of the Preliminary Conference of March 16, 1978, and (3) the Presiding Officer's recommendation of March 31, 1978, THE COMMISSION DETERMINES that Ataka is not currently in violation of Section 337.

Accordingly, THE COMMISSION GRANTS Motion No. 43-3 AND ORDERS that Ataka be and hereby is terminated as a party respondent to the instant investigation.

Opinion

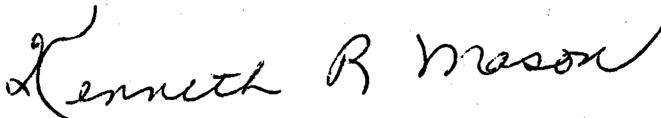
Ataka's motion of March 13, 1978, was accompanied by an affidavit of Mr. James J. Crawford, Vice President of Ataka, which affirmed that Ataka, as of the close of business on September 30, 1977, ceased all active business operations in light of severe business reversals suffered by it. Mr. Crawford also affirmed that virtually all of Ataka's business lines, including its centrifugal trash pumps business, were transferred to an entity referred to as "Ataka USA International, Inc.," which subsequently merged into C. Itoh America, Inc., also a respondent in this investigation. Mr. Crawford also affirms that no personnel or records with respect to the centrifugal trash pumps which are the subject of the Commission's investigation are under the control of Ataka.

The record of the Preliminary Conference, held before the Presiding Officer on March 16, 1978, reveals that Complainant, Hale Fire Pump Company of Conshohocken, Pennsylvania, and the Commission Investigative Attorney both

stipulated that they would not oppose Ataka's Motion to Terminate. 1/

Inasmuch as (1) Ataka has no current connection with those centrifugal trash pumps which are the subject matter of this investigation and (2) that phase of Ataka's business which concerned those centrifugal trash pumps which are the subject matter of this investigation is now apparently part of an active respondent's business (C. Itoh America, Inc), it is no longer necessary to maintain Ataka as a party respondent to this investigation. Moreover, the affidavit of Mr. James J. Crawford, Vice President of Ataka, in support of Ataka's motion is uncontroverted; indeed, Complainant and the Commission Investigative Attorney stipulated that they would not oppose Ataka's motion. For these reasons, the Commission has determined to order the termination of Ataka as a party respondent to the instant investigation.

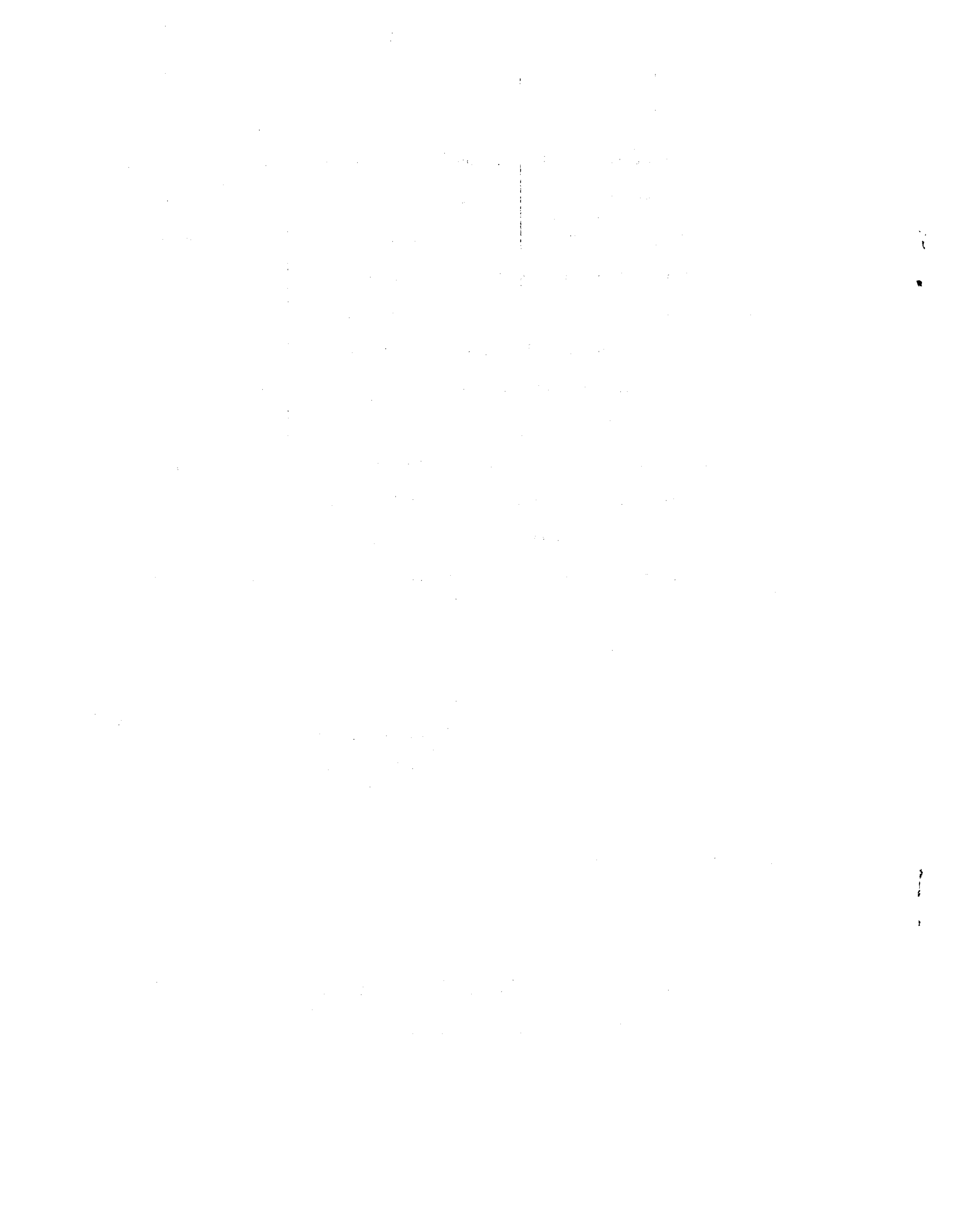
By order of the Commission:



Kenneth R. Mason
Secretary

Issued: April 14, 1978

1/ Official Report of Proceedings Before the United States International Trade Commission, *In the Matter of Certain Centrifugal Trash Pumps (Investigation No. 337-TA-43)*, at pp. 5-9 (March 16, 1978).



UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of CERTAIN CENTRIFUGAL TRASH PUMPS	)))))	Investigation No. 337-TA-43

Notice and Order of
Termination of Investigation

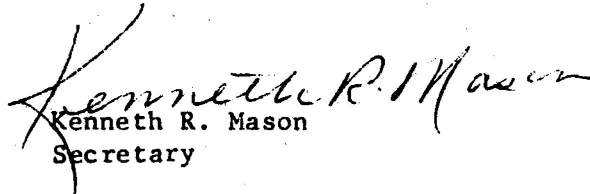
Upon consideration of the presiding officer's recommended determination and the record in this proceeding, the Commission orders the termination of investigation No. 337-TA-43, Certain Centrifugal Trash Pumps, on the basis of a unanimous Commission determination that no violation of section 337 of the Tariff Act of 1930, as amended, exists.

This Commission order is effective on the date of its publication in the Federal Register. Any party wishing to petition for reconsideration must do so within fourteen (14) days of service of the Commission determination. Such petitions must be in accord with section 210.56 of the Commission rules (19 CFR 210.56). Any person adversely affected by a final Commission determination may appeal such determination to the United States Court of Customs and Patent Appeals.

Copies of the Commission's Determination and Order, and Commissioners' opinions (USITC Publication No. 943, February 1979) are available to the public during official working hours at the Office of the Secretary, United

States International Trade Commission, 701 E Street, N.W., Washington, D.C. 20436, telephone (202) 523-0161. Notice of the institution of the Commission's investigation was published in the Federal Register of February 14, 1978 (43 F.R. 6342).

By order of the Commission.



Kenneth R. Mason
Secretary

Issued: February 14, 1979

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

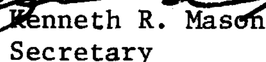
In the matter of: Certain plastic fastener assemblies	Investigation No. 337-TA-36

Notice of Resumption of Investigation

Notice is hereby given that the United States International Trade Commission on April 5, 1978, ordered the termination of the suspension of Commission investigation No. 337-TA-36 of Certain Plastic Fastener Assemblies effective April 28, 1978. The investigation was suspended because of litigation involving common parties and issues in the United States District Court for the Southern District of New York, *Dennison Manufacturing Co.* v. *Ben Clements & Sons, Inc.*, 74 Civ. 979 (CES).

Notice of institution of the investigation was published in the *Federal Register* on August 11, 1977 (42 F.R. 40786); notice of suspension of the investigation was published in the *Federal Register* on October 18, 1977 (42 F.R. 55654); notice of date of resumption of the investigation was published in the *Federal Register* on November 10, 1977 (42 F.R. 58581); and notice of extention of suspension of investigation was published in the *Federal Register* on January 4, 1978 (43 F.R. 800).

By order of the Commission:



Kenneth R. Mason
Secretary

Issued: April 6, 1978

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D. C.

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OFFICE OF THE SECRETARY
U.S. INTL. TRADE COMMISSION

In the Matter of
CERTAIN CENTRIFUGAL TRASH PUMPS

Investigation No. 337-TA-43

ORDER

Pursuant to my authority as Chief Administrative Law Judge of this Commission, I hereby designate Administrative Law Judge Donald K. Duvall as Presiding Officer in this investigation.

The Secretary shall serve a copy of this order upon all parties of record and shall publish it in the Federal Register.

Myron R. Renick
Chief Administrative Law Judge

Issued February 16, 1978.

OPINION

Decisional approach

In approaching our decision in the instant investigation, the ultimate issue for our consideration and determination under section 337 is whether or not respondents, as manufacturers, exporters, or importers of the accused centrifugal trash pumps, are in violation of section 337 by reason of their having engaged in unfair methods of competition or unfair acts which have the effect or tendency to destroy or to substantially injure an industry, efficiently and economically operated, in the United States. In considering the ultimate issue, the following five questions must be considered:

1. Is the patent under which complainant produces its centrifugal trash pumps (United States Letters Patent No, 3,499,388) a valid patent?
2. Do respondents' accused trash pumps infringe claims 1 and/or 17 of complainant's patent?
3. Are respondents' accused trash pumps imported and sold in the United States?
4. Does the importation and sale of respondent's accused trash pumps have the effect or tendency of destroying or substantially injuring complainant's centrifugal trash pump industry? and
5. Is complainant's centrifugal trash pump industry a domestic industry that is efficiently and economically operated?

In order for us to determine that a violation of section 337 exists in the instant investigation, we must answer all five of these questions in the affirmative. A negative answer to any one of these questions will require us to hold that a violation of section 337 does not exist. We shall not consider relief, bonding, and the public interest factors (19 U.S.C. 1337(d) and (f)) in light of our negative determination.

Rationale for Decision

1. Is the patent under which complainant produces its centrifugal trash pumps a valid patent for the purpose of section 337?

In patent-based section 337 cases, patent validity is our threshold consideration. The presiding officer found the '388 patent to be valid for the purpose of section 337 (Recommended Determination, Conclusion of Law No. 3). As the presiding officer correctly noted, a patent is presumed valid as a matter of law under 35 U.S.C. 282 and applicable case law. As our appellate court noted in Solder Removal Company, et al. v. United States International Trade Commission, et al., 582 F.2d 628 (CCPA, 1978), 199 U.S.P.Q. 120 (CCPA, 1978) the determination of whether the presumption of validity is rebutted "requires careful consideration of whether the prior art relied upon does in truth render the claimed invention anticipated or obvious. Until that question is answered in the affirmative, the presumption is not rebutted and continues alive and well." In order to rebut the presumption of validity which attaches to the '388 patent, Respondents would have to prove that the Hale centrifugal trash pump lacks an element required for patentability such as novelty, utility, or nonobviousness (35 U.S.C. 101, 102, and 103). Respondents did not seek to establish invalidity of the '388 patent over the prior art. On the contrary, respondents' position on the validity question during the course of this investigation has been that the '388 patent is valid so long as it is given its proper and narrow construction in light of the prosecution history, drawings, and specifications. Only if the language of claims 1 and 17 are construed so broadly as to cover respondents' accused pumps do respondents argue that the '388 patent becomes invalid over the prior

art (Transcript of Oral Argument before the Commission, December 13, 1978, at pages 76 and 77). The Commission investigative attorney and the presiding officer agreed with the correctness of this position. We also agree with this position. In light of the prosecution history of the '388 patent and in light of the specifications and drawings, it is apparent to us that the '388 patent is valid if properly and narrowly construed.

2. Do respondents' accused trash pumps infringe claims 1 and/or 17 of complainant's '388 patent?

As the presiding officer pointed out in his recommended determination of October 25, 1978, the fair resolution of the infringement issue requires close attention to the full prosecution history of the '388 patent, particularly with reference to claims 1 and 17, and the pertinent specifications and drawings (Recommended Determination page 5.). The presiding officer found that complainant's contention that respondents' accused trash pumps infringe claims 1 or 17 of the '388 patent is not sustained by a preponderance of the evidence of record (Recommended Determination, pages 30, 43). We agree with the presiding officer. Specifically, we determine that claims 1 and 17 of the '388 patent are not, either literally or by equivalents, infringed by respondents' QP series of trash pumps.

a. Claim 1. Claim 1 of the '388 patent provides as follows:

> A centrifugal pump comprising a casing having an intake side with at least one inlet port and a discharge side with a discharge port, a unitary volute assembly consisting of a suction volute section and a discharge volute section, an impeller mounted for rotation about a predetermined axis and releasable means having means for moving said volute assembly into an assembled position interiorly of the casing and for moving said volute assembly into a disassembled position whereby on releasing of said releasable means alone permitting complete disassembly of said volute assembly from said casing and any other interior parts of said pump.

During the course of the proceedings before the Commission, complainant's position with respect to infringement of claim 1 was two-fold. First and foremost, complainant argued that respondents' accused trash pumps literally infringe the language of claim 1. Second, complainant argued infringement by equivalents should the Commission decline to find literal infringement (Transcript of Oral Argument before the Commission, December 13, 1978, pages 34, 35).

(i) Literal infringement. Complainant argues that respondents' accused pumps literally infringe claim 1 of the '388 patent; however respondents' accused pumps do not have a releasable means for moving the volute assembly into a disassembled position whereby on releasing of the releasable means alone permits complete disassembly of the volute assembly (emphasis supplied) (Recommended Determination, page 44). We therefore reject Complainant's contention of literal infringement.

As our appellate court noted in Coleco Industries, Inc. v. United States International Trade Commission, et al., 573 F.2d 1247 (CCPA, 1978), 197 U.S.P.Q. 472 (CCPA, 1978), "Patent claims are the measure of a patent grant. Construction of claims to ascertain the intended boundaries of the patent grant is made by reference to the patent's specification" (573 F.2d at 1253, 197 U.S.P.Q. at 476, citing Graham v. John Deere Co., 383 U.S. 1, 33, 148 U.S.P.Q. at 459, 473 (1966); United States v. Adams, 383 U.S. 39, 49, 148 U.S.P.Q. at 479, 482 (1966)). The specifications of the '388 patent, state in part:

> Displacement of the volute assembly is controlled by means of a jack screw assembly . . . By this arrangement the jack screw may be used to disassemble the volute assembly simply by turning the jack screw . . . Now when it is desired to remove the volute assembly, the jack screw is simply threaded outwardly whereby the volute is

> displaced axially toward the rear of the pump body. This arrangement . . . provides the necessary power leverage to break the volute free should it be stuck from corrosion or foreign matter....
>
> In summary, therefore, the one-piece body and volute are easily assembled and disassembled by means of the reversible jack screw clamp. Also by this arrangement it is possible to pry the pump apart should it tend to bind from corrosion or dirt (Emphasis Supplied) (See United States Letters Patent No. 3,499,388, specifications, column 5, lines 55 through 75, and column 6, lines 1 through 8, and lines 67 through 71, which was included in RX 1).

Clearly, claim 1, construed in light of the specifications, defines a reversible jack screw assembly with a definite mechanical advantage of power leverage. The drawings contained in the '388 patent only reinforce this conclusion (See RX 1). Respondents' accused pumps do not have the reversible jack screw assembly of Hale's patented pumps referred to in the '388 patent specifications. Nor do respondents' accused pumps have the patented advantage of Hale's 30SA pump. The knobs and handles of respondents' accused pumps, unlike the reversible jack screw of the Hale 30SA, cannot exert a mechanical advantage or power leverage to break the seal between the pump's cover and the volute assembly. As the above-cited specifications indicate, if the patented Hale 30SA pump is frozen or corroded, its reversible jack screw (releasable means) alone moves the volute assembly into a disassembled position. The mechanical advantage of power leverage, in alone freeing a volute frozen in place by corrosion, provided by the reversible jack screw of the Hale 30SA pump, is one of its primary advantages. This mechanical advantage has been likened to a "wheel-puller" effect (Transcript of Oral Argument before the Commission, December 13, 1978, at page 65).

b. Claim 17. Claim 17 of the '388 patent provides as follows:

> A centrifugal pump comprising a casing having an intake side with at least one inlet port and a discharge side with a discharge port, a volute assembly removably mounted in said casing and an impeller mounted for rotation about a predetermined axis, means for securing the volute assembly in a predetermined fixed position in the casing comprising a pilot hole in said casing, a plurality of locating holes in said volute assembly adapted to register with said pilot hole upon rotation of the volute assembly relative to said casing, and a pin engageable in a selected one of said locating holes and said pilot hole.

The key features of claim 17, namely, the plurality of locating holes, the pilot hole in the casing, and the pin obviously serve some purpose. That purpose can be seen by turning to the specifications and construing this claim in light thereof--

> In self-priming pumps . . . it is desirable and necessary to have a close clearance at the cut-off, that is, the juncture of the inner most portion of the spiral wall of the volute and the outer trace of the propeller blades in order to peel off air bubbles during the priming. It has been found that in pumps of this type the initial clearance may be accurately controlled, but that after a period of use a gap develops due to wear in this area which results in very slow priming time . . .
>
> In the past this necessitated time consuming disassembly of the pump and replacement of expensive parts to re-establish the close tolerance. In accordance with the present invention "cut-off" clearance may be adjusted from time to time easily and quickly without major disassembly of parts of the pump . . .
>
> . . . In accordance with the present invention, a comparatively simplified means is provided for re-adjusting the gap from time to time to compensate for wear and maintain the desired close critical clearance between the insert edge and the trace of the impeller blades. (Emphasis Supplied) (*See* United States Letters Patent No. 3,499,388, specifications, column 4, lines 69-75, column 5, lines 1-8, 30-35, which was included in RX 1).

These excerpts illustrate the purpose of the key features of claim 17, namely, to provide "a comparatively simplified means . . . for re-adjusting

the gap from time to time to compensate for wear and maintain the desired close critical clearance between the insert edge and the trace of the impeller blades." As the presiding officer correctly noted, the novel feature of claim 17 is the adjustability of the pin fixed in one of a plurality of locating holes in the volute assembly which slip-fits into the pilot hole in the casing, thus permitting compensation for wear of the cut-off on the volute and preventing rotation of the volute assembly in the casing during operation of the pump (Recommended Determination, page 50).

The language of claim 17, construed in light of the specifications, cannot support a finding of either literal infringement or infringement by equivalents. Complainant contends that the lugs and slots of respondents' accused pumps infringe claim 17 of the '388 patent. However, the only purpose of the lugs and slots of respondents' accused pumps is to prevent rotation of the volute assembly during operation of the pumps. Respondents' pumps simply do not have a plurality of locating holes and a cut-off adjustment pin. Accordingly, respondents' pumps do not embody the novel feature of claim 17, namely, a provision for adjustment for wear of the cut-off on the volute and literal infringement cannot be found. Likewise, respondents' accused trash pumps do not meet the 3-pronged test of the doctrine of equivalents, referred to by our appellate court in Coleco; the alleged infringing trash pumps do not employ substantially the same means to accomplish substantially the same result in substantially the same way.

At the oral argument before us on December 13, 1978, complainant contended that the provision for adjustment for wear on the cut-off of the volute is a feature which must be "read out of the claim" (Transcript of Oral Argument before the Commission, December 13, 1978, page 53). Complainant's position is not tenable, however, since the anti-rotation feature or its equivalent has already been taught by the prior art (FF 70 through FF 73). Since respondents' accused pumps do not incorporate the novel feature of claim 17 of the '388 patent, no finding of infringement thereof, either literally or by equivalents, is warranted and we sustain the presiding officer's position.

Conclusion

In conclusion, with respect to the importation and sale of respondents' accused centrifugal trash pumps, we have determined that such accused pumps do not infringe, either literally or by equivalents, claims 1 and/or 17 of complainant's '388 patent. We therefore adopt the findings and conclusions of the presiding officer on these issues. As a result of our finding of no infringement, there can be no violation of section 337 and we need not address the remaining issues in this investigation.

CONCURRING OPINION OF VICE CHAIRMAN ALBERGER

For the reasons set forth in the majority opinion, I concur with my fellow Commissioners in finding that the patent in question is valid, but is not infringed by respondents. I therefore adopt the findings and conclusions of the presiding officer on these questions.

I would reach two further issues in this case. 1/ I find that even if respondent's pumps infringe the patent in question so as to constitute an unfair method of competition, this has not had the effect or tendency to substantially injure the domestic industry. I also find that the domestic industry is efficiently and economically operated. These issues were contested by the parties, addressed by the presiding officer in his findings and conclusions, and could be raised on appeal by complainant. If the majority were to reach these issues, and our appellate court were to reverse our holding as to infringement, a costly and time consuming remand might be avoided.

Our governing statutes and rules are unclear on the need to reach all appealable issues. While the CCPA has expressed itself on the matter, most judicial bodies avoid deciding issues unnecessarily where those issues might not be fully developed. 2/ In patent cases there is a greater need to address at least the issues of validity and the infringement. 3/

1/ It should be noted that the CCPA has admonished the Commission to reach all appealable issues in order to avoid remand. See Coleco Industries v. United States International Trade Commission, 573 F.2d 1247, 1252 note 5 (CCPA, 1978).

2/ This case does not involve moot issues or constitutional questions for which a posture of abstention is proper. We are asked to resolve the case by applying the law to clear factual circumstances.

3/ Sinclair & Carrol Co. v. Interchemical Corp., 325 U.S. 327, 330 (1945); Lucerne Products, Inc. v. Cutler-Hammer, Inc. 568 F.2d 784 (1977).

In this particular case, I view the record as adequately developed to resolve additional issues. In circumstances such as this the Commission should endeavor to provide a record for appeal which would dispose of the matter without further evidentiary proceedings.

Effect or Tendency to Substantially Injure the Domestic Industry

Complainant has shown facts sufficient to indicate substantial injury. Profits from the 30SA pump have declined rapidly since 1974 (FF 114). Complainant has lost customers who now purchase from respondent. From 1975 through the first quarter of 1978, the ratio of sales of respondent's QP pump to complainant's 30SA pumps averaged 1295 percent (FF 126).

In most cases, these facts, coupled with a showing of patent infringement, would be sufficient to constitute a section 337 violation. However, several findings by the presiding officer reveal why this particular case is unique. The overwhelming evidence indicates a trend toward cheaper lightweight trash pumps (FF 100, 124, 125). Hale's own sales manager conceded this point (CX 47A, page 40). The distributor who formerly purchased the 30 SA pump indicated that his switch to other lines was due to a shift in demand to lightweight pumps (transcript before Judge Duvall, at pages 747-48). He indicated that the lightweight pumps outsell heavy-duty pumps 5 to 1. He also indicated that a complainant's clean-out features are not a prime consideration, suggesting that even lines which do not have the patented features outsell complainants heavier, more costly pump (transcript before Judge Duvall, at page 751). In fact, it seems that even complainant anticipates higher sales for its lightweight pump than for the 30SA in future years (FF 98, RX 28). This merely buttresses the notion that complainant's

patented industry was the victim of changing consumer demand rather than clever imitation by a patent infringer.

In most cases it would be difficult to separate infringement from other factors causing injury. In this case, for example, one could make the argument that if we eliminated the allegedly infringing QP pump from the market the 30SA would sell profitably. I do not believe that is true. A number of other inexpensive lightweight trash pumps are on the market today, and the construction industry has made it clear they favor such products (FF 125, RX 16). Even complainant's sales representative intimated that other inexpensive brands made it difficult to market the 30SA (CX 47, pages 29-30). A distributor said that Midland, a non-respondent competitor, carries a better line of trash pumps than does Hale (transcript before Judge Duvall, at pages 751-52).

In sum, while there are definite purposes for which a heavy-duty pump is desirable, the clear indication from our record is that the market for pumps such as the 30SA is shrinking. In cases such as this, it is impossible to attribute injury to just one factor. We should not grant relief where the most attractive feature leading to the growth of importations does not reside in the patent itself. This is particularly so where other products on the market demonstrate a consumer preference for unpatented features. Accordingly, I refuse to adopt the presiding officer's conclusion of law No. 7. While importations of respondent's products have obviously contributed to Hale's injury, it is not the incorporation of infringing features which is responsible for that injury. Rather, it is a general shift in consumer demand that explains the disappointing performance of the 30SA.

Efficiency and Economically Operated Domestic Industry

The presiding officer cited reliable, probative evidence which supports a finding that the domestic industry is efficiently and economically operated (FF 75-79). While respondent contested this evidence in both its brief before the presiding officer and hearings before the full Commission, I do not consider those arguments or the facts underlying them sufficient to rebut complainant's affirmative showing.

Considerable evidence supports the presiding officer's conclusion. There was testimony that complainant utilizes modern, automated production facilities. There is an incentive program for employees to encourage productivity. From 1974 through 1977 the 30SA pump was quite profitable (CX 39A). Sales expanded during that period. Hale's year-end financial reports show balanced ledgers, an acceptable level of retained earnings, and sufficient working capital (CX 33, 34). Total sales in 1976 and 1977 exceeded assets. The company employs several hundred persons, most of whom are unionized. Complainant's sales manager described what is essentially a national distribution network (CX 47). While there are no company salesmen, there are 13 separate manufacturers' representatives in 13 states. They sell directly to distributors, who usually purchase against orders. (This is not an unusual practice in the construction equipment business.) Complainant also presented evidence of high investment in research and development of the patent pump (FF 78).

Against this formidable array of evidence that complainant is efficiently and economically operated, respondent presented only a few pieces of testimony suggesting that Hale had inefficient distribution, marketing and promotion schemes (transcript before Judge Duvall at 731-759; CX 47). Respondent could

not show that these alleged inefficiencies had resulted in an inability to fill orders. Allegations that complainant allocates insufficient resources to production of the 30SA are offset by evidence of high research and development costs. Allegations concerning inefficient modes of production are also rebutted by reliable testimony. While one could argue that complainant's late entry into the inexpensive lightweight pump market is a sign of inefficiency, complainant had every reason to suspect its higher quality pump would remain competitive. Reasonable business judgment shown faulty only by 20-20 hindsight is hardly a basis for labeling an industry "inefficient" under the statute, particularly where all other signs point towards an opposite finding.

Some of the evidence summarized above is based upon complainant's non-patent operations as well as their patent production. While this might not accurately reflect the true state of Hale's patent-based production, I think it would be unduly burdensome to require a complete breakdown of financial data. If a complainant can show an overall efficient and economical business, the burden should shift to respondent to demonstrate that the patent operation is an exception -- particularly where patent-based production has been as profitable as other components of the overall operation. We must not allow our restrictive definition of industries in patent-based cases to make it impossible for a complainant to show he is efficiently and economically operated. Our requirements of proof on these matters must comport with business realities.

CONCURRING OPINION OF COMMISSIONER STERN

For the reasons set forth in the majority opinion, I concur with my fellow Commissioners in finding that the patent in question is valid, but not infringed by respondents and, therefore, that there is no violation of Section 337.

Having found no violation of Section 337, the majority opinion did not reach the two other elements of the statute, i.e., whether the importation and sale of respondent's trash pumps have the effect or tendency of destroying or substantially injuring complainant's trash pump industry and whether that industry is economically and efficiently operated. However, since the presiding officer reached a conclusion of law on the question of injury, based on what I found to be an inadequate record, I feel it is necessary to comment on this issue.

The presiding officer, in deciding the injury question, found that there would be injury if there were an unfair act or unfair method of competition. In addition, the presiding officer found there would be a causal connection between the unfair act and complainant's injury. As indicia of injury, the presiding officer cited the proven high ratio of imported pump sales, Hale's loss of potential sales and profits and production underutilization since 1975. The presiding officer inferred a causal link between the unfair act and injury on these same indicia. 1/

However, inferences that no causal link exists can also be drawn from the record. Thus, respondents pointed out during oral arguments before the

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1/ Presiding Officer's Recommended Determination, page 59.

Commission that:

1. Complainant's 30SA trash pumps and respondents' accused trash pumps may be said not to be directly competitive on the basis of weight, price, consumer demand, application, and customer preference (Transcript of Oral Argument before the Commission, December 13, 1978, page 90).

2. Mere competition and the presence and sale of imported goods in domestic market are not enough to establish a tendency to injure. The record does not contain enough evidence to support loss sales or potential loss sales (Transcript of Oral Argument before the Commission, December 13, 1978, page 90).

3. Major 30SA distributors have ceased purchasing the 30SA and are now selling complainant's cheaper, lighter TNT pump (Transcript of Oral Argument before the Commission, December 13, 1978, page 91).

4. The 30SA has been selling in a stagnant and declining market while complainant's TNT series and respondents' accused QP series are selling in an expanding market (Transcript of Oral Argument before the Commission, December 13, 1978, page 91).

5. Despite the knowledge of the trend toward lighter, compact trash pumps, complainant was a late entrant to the market and then entered it with the TNT, a pump which does not embody the patented features of the 30SA (Transcript of Oral Argument before the Commission, December 13, 1978, page 91).

6. Finally, complainant may be said to be injuring the 30SA industry itself through, for example, alleged inadequate distribution and marketing techniques, inflexibility in failing to offer a wider variety of models of the 30SA (e.g., a two inch and a four inch size in addition to its three inch size), and failure to improve the 30SA since its introduction to the market (Respondents' Post-Hearing Brief, submitted following hearing before the presiding officer, pages 78-86).

The Commission has in past cases inferred causation of injury from such indicia as the ratio of sales of the imported infringing articles to sales of patented articles over a substantial period of time and capacity for importation of the infringing article. 1/ However, in view of the strong contrary inferences which can be drawn in this case, I feel that a

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1/ Reclosable Plastic Bags, Inv. No. 337-TA-22 (USITC Pub. No. 801, p. 14). PTFE Tape, Inv. No. 337-TA-4 (USITC Pub. No. 769, p. 19).

determination based on inference would be inappropriate and that complainant and the Commission investigative attorney should have developed a more complete evidentiary record on the question of causation of injury. As the Commission noted in the majority opinion, we need not reach this question because we found no violation of section 337 on the basis of no infringement. However, if our decision had depended on a determination on this issue, in the absence of a more complete record I would not have been able to make such a determination. I would have felt compelled to remand the case to the presiding officer for additional consideration and fact finding.

Library Cataloging Data

U.S. International Trade Commission.
In the matter of: certain centrifugal trash pumps, investigation no. 337-TA-43. Washington, 1979.

26 p. illus. 28 cm. (USITC Publication 943)

1. Centrifugal pumps. 2. Pumping machinery. I. Title. II. Title: Certain centrifugal trash pumps.

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