

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

In the Matter of

**CERTAIN L-LYSINE FEED PRODUCTS,
THEIR METHODS OF PRODUCTION
AND GENETIC CONSTRUCTS FOR
PRODUCTION**

Investigation No. 337-TA-571

**NOTICE OF COMMISSION DETERMINATION (1) TO REVIEW AND NOT TAKE A
POSITION ON CERTAIN ISSUES IN THE FINAL INITIAL DETERMINATION OF
THE ADMINISTRATIVE LAW JUDGE AND (2) NOT TO REVIEW THE REMAINDER
OF THE FINAL INITIAL DETERMINATION; 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 (1) to review and not take a position on certain issues in the final initial determination (“ID”) of the presiding administrative law judge (“ALJ”) and (2) not to review the remainder of the ID finding no violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (“section 337”). This action terminates the investigation.

FOR FURTHER INFORMATION CONTACT: James Worth, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3065. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission’s electronic docket (EDIS) at <http://edis.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 May 31, 2006, the Commission instituted this investigation based upon a complaint filed on behalf of Ajinomoto Heartland LLC (Chicago, Illinois) (“Ajinomoto Heartland”). 71 *Fed. Reg.* 30958 (May 31, 2006). The complaint, as amended, alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (“section 337”), in the importation into the United States, the sale for importation, and the

sale within the United States after importation of certain L-lysine feed products and genetic constructs for production thereof by reason of infringement of claims 13, 15-19, and 21-22 of U.S. Patent No. 5,827,698 (“the ‘698 patent”) and claims 1, 2, 15, and 22 of U.S. Patent No. 6,040, 160 (“the ‘160 patent”).

The complaint named as respondents Global Bio-Chem Technology, Group Company Ltd. (Admiralty, Hong Kong), Changchun Dacheng Bio-Chem Engineering Development Co., Ltd., (Jilin Province, China), Changchun Baocheng Bio Development Co., Ltd. (Jilin Province, China), Changchun Dahe Bio Technology Development Co., Ltd. (Jilin Province, China), Bio-Chem Technology (HK) Ltd. (Admiralty, Hong Kong) (collectively, “GBT”). 71 *Fed. Reg.* 30958. On June 29, 2006, Ajinomoto Heartland further amended the complaint and notice of institution by adding its parent company, Ajinomoto, Inc. (Tokyo, Japan) as a complainant. 71 *Fed. Reg.* 43209 (July 31, 2006).

On October 15, 2007, the Commission determined not to review an order of the ALJ, granting Ajinomoto’s motion to withdraw claims 1, 2, and 22 of the ‘160 patent and claims 13, 16-19, and 21-22 of the ‘698 patent.

On July 31, 2008, the ALJ issued his final ID, in which he found no violation of section 337 with regard to either the ‘160 or the ‘698 patents because he found that the asserted claims of both patents were invalid for failure to satisfy the best mode requirement of 35 U.S.C. § 112 ¶ 1 on two separate grounds and that both patents were unenforceable because of inequitable conduct. He found infringement of the asserted claims through importation of lysine made using the “old” strain of E. coli by GBT, but not the “new” strain, based upon the stipulation of the parties. The ALJ also found the existence of a domestic industry for the asserted claims, and found that the asserted claims were not invalid for obviousness or obviousness-type double patenting, and that the asserted patents were not unenforceable by reason of unclean hands.

On August 19, 2008, Ajinomoto petitioned for review of the ALJ’s final ID regarding invalidity of the asserted claims for failure to meet the best mode requirement and unenforceability of the patents because of inequitable conduct. Neither GBT nor the Commission investigative attorney petitioned for review of any part of the ID.

Having examined the relevant portions of the record in this investigation, including the final ID, the petition for review, and the responses thereto, the Commission has determined (1) to review and take no position on (a) the ALJ’s finding that claim 15 of the ‘160 patent is invalid for failure to meet the best mode requirement to the extent that finding is based on alleged fictitious data and (b) the ALJ’s finding that the ‘160 patent is unenforceable for inequitable conduct and (2) not to review the remainder of the ID. Thus, the investigation is terminated with a finding of no violation of section 337.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.42 - .46 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.42 - .46).

By order of the Commission.

/s/

Marilyn R. Abbott
Secretary to the Commission

Issued: September 29, 2008