

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

**In the Matter of
CERTAIN BEVERAGE DISPENSING
SYSTEMS AND COMPONENTS
THEREOF**

Investigation No. 337-TA-1130

**NOTICE OF COMMISSION DECISION
TO REVIEW A FINAL INITIAL DETERMINATION IN ITS ENTIRETY;
SCHEDULE FOR FILING WRITTEN SUBMISSIONS ON THE ISSUES UNDER
REVIEW AND ON REMEDY, THE PUBLIC INTEREST, AND BONDING**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the Commission has determined to review the presiding administrative law judge's ("ALJ's") final initial determination ("ID" or "final ID") finding a violation of section 337 of the Tariff Act of 1930, as amended, with respect to U.S. Patent No. 7,188,751 ("the '751 patent"). The Commission requests briefing from the parties on certain issues under review, as set forth in this notice. The Commission also requests briefing from the parties, interested persons, and government agencies on the issues of remedy, the public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Sidney A. Rosenzweig, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 708-2532. The public version of the complaint can be accessed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>, and 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 SW., Washington, DC 20436, telephone (202) 205-2000.

General information concerning the Commission may also be obtained by accessing its Internet server (<https://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://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: The Commission instituted this investigation on September 5, 2018, based on a complaint filed by Heineken International B.V. and Heineken Supply Chain B.V., both of Amsterdam, The Netherlands; and Heineken USA

Inc. of White Plains, New York (collectively, “Heineken”). 83 FR 45141, 45141-42 (Sept. 5, 2019). The complaint alleges a violation of 19 U.S.C. 1337 in the importation into the United States, sale for importation, or sale in the United States after importation of certain beverage dispensing systems and components thereof that allegedly infringe claims 1-11 of the ’751 patent. *Id.* The notice of investigation names as respondents Anheuser-Busch InBev SA, and InBev Belgium NV, both of Leuven, Belgium; and Anheuser-Busch, LLC of St. Louis, Missouri (collectively, “ABI”). *Id.* The Office of Unfair Import Investigations was not named as a party to this investigation. *Id.*

On February 6, 2019, the ALJ granted Heineken’s motion to partially terminate the investigation as to claims 2, 4-6, 8-9, and 11 of the ’751 patent. Order No. 6 (Feb. 6, 2019), *not reviewed*, Notice (Mar. 7, 2019). Remaining within the investigation are claims 1, 3, 7, and 10 of the ’751 patent. On March 26, 2019, the ALJ issued Order No. 14, the *Markman* Order, construing certain claim terms. The ALJ conducted the evidentiary hearing from April 16-18 and 23, 2019.

On September 5, 2019, the ALJ issued the subject final ID, finding claims 1, 3, 7, and 10 infringed and not invalid, and thereby finding a violation of section 337. On September 19, 2019, the ALJ issued a Recommended Determination on Remedy and Bond (“RD”). The RD recommends that should the Commission find a violation of section 337, that the Commission issue a limited exclusion order, cease and desist orders, and impose a bond rate during the period of Presidential review in the amount of 5% of the entered value of infringing articles.

On September 18, 2019, ABI filed a petition for Commission review of the ID. That same day, Heineken filed a contingent petition for review. On September 26, 2019, the parties responded to each other’s petitions.

Having reviewed the record of the investigation, including Order No. 14, the final ID, and the parties’ submissions to the ALJ and to the Commission, the Commission has determined to review the ID in its entirety.

In connection with its review, the Commission requests responses to the following questions. The parties are requested to brief their positions with reference to the applicable law and the existing evidentiary record.^[1]

- (1) If the Commission were to find that the “operating element” limitation of claims 1 and 7 should be construed as a means-plus-function claim limitation,

^[1] In reviewing the ID, and in seeking briefing on these issues, the Commission has not determined to excuse any party’s noncompliance with Commission rules and the ALJ’s procedural requirements, including requirements to present issues in pre-hearing and post-hearing submissions. *See, e.g.*, Order No. 3 (Sept. 11, 2018) (ground rules). The Commission may, for example, decline to disturb certain findings in the final ID upon finding that issue was not presented in a timely manner to the ALJ.

and if the Commission were to adopt Heineken's recited function and corresponding structure as set forth on pages 12-13 of Claim Chart No. 1 in Order No. 14:

Whether the accused products and domestic industry products practice that limitation.

The parties are not to provide further briefing as to the propriety of such a construction, or to advocate alternative claim constructions. The existing record is adequate as to the parties' positions on these issues.

- (2) Whether, for purposes of contributory infringement under 35 U.S.C. 271(c), the accused NOVA couplers or the NOVA appliances are especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use.
- (3) Whether claims 1 and 7 of the '751 patent are obvious in view of Figures 17-20 and the associated written description in Jeans (RX-658) (*see* ABI Pet. for Comm'n Rev. at 50-54) when combined with Timmermans (RX-838), van der Meer (RX-837) or Grill (RX-312).
- (4) Whether Heineken demonstrated significant investment in plant and equipment or significant employment of labor or capital, *see* 19 U.S.C. 1337(a)(3)(A), (B), in an appropriate context, in view of Federal Circuit and Commission precedent concerning such context (including but not limited to *Certain Carburetors and Products Containing Such Carburetors*, Inv. No. 337-1123, Comm'n Op. (Oct. 28, 2019) (public version)). For any context you argue is appropriate, please address the evidence in the record that permits an analysis within that context.

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 a cease and desist order that could result in the respondent 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).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist order 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 or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions limited to the enumerated questions above. The parties' opening submissions should not exceed 50 pages, and their reply submissions should not exceed 40 pages. 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 submissions should address the recommended determination by the ALJ on remedy and bonding. Complainants are requested to submit proposed remedial orders for the Commission's consideration. Complainants are also requested to state the date that the asserted patents expire and the HTSUS numbers under which the accused products are imported, and provide identification information for all known importers of the subject articles. Initial written submissions and proposed remedial orders must be filed no later than close of business on Monday, November 18, 2019. Reply submissions must be filed no later than the close of business on Tuesday, November 26, 2019. No further submissions on these issues will be permitted unless otherwise ordered by the Commission. Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 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 CFR 210.4(f)). Submissions should refer to the investigation number (Inv. No. 337-TA-1130) in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures*, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf). Persons with questions regarding filing should contact the Secretary at (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,^[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

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', with a stylized flourish at the end.

Lisa R. Barton
Secretary to the Commission

Issued: November 4, 2019

^[2] All contract personnel will sign appropriate nondisclosure agreements.