

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

In the Matter of

**CERTAIN ELECTRONIC CANDLE
PRODUCTS AND COMPONENTS
THEREOF**

Investigation No. 337-TA-1195

**NOTICE OF A COMMISSION DETERMINATION TO REVIEW IN PART
AN INITIAL DETERMINATION FINDING A VIOLATION OF SECTION 337;
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 U.S. International Trade Commission (“Commission”) has determined to review in part an initial determination (“ID”) (Order No. 41) of the presiding administrative law judge (“ALJ”). The Commission requests briefing from the parties on certain issues under review, as indicated in this notice. The Commission also requests briefing from the parties, interested government agencies, and other interested persons on the issues of remedy, the public interest, and bonding.

FOR FURTHER INFORMATION CONTACT: Robert Needham, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street S.W., Washington, D.C. 20436, telephone (202) 708-5468. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on April 6, 2020, based on a complaint filed by L&L Candle Company LLC of Brea, California and Sotera Tschetter, Inc. of St. Paul, Minnesota (together, “Complainants”). 85 FR 19158-59. The complaint alleged violations of section 337 in the importation into the United States, the sale for importation, and the sale after importation within the United States after importation of certain electronic candle products and components thereof by reason of infringement of one or more of

claims 1-6, 10, 12-15, 17-19, and 28 of U.S. Patent No. 8,550,660; claims 1-15 of the U.S. Patent No. 9,366,402; claims 1-4, 6-12, 14-18, 20-25, 27, and 28 of the U.S. Patent No. 9,512,971; claims 1-7, 10-14, 17, 18, 22, 24, 25, 27, and 29 of U.S. Patent No. 9,523,471; and claims 1-5, 7, 8, 10-12, 15, 17, 21 and 22 of U.S. Patent No. 10,533,718. *Id.* The notice of investigation named as respondents The Gerson Company of Olathe, Kansas; Gerson International (H.K.) Ltd. of Hong Kong; Sterno Home Inc. of Coquitlam, Canada; Ningbo Huamao International Trading Co., Ltd. of Ningbo City, China; Ningbo Yinzhou Langsheng Artware Co., Ltd. of Ningbo City, China; Lifetime Brands, Inc. of Garden City, New York; Scott Brothers Entertainment, Inc. of Las Vegas, Nevada; Nantong Ya Tai Candle Arts & Crafts Co., Ltd. of San Gabriel, California; NapaStyle, Inc. of Napa, California; Veraflame International, Inc. of Vancouver, Canada (“Veraflame”); MerchSource, LLC of Irvine, California; Ningbo Mascube Import Export Company of Ningbo City, China (“Ningbo Mascube”); Decorware International Inc. dba Decorware Inc. of Rancho Cucamonga, California; Shenzhen Goldenwell Smart Technology Co., Ltd. of Shenzhen City, China; Shenzhen Ksperway Technology Co., Ltd. of Shenzhen City, China; Ningbo Shanhuang Electric Appliance Co. of Ningbo City, China (“Ningbo Shanhuang”); Yiwu Shengda Art Co., Ltd. of Yiwu City, China (“Yiwu Shengda”); Shenzhen Tongfang Optoelectronic Technology Co., Ltd. of Shenzhen City, China; TFL Candles of Shenzhen City, China; Guangdong Tongfang Lighting Co., Ltd. of Hong Kong; Tongfang Optoelectronic Company of Hong Kong; and Virtual Candles Limited of Kent, United Kingdom (“Virtual Candles”). *Id.* at 19159. The Office of Unfair Import Investigations (“OUII”) is a party to the investigation. *Id.*

The Commission terminated five respondents from the investigation based on consent orders. See Order No. 7 (May 4, 2020), *unreviewed by* Notice (Jun. 3, 2020) (terminating the investigation with respect to Shenzhen Tongfang Optoelectronic Technology Co., Ltd.; TFL Candles; Guangdong Tongfang Lighting Co., Ltd.; and Tongfang Optoelectronic Company); Order No. 37 (Dec. 17, 2020), *unreviewed by* Notice (Jan. 5, 2021) (terminating the investigation with respect to Nantong Ya Tai Candle Arts & Crafts Co., Ltd. based on a consent order and a settlement agreement). The Commission also terminated eight respondents from the investigation based on settlement. Order No. 12 (Jun. 15, 2020), *unreviewed by* Notice (Jun. 20, 2020) (terminating The Gerson Company and Gerson International (H.K.) Ltd. based on settlement); Order No. 15 (Jul. 15, 2020), *unreviewed by* Notice (Aug. 5, 2020) (terminating Merchsource, LLC based on settlement); Order No. 29 (Oct. 19, 2020), *unreviewed by* Notice (Nov. 2, 2020) (terminating Decorware International Inc. based on settlement); Order No. 38 (Dec. 18, 2020), *unreviewed by* Notice (Jan. 5, 2021) (Sterno Home Inc., Ningbo Huamao International Trading Co., Ltd., and Ningbo Yinzhou Langsheng Artware Co., Ltd. based on settlement); Order No. 39 (Dec. 18, 2020), *unreviewed by* Notice (Jan. 5, 2021) (terminating Lifetime Brands, Inc. based on settlement). The Commission further terminated three respondents from the investigation based on Complainants’ partial withdrawal of the complaint due to the failure to serve those entities with the complaint and notice of investigation. Order No. 35 (Nov. 13, 2020), *unreviewed by* Notice (Nov. 30, 2020) (terminating NapaStyle, Inc., Shenzhen Goldenwell Smart Technology Co., Ltd., and Shenzhen Ksperway Technology Co., Ltd. based on a partial withdrawal of the complaint). Finally, the Commission terminated Scott Brothers Entertainment Inc. from the investigation based on a summary determination that

Complainants failed to establish the importation requirement with respect to that respondent. Order No. 17 (Jul. 28, 2020), *unreviewed by* Notice (Aug. 28, 2020).

With respect to the five remaining respondents, the Commission found Veraflame, Ningbo Mascube, Virtual Candles, Yiwu Shengda, and Ningbo Shanhuang (together, “the Defaulting Respondents”) in default for failing to respond to the complaint and notice of investigation and for failing to show cause why they had not done so, or for failing to participate in discovery. Order No. 14 (Jul. 8, 2020), *unreviewed by* Notice (Aug. 3, 2020) (finding Veraflame, Mascube, and Virtual Candles in default); Order No. 33 (Nov. 12, 2020), *unreviewed by* Notice (Nov. 30, 2020) (finding Yiwu Shengda and Ningbo Shanhuang in default).

On November 13, 2020, Complainants moved for a summary determination of violation and for a recommendation for the issuance of a GEO. On December 4, 2020, OUII filed a response that questioned whether Complainants had satisfied the economic prong of the domestic industry requirement, but otherwise supported a finding of violation and the issuance of a GEO. On December 9, 2020, Complainants filed a reply in support of their motion.

On April 2, 2021, the ALJ issued the subject ID and granted Complainants’ motion for a summary determination of violation by each of the five Defaulting Respondents. Order No. 41 (Apr. 2, 2021). No party petitioned for review of the subject ID.

The Commission has determined to review the subject ID in part. Specifically, the Commission has determined to review the ID’s finding that Complainants satisfied the economic prong of the domestic industry requirement. The Commission has not determined to review any other findings in the ID.

In connection with its review, the Commission is interested in briefing on the following issues:

1. Attached to Complainants’ motion for summary determination, Complainants submitted the declaration of Dr. Seth Kaplan. That declaration repeatedly refers to exhibits “attached hereto,” but the declaration contains no attachments. Do the documents referred to in Dr. Kaplan’s declaration appear elsewhere in the record? If so, please identify the location. If not, please address the admissibility of Dr. Kaplan’s declaration and whether the Commission should entertain a motion under Rule 210.15 (19 CFR 210.15) by Complainants, accompanied by the exhibits, to reopen the record to admit the exhibits into the administrative record.
2. Please discuss Complainants’ domestic industry investments under Section 337(a)(3)(A), (B), or (C) that are related to products that practice each patent and explain whether such investments are significant or substantial under each subsection in light of Commission and Federal Circuit precedents. Please include in your response, a contextual discussion of the relevant marketplace, for example, without being exhaustive, a discussion of Complainants’ foreign investments relative to its

domestic industry expenditures in these statutory categories, a discussion of the value added to the product from Complainant's activities in the United States, and/or a discussion of the domestic industry investments in the statutory categories relative to Complainants' total domestic operations. *See, e.g., Certain Carburetors & Prods. Containing Such Carburetors*, Inv. No. 337-TA-1123, Comm'n Op., 2019 WL 5622443, *12 (Oct. 28, 2019); *Certain Solid State Storage Drives, Stacked Electronics Components, and Products Containing the Same*, Inv. No. 337-TA-1097, Commission Op. at 29-30 (June 29, 2018).

3. Please address whether the domestic industry investments constitute investments in the "exploitation" of the asserted patents under Section 337(a)(3)(C). *See Certain Integrated Circuit Chips and Products Containing the Same*, Inv. No. 337-TA-859, Comm'n Op., 2014 WL 12796437 (Aug. 22, 2014).
4. Please explain whether Complainants' asserted domestic industry differs from that of a mere importer, including by discussing: (A) how the Commission and the Federal Circuit have considered such investments in prior investigations, and (B) how the facts of this investigation should be assessed in light of applicable precedent. Also address the extent to which the activities relied upon to show satisfaction of the economic prong need to take place in the United States either as a legal or a practical matter, such that those activities would not distinguish a domestic industry from a mere importer.

The parties are invited to brief only the discrete issues described above, with reference to the applicable law and evidentiary record. The parties are not to brief other issues on review, which are adequately presented in the parties' existing filings.

In connection with the final disposition of this investigation, the statute authorizes issuance of (1) an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) cease and desist orders that could result in the respondents 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 (December 1994).

The statute requires the Commission to consider the effects of that remedy upon the public interest. The public interest factors the Commission will consider include the effect that an exclusion order and/or a 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, disapprove, or take no action on the Commission's determination. *See* Presidential Memorandum of July 21, 2005, 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: The Commission requests that the parties to the investigation file written submissions on the issues identified in this notice. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such initial submissions should include views on the recommended determination by the ALJ on remedy and bonding.

In their initial submissions, Complainants and OUII are also requested to identify the remedy sought and to submit proposed remedial orders for the Commission's consideration. Complainants are also requested to state the HTSUS subheadings under which the accused products are imported and to supply the identification information for all known importers of the products at issue in this investigation. The initial written submissions and proposed remedial orders must be filed no later than close of business on June 1, 2021. Reply submissions must be filed no later than the close of business on June 8, 2021. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. The Commission's paper filing requirements in 19 C.F.R. 210.4(f) are currently waived. 85 FR 15798 (March 19, 2020). Submissions should refer to the investigation number (Inv. No. 337-TA-1195) in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures*, https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf). Persons with questions regarding filing should contact the Secretary, (202) 205-2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. 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. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal

investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements. All nonconfidential written submissions will be available for public inspection on EDIS.

The Commission vote for this determination took place on May 19, 2021.

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', enclosed in a large, loopy oval shape.

Lisa R. Barton
Secretary to the Commission

Issued: May 19, 2021