

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN PERCUSSIVE MASSAGE
DEVICES**

Investigation No. 337-TA-1206

**NOTICE OF COMMISSION DETERMINATION TO REVIEW IN PART AN INITIAL
DETERMINATION GRANTING A MOTION TO TERMINATE THE ASSERTED
DESIGN PATENTS FOR LACK OF STANDING AND, ON REVIEW,
TO AFFIRM WITH MODIFICATIONS**

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 the presiding administrative law judge’s (“ALJ”) initial determination (“ID”) (Order No. 39) granting a motion to terminate U.S. Design Patent Nos. D855,822 and D886,317 (“the Asserted Design Patents”) for lack of standing. On review, the Commission has determined to affirm the ID with modifications as set forth below. The investigation is terminated as to the Asserted Design Patents.

FOR FURTHER INFORMATION CONTACT: Cathy Chen, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, D.C. 20436, telephone (202) 205-2392. 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 July 22, 2020, based on a complaint filed on behalf of Hyper Ice, Inc. (“Hyperice”) of Irvine, California. 85 FR 44322 (July 22, 2020). The complaint, as supplemented, alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain percussive massage devices by reason of infringement of certain claims of the Asserted Design Patents and U.S. Patent No. 10,561,574 (“the ’574 patent”). The complaint further alleges that a domestic industry exists. The Commission’s notice of investigation names the following nineteen respondents: Laiwushiyu Xinuan Trading Company of Shandong District, China; Shenzhen Let Us Win-Win Technology Co., Ltd. of Guangdong, China; Shenzhen Qifeng

Technology Co., Ltd. of Guangdong, China; Shenzhen QingYueTang E-commerce Co., Ltd. of Guangdong, China; and Shenzhen Shiluo Trading Co., Ltd. of Guangdong, China (collectively, the “Unserved Respondents”); Kinghood International Logistics Inc. (“Kinghood”) of La Mirada, California; Manybo Ecommerce Ltd. (“Manybo”) of Hong Kong, China; Shenzhen Infein Technology Co., Ltd. (“Shenzhen Infein”) of Guangdong, China; Hong Kong Yongxu Capital Management Co., Ltd. (“Hong Kong Yongxu”) of Hong Kong, China; Kula eCommerce Co., Ltd. (“Kula”) of Guangdong, China; Performance Health Systems, LLC (“Performance Health”) of Northbrook, Illinois; Rechar, Inc. (“Rechar”) of Strasburg, Colorado; Ning Chen of Yancheng, Jiangsu China; Opove, Ltd. (“Opove”) of Azusa, California; Shenzhen Shufang E-Commerce Co., Ltd. (“Shufang E-Commerce”) of Shenzhen, China; Fu Si (“Shenzhen Fusi Technology”) of Guangdong, China;¹ WODFitters (“WODFitters”) Lorton, Virginia; Massimo Motor Sports, LLC (“Massimo”) of Garland, Texas; and Addaday LLC (“Addaday”) of Santa Monica, California. The notice of investigation also names the Office of Unfair Import Investigations (“OUII”) as a party.

On October 16, 2020, the Commission determined not to review Order No. 11 granting motions to intervene by third parties Shenzhen Xinde Technology Co., Ltd. (“Xinde”) and Yongkang Aijiu Industrial & Trade Co., Ltd. (“Aijiu”) in the investigation. *See* Order No. 11 (Sept. 25, 2020), *unreviewed by* Comm’n Notice (Oct. 16, 2020).

Respondents Addaday, WODFitters, Massimo, Performance Health, Rechar, Ning Chen, Opove, Shufang E-Commerce, Xinde, Aijiu, and Shenzhen Fusi Technology were terminated from the investigation based upon settlement agreements. *See* Order No. 10 (Sep. 16, 2020), *unreviewed by* Comm’n Notice (Oct. 15, 2020); Order No. 12 (Nov. 4, 2020), *unreviewed by* Comm’n Notice (Nov. 20, 2020); Order No. 30 (Apr. 8, 2021), *unreviewed by* Comm’n Notice (Apr. 22, 2021).

The Unserved Respondents were terminated from the investigation based upon withdrawal of the complaint. *See* Order No. 36 at 2 (Aug. 3, 2021), *unreviewed by* Comm’n Notice (Aug. 19, 2021).

The remaining Respondents Kinghood, Manybo, Shenzhen Infein, Hong Kong Yongxu, and Kula (collectively, “the Defaulting Respondents”) were found in default. *See* Order No. 17 (Dec. 17, 2020), *unreviewed by* Comm’n Notice (Jan. 5, 2021).

On May 6, 2021, OUII filed a motion to terminate the Asserted Design Patents from the investigation for lack of standing because a previously unnamed co-inventor had not assigned his interest in the Asserted Design Patents to Complainant Hyperice by the time the investigation was instituted. On May 17, 2021, Hyperice filed its response in opposition to OUII’s motion to

¹ Respondent Fu Si’s full name is Shenzhen Fusi Technology Co., Ltd. *See* Response of Opove Ltd., Shenzhen Shufang E-Commerce Co., Ltd., and Fu Si to the Complaint and Notice of Investigation at ¶ 40, EDIS Doc ID 716966 (Aug. 11, 2020). The principal place of business of Shenzhen Fusi Technology Co., Ltd. was changed to 14E, Building A, Guanghao International Center, No. 441 Meilong Road, Minzhi Street, Longhua District, Shenzhen, China, 518131, effective September 15, 2020. *Id.*

terminate, which included a cross-motion to amend the complaint to reflect proper inventorship.

On May 7, 2021, Hyperice filed a motion for summary determination that the Defaulting Respondents have violated section 337 for infringing its three asserted patents. On May 14, 2021, Hyperice supplemented its motion with additional declarations. On May 20, 2021, Hyperice again supplemented its motion with claim charts and exhibits. OUII filed a response in support of the motion with respect to the '574 patent but not with respect to the Asserted Design Patents.

On August 17, 2021, the ALJ issued Order No. 38 denying Hyperice's motion to amend the complaint to reflect proper inventorship. That same day, the ALJ issued the subject ID (Order No. 39) granting OUII's motion to terminate the Asserted Design Patents for lack of standing. Hyperice filed a timely petition for review of the subject ID and OUII filed a response to the petition.

On August 20, 2021, the ALJ issued Order No. 40 granting in part Hyperice's motion for summary determination of violation of section 337. Specifically, the ALJ found that four of the five Defaulting Respondents have infringed one or more of claims 1-7, 9, 14, and 15 of the '574 patent in violation of section 337. The ALJ concurrently issued a Recommended Determination ("RD") on the issues of remedy and bonding. The RD recommends the issuance of a general exclusion order (GEO) and a cease and desist order and setting the bond during the period of Presidential review in the amount of one hundred percent (100%) of the entered value. On October 20, 2021, the Commission determined to review in part Order No. 40 and requested written submissions from the parties on an issue under review.

Having reviewed the record of the investigation, including the subject ID, the parties' submissions to the ALJ, the petition for review, and the response thereto, the Commission has determined to review section IV(B) of the ID addressing Hyperice's procedural challenges to OUII's motion to terminate, but does not review any other portion of the ID. Thus, the Commission adopts the ID's finding that Hyperice was required to join Mr. Pascale Ruelle to establish standing in this investigation under Commission precedent and Commission Rule 210.12. The Commission also adopts the ID's finding that Hyperice's attempt to correct inventorship and obtain ownership of the Asserted Design Patents after the investigation was instituted through later Certificates of Correction and assignments from Mr. Ruelle does not cure its standing deficiency. Moreover, the Commission notes that Hyperice attempted to amend the complaint, but that, in this case, the ALJ denied Hyperice's motion to amend in Order No. 38 because Hyperice was not diligent in its request. Hyperice did not challenge the ALJ's denial in Order No. 38 in its petition for review and, thus, has abandoned its request to amend the complaint.

With regard to Hyperice's procedural challenges to OUII's motion to terminate, the Commission affirms with modifications the ID's denial of limited relief under section 337(g)(1) as to the Defaulting Respondents. The Commission agrees with the ID that *Laerdal v. Int'l Trade Comm'n*, 910 F.3d 1207 (Fed. Cir. 2018), does not decide or address the circumstances here. The Federal Circuit held in *Laerdal* that subsection (g)(1) sets forth the requirements for finding a violation by defaulting respondents in addition to stating the remedies that the

Commission shall issue upon request, and upon finding a violation under section 337(g)(1), subject only to the public interest concerns. *Laerdal*, 910 F.3d at 1212-13. The Court held that where the requirements of section 337(g)(1)(A)-(E) are met, “the Commission was required under § 1337(g)(1) to presume all facts alleged in the complaint as true and issue an exclusion order, cease and desist order, or both” subject only to the public interest considerations. *Id.* at 1215; 19 U.S.C. 1337(g)(1). The Court observed that in the case before it no responding party challenged the complaint’s trade dress allegations, nor did the record reveal that OUII or the ALJ shared the Commission’s concerns about the adequacy of these trade dress allegations. *Id.* at 1215. The Court found that the time for the Commission to determine that the complaint’s trade dress allegations were an insufficient basis on which to find a violation was at the time of institution and therefore the Commission could not deny relief against defaulting respondents on the basis that the complaint failed to contain allegations – even if presumed true – sufficient to support a finding of violation. *Id.* at 1213-14.

The Court did not reach the issue of how section 337(g)(1) is to be applied where OUII contests the accuracy of the facts alleged in the complaint or the ALJ or the Commission finds based on evidence placed on the record post-institution that the facts alleged in the complaint are not true. In this case, OUII challenged the validity and inventorship of the Asserted Design Patents and Hyperice’s standing throughout the investigation and filed the motion to terminate the Asserted Design Patents from the investigation for lack of standing after Hyperice filed the Certificates of Correction adding Mr. Ruelle as an additional inventor of the Asserted Design Patents. As a result of OUII’s challenges, Hyperice placed this evidence in the record post-institution and the evidence established its lack of standing at the time of institution and refuted the allegations in the complaint. The Commission does not consider that section 337(g)(1) or the court’s holding in *Laerdal* requires it to ignore OUII’s challenge to Complainant’s standing and the evidence placed on the record post-institution that refutes the truth of what the complaint alleges. Thus, the Commission finds that the ID properly adjudicated and granted OUII’s motion to terminate the Asserted Design Patents because the post-institution facts and evidence show the allegations in the complaint with respect to standing are not true. Without standing to assert the Asserted Design Patents, Hyperice is not entitled to limited relief against the Defaulting Respondents even under *Laerdal*. Therefore, as the ID found and as further explained herein, Hyperice’s procedural arguments are without merit.

The investigation is terminated as to the Asserted Design Patents. The statute does not bar Hyperice from filing a new complaint with the Commission asserting the same design patents.

The Commission vote for this determination took place on November 22, 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', written in a cursive style.

Lisa R. Barton
Secretary to the Commission

Issued: November 22, 2021