

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN OPAQUE POLYMERS

Investigation No. 337-TA-883

**NOTICE OF COMMISSION DECISION TO AFFIRM AN
ADMINISTRATIVE LAW JUDGE'S CONFIDENTIALITY
DETERMINATION UNDER COMMISSION RULE 210.5(e)**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to grant the interlocutory appeal presented to it regarding the ALJ's determination of confidentiality under Commission rule 210.5(e), and has determined to affirm the decision of the presiding Administrative Law Judge (Order Nos. 17 and 18), finding certain information not to be confidential business information.

FOR FURTHER INFORMATION CONTACT: Sidney A. Rosenzweig, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2532. 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: The Commission instituted this investigation on June 21, 2013, based on a complaint filed by the Dow Chemical Company of Midland, Michigan, and by Rohm and Haas Company and Rohm and Haas Chemicals LLC, both of Philadelphia, Pennsylvania (collectively, "Dow"). *78 Fed. Reg.* 37571 (June 21, 2013). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended 19 U.S.C. § 1337, by reason of the importation into the United States, the sale for importation, and the sale within the United States after importation of certain opaque polymers that infringe certain claims of four United States patents. The notice of institution named five respondents: Organik Kimya San. ve

Tic. A.Ş of Istanbul, Turkey; Organik Kimya Netherlands B.V. of Rotterdam-Botlek, Netherlands; Organik Kimya US, Inc. of Burlington, Massachusetts (collectively, “Organik Kimya”); Turk International LLC of Aptos, California; and Aalborz Chemical LLC d/b/a All Chem of Grand Rapids, Michigan. The complaint and notice of investigation have since been amended to add allegations of misappropriation of trade secrets. 78 *Fed. Reg.* 71643 (Nov. 29, 2013).

Some of Dow’s trade secret allegations are based upon the actions of a former Dow employee. Order No. 15 (Feb. 4, 2014) ordered certain discovery from the former employee, subject to certain safeguards put in place by the ALJ. In Order No. 16 (Feb. 20, 2014), the ALJ ordered certain discovery against Organik Kimya. In redactions originally proposed to the ALJ, Organik Kimya redacted the former employee’s name. Subsequently, Organik Kimya agreed that the name of the former employee could be made public in Order Nos. 15 and 16. The former employee objected to disclosure of certain information, including his name, which appears publicly elsewhere in the Commission record. In Order No. 17 (Apr. 7, 2014), the ALJ overruled that objection, and found that the former employee’s name could be released publicly in connection with Order Nos. 15 and 16, which have not yet been made public. In Order No. 18 (Apr. 29, 2014), the ALJ denied the former employee’s motion for reconsideration, but granted the former employee’s alternative request to certify Order No. 17 for interlocutory review by the Commission, pursuant to Commission Rules 210.5(e)(1) and 210.24(b)(2).

On May 4, 2014, the former employee filed his interlocutory appeal. On May 13, 2013, Dow filed an opposition. Organik Kimya did not respond.

Pursuant to Commission Rule 210.24(b)(3), “the Commission may, in its discretion, permit an appeal,” and unless “otherwise ordered by the Commission, Commission review, if permitted, shall be confined to the application for review and answer thereto, without oral arguments or further briefs.” The Commission has determined to permit the former employee’s appeal.

Section 337(n) provides in pertinent part that information properly designated as confidential pursuant to Commission rules may not be disclosed except under protective order. 19 U.S.C. § 1337(n). When the Commission or the ALJ “issues a confidential version of an order, initial determination, opinion, or other document, the Commission or the presiding [ALJ] . . . shall issue any public version of the document within 30 days, unless good cause exists to extend the deadline.” 19 C.F.R. § 210.5(f); *see* Notice of Final Rule, 78 *Fed. Reg.* 23474, 23480 (Apr. 19, 2013). That same rule provides that upon “request by the Commission” or the presiding ALJ, “parties must provide support in the record for their claim of confidentiality, pursuant to § 201.6 of this chapter and § 210.4 of this subpart for any proposed redactions that parties may submit to the Commission or the [ALJ] for the preparation of any public version.” 19 C.F.R. § 210.5(f). Similarly, the protective order in this investigation states that an “opportunity shall be provided to the supplier of such information to argue its confidentiality prior to the time of such ruling.” Order No. 1, ¶ 2(b) (June 23, 2013).

Following these procedures, the ALJ here conducted a teleconference on March 26, 2014 that included counsel for the former employee. During that teleconference, the ALJ expressed

skepticism about treating the former employee's name as confidential, and urged the parties and counsel for the former employee to come to some agreement. Tr. 24 (Mar. 26, 2014). A follow-up email on March 27, 2014 from the ALJ's law clerk to the parties and counsel for the former employee requested support for the claimed redactions in Orders 15 and 16. The former employee provided a response that reasserted confidentiality as to certain information, including his name, without supplying support for the proposition that such information is confidential business information under Commission Rule 201.6. Letter to Judge Pender (Mar. 28, 2014) (EDIS Doc. 530759). Such support could have substantiated his assertion that the designated information meets the definition of confidential business information set forth in 19 C.F.R. § 201.6(a) to warrant redaction from the public version of Orders 15 and 16.

In Order No. 17, the ALJ rejected the former employee's showing as inadequate. In response, the former employee filed an affidavit appended to a motion for reconsideration. But even if taken as timely, the affidavit offered no particular information beyond the same prior conclusory assertion of confidentiality, which the ALJ had already rejected. In Order No. 18, the ALJ found the motion provided no new evidence for the former employee's assertion that the information was properly designated as confidential business information under Rule 201.6, but that it "simply reargues that which he already argued in his letter of March 28, 2014." Order No. 18 at 2. However, the ALJ permitted the former employee to seek interlocutory review.

Accordingly, the Commission grants the motion for interlocutory appeal. Upon consideration of the submissions filed in the appeal, and the record below concerning notice and opportunities provided by the ALJ to the former employee to submit support for his request for confidential treatment and the former employee's responses thereto, the Commission affirms Order No. 17. The effect of this decision is stayed until September 3, 2014, in order to permit the former employee to seek such judicial review as may be available.

The authority for the Commission's determination is contained in sections 332(g) and 337 of the Tariff Act of 1930, as amended (19 U.S.C. §§ 1332(g) & 1337), and in Parts 201 and 210 of the Commission's Rules of Practice and Procedure (19 C.F.R. Parts 201 & 210).

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: August 13, 2014