

In the Matter of

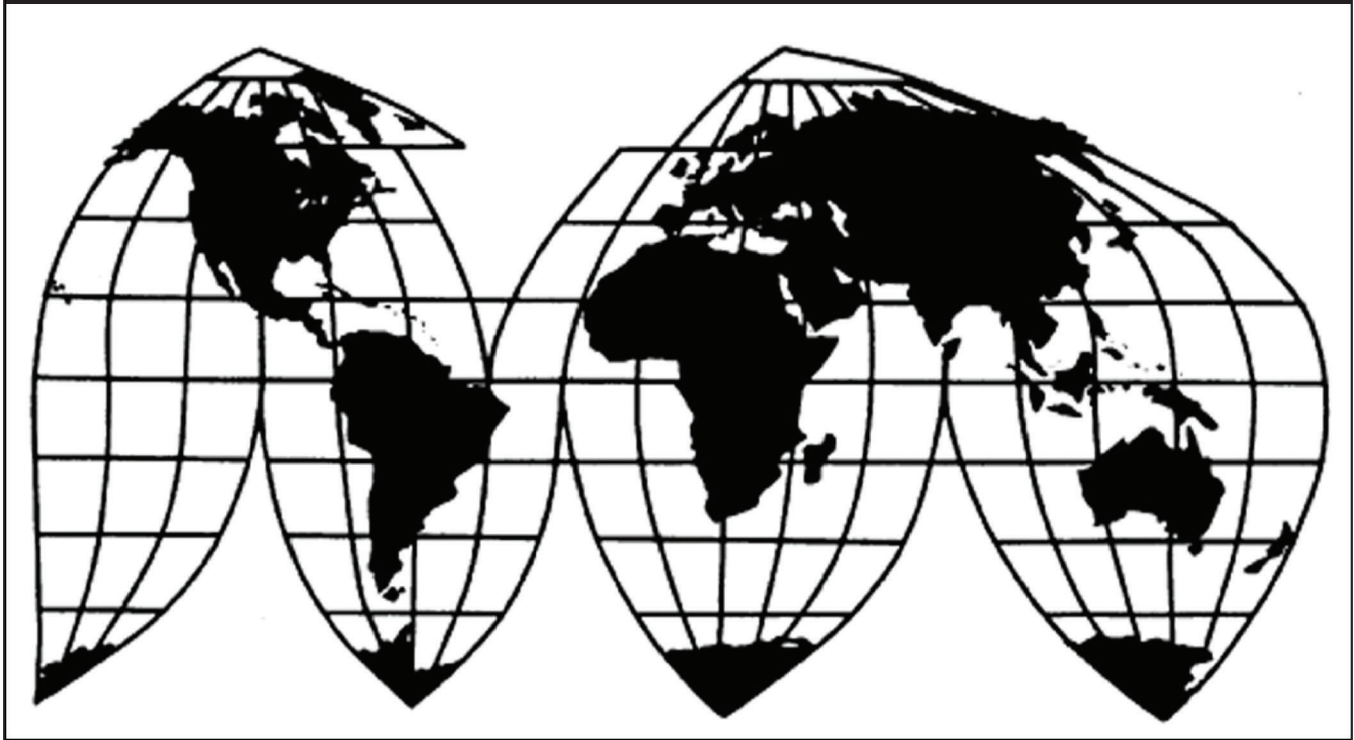
**CERTAIN ELECTRIC SKIN CARE DEVICES,
BRUSHES AND CHARGERS THEREFOR,
AND KITS CONTAINING THE SAME**

Investigation No. 337-TA-959

Publication 4923

August 2019

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

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Washington, DC 20436

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In the Matter of

CERTAIN ELECTRIC SKIN CARE DEVICES, BRUSHES AND CHARGERS THEREFOR, AND KITS CONTAINING THE SAME

Investigation No. 337-TA-959



UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN ELECTRIC SKIN CARE
DEVICES, BRUSHES AND CHARGERS
THEREFOR, AND KITS CONTAINING
THE SAME**

Investigation No. 337-TA-959

**MODIFICATION OF INITIAL DETERMINATION; ISSUANCE OF A GENERAL
EXCLUSION ORDER, A LIMITED EXCLUSION ORDER, AND CEASE AND DESIST
ORDERS; TERMINATION OF INVESTIGATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined that there is a violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337) in the above-captioned investigation. The Commission has determined to modify the ALJ's initial determination ("ID") (Order No. 42) in part and to issue a general exclusion order ("GEO"), a limited exclusion order ("LEO"); and cease and desist orders ("CDOs"). The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Michael Liberman, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3115. 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 <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 under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 ("section 337"), on June 25, 2015, based on a complaint filed by Pacific Bioscience Laboratories, Inc. of Redmond, Washington ("Complainant," or "PBL"). 80 *Fed. Reg.* 36576-77 (Jun. 25, 2015). The amended complaint, as supplemented, alleges a violation of section 337 based upon the importation into the United States, the sale for importation, or the sale within the United States after importation of certain electric skin care devices, brushes and chargers therefor, and kits containing the same

by reason of infringement of certain claims of U.S. Patent Nos. 7,320,691 (“the ‘691 patent”) and 7,386,906 (“the ‘906 patent”), and U.S. Design Patent No. D523,809 (“the D’809 patent”). The complaint further alleges violations of section 337 by reason of trade dress infringement, the threat or effect of which is to destroy or substantially injure an industry in the United States. *Id.* The complaint named numerous respondents. The Commission’s Office of Unfair Import Investigations was named as a party.

During the course of the investigation, eight of the respondents were terminated by consent order: Nutra-Luxe M.D., LLC of Fort Myers, Florida (Order No. 10) (consent order issued Jan. 5, 2016); SkincarebyAlana of Dana Point, California (Order No. 11) (consent order issued Oct. 6, 2015); Unicos USA, Inc. of LaHabra, California (Order No. 15) (consent order issued Oct. 20, 2015); H2PRO Beautylife, Inc. of Placentia, California (Order No. 19) (consent order issued Oct. 22, 2015); Jewlzle of New York, New York (Order No. 20) (consent order issued Oct. 22, 2015); Home Skinovations Inc. of Richmond Hill, Ontario, Canada, and Home Skinovations Ltd. of Yokneam, Israel (Order No. 30) (consent order issued Dec. 23, 2015); and Accord Media, LLC of New York, New York (Order No. 31) (consent order issued Dec. 23, 2015). Respondent RN Ventures Ltd. of London, United Kingdom, was terminated based on a settlement agreement (Order No. 36) (*not reviewed* Feb. 4, 2016). Respondents Michael Todd LP and MTTO LLC, both of Port St. Lucie, Florida, were also terminated based on a settlement agreement (Order No. 37) (*not reviewed* Mar. 3, 2016).

The remaining ten respondents were found in default: Coreana Cosmetics Co., Ltd. of Chungcheongnam-do, Republic of Korea; Flageoli Classic Limited of Las Vegas, Nevada (“Flageoli”); Serious Skin Care, Inc. of Carson City, Nevada (“Serious Skin Care”); Shanghai Anzikang Electric Co., Ltd. of Shanghai, China (“Anzikang”); and Wenzhou Ai Er Electrical Technology Co., Ltd. of ZheJiang, China (Order No. 13) (*not reviewed*, as modified by Order No. 15, Oct. 20, 2015); ANEX Corporation of Seoul, Republic of Korea; Korean Beauty Co., Ltd. of Seoul, Republic of Korea; and Our Family Jewels, Inc. of Parker, Colorado (“Our Family Jewels”) (Order No. 18) (*not reviewed* Oct. 22, 2015); Beauty Tech, Inc. of Coral Gables, Florida (“Beauty Tech”) (Order No. 24) (*not reviewed* Nov. 13, 2015); and Xnovi Electronic Co., Ltd. of Shenzhen, China (Order No. 32) (*not reviewed* Dec. 23, 2015) (collectively, “the Defaulting Respondents”).

On February 18, 2016, complainant PBL filed a motion for summary determination of violation of Section 337 by the Defaulting Respondents. The Commission investigative attorney (“IA”) filed a response in support of the motion. No other responses were filed.

On April 11, 2016, the ALJ issued an ID (Order No. 42) granting complainant’s motion for summary determination of violation and making recommendations regarding remedy and bonding. The IA filed a timely petition for review-in-part of the ID. No other party petitioned for review of the ID. Complainant PBL filed a response in support of the IA’s petition. No other responses were filed.

On May 26, 2016, the Commission determined to review the ID in part, and issued a "Notice Of A Commission Determination To Review In Part An Initial Determination Granting Complainant's Motion For Summary Determination Of Violation Of Section 337; Request For Written Submissions On Remedy, The Public Interest, And Bonding" ("the Commission Notice"), in which the Commission specified the issues under review. *See* 81 *Fed. Reg.* 35377-79 (Jun. 2, 2016). In particular, the Commission determined "to review the ID's findings on the economic prong of the domestic industry requirement as to the patent-based allegations, all issues related to violation of the asserted trade dress, and to correct certain minor typographical errors." Commission Notice at 2. The Commission did not request any submissions on the issues under review.

The Commission requested written submissions on remedy, public interest, and bonding. *Id.* at 3. PBL and the IA timely filed their submissions pursuant to the Commission Notice. Settled respondents Michael Todd LP and MTTO LLC also filed a Written Submission on the Issue of Remedy and a Reply to PBL's Written Submission. No other submissions were received in response to the Commission Notice.

Having examined the record in this investigation, the Commission has determined as follows:

(I) With respect to the ID's findings on the economic prong of the domestic industry requirement as to the patent-based allegations:

(A) To vacate the subsection labeled "Significant Investment." on pages 21-22 of the ID.

(B) To take no position on, and therefore vacate, the ID's analysis and findings pertaining to the ID's determination that the "non-manufacturing expenditures would need to be backed out of the calculation of qualifying investments under subsections (A) as well as (B)." ID/RD at 25.

(C) To affirm the ID's finding that PBL satisfied the economic prong requirement under subsections 337(a)(3)(A) and (B).

(D) To take no position on, and therefore vacate, the ID's analysis and findings regarding whether PBL satisfied the economic prong requirement under subsection (C) of section 337(a)(3). *See Beloit Corporation v. Valmet Oy*, 742 F.2d 1421, 1423 (Fed. Cir.1984) ("*Beloit*").

(II) With respect to all of the ID's findings pertaining to the alleged violation of PBL's asserted trade dress, the Commission takes no position. *See Beloit*, 742 F.2d at 1423. The Commission finds that the respondents accused of infringing the trade dress are in default under section 337(g)(1).

(III) The Commission has corrected two typographical errors by substituting "Mot. Ex. 35 (Fabien Decl.) ¶¶ 31, 35" for "*Id.* ¶¶ 31,35" in the last paragraph on page 38 of the ID, and "Mot. Ex. 35 (Fabien Decl.) ¶¶ 31, 35" for "*Id.* ¶¶ 31, 35" in the last paragraph on page 31 of the ID.

Having reviewed the submissions on remedy, the public interest and bonding filed in response to the Commission's Notice, and the evidentiary record, the Commission has determined that the appropriate form of relief in this investigation is: (a) a GEO prohibiting the unlicensed importation of certain electric skin care devices, brushes or chargers therefor, or kits containing same that infringe one or more of claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, 49 of the '691 patent and claims 1-2, 4-5, and 7-15 of the '906 patent; (b) an LEO prohibiting the unlicensed entry of (i) infringing electric skin care devices, brushes or chargers therefor, or kits containing same that are covered by the claim of the D'809 patent and that are manufactured abroad by or on behalf of, or imported by or on behalf of respondents Beauty Tech; Flageoli; Our Family Jewels; Serious Skin Care; and Anzikang, and (ii) electric skin care devices, brushes or chargers therefor, or kits containing same that are covered by one or more of the Clarisonic Device Trade Dress or Clarisonic Charging Station Trade Dress and that are manufactured abroad by or on behalf of, or imported by or on behalf of respondents Our Family Jewels or Anzikang; and (c) cease and desist orders directed against each domestic and foreign Defaulting Respondent.

Chairman Schmidtlein and Commissioner Kieff each write separately to explain their views as to the basis for issuing the cease and desist orders.

The Commission has further determined that the public interest factors enumerated in subsections (d)(1), (f)(1), and (g)(1) (19 U.S.C. §§ 1337(d)(1), (f)(1), (g)(1)) do not preclude issuance of the above-referenced remedial orders. Additionally, the Commission has determined that a bond in the amount of one hundred (100) percent of the entered value is required to permit temporary importation of the articles in question during the period of Presidential review (19 U.S.C. § 1337(j)). The investigation is terminated.

The Commission's orders, opinion, and the record upon which it based its determination were delivered to the President and to the United States Trade Representative on the day of their issuance. The Commission has also notified the Secretary of the Treasury of the orders.

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 C.F.R. Part 210).

By Order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: February 6, 2017

**CERTAIN ELECTRIC SKIN CARE DEVICES, BRUSHES
AND CHARGERS THEREFOR, AND KITS CONTAINING
SAME**

Inv. No. 337-TA-959

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, Sarah J. Sladic, Esq., and the following parties as indicated, on **February 7, 2017**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

**On Behalf of Complainants Pacific Bioscience Laboratories,
Inc.:**

Robert M. Masters, Esq.

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP

801 17th St. NW

Washington, DC 20006

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Respondents:

Our Family Jewels, Inc. d/b/a Epipür Skincare

7770 E. Iliff Ave. Rm./Suite E

Denver, CO 80231

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Xnovi Electronic Co., Ltd.

Unit 6A, Block C1, Area G

Sha Jing Street, Min Zhu Industrial Estate,

Baoan District, Shenzhen City,

China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Shanghai Anzikang Electric Co., Ltd.

168 Ji Xin Road, Building 3, Room 401

Minhang District, Shanghai,

China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

**CERTAIN ELECTRIC SKIN CARE DEVICES, BRUSHES
AND CHARGERS THEREFOR, AND KITS CONTAINING
SAME**

Inv. No. 337-TA-959

Certificate of Service – Page 2

Beauty Tech, Inc.
1430 S. Dixie Hwy., Ste. 321
Coral Gables, FL 33146-3175

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

ANEX Corporation
#304-705 Bucheon Techno Park
345 Seokcheon-ro, Ojeong-gu
Bucheon City, Gyeonggi-do
421-741, Korea

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Korean Beauty Co., Ltd.
10 F, Pluszone Bldg. 700
Deungchon-Dong, Gangseo-Gu
Seoul, Korea

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Serious Skin Care, Inc.
112 N. Curry St.
Carson City, NV 89703-4934

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Wenzhou Ai Er Electrical Technology Co., Ltd. d/b/a CNAIER
1#, XiaSong Road, WanQuan Town
PingYang, ZheJiang
China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Coreana Cosmetics Co., Ltd.
204-1 Jeongchon-ri, eup, Seonggeo-eup
Seobuk-gu, Cheonan-si, Chungcheongnam-do
Korea

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Flageoli Classic Limited
7310 Smoke Ranch Road
Las Vegas, NV 89128

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC**

In the Matter of

**CERTAIN ELECTRIC SKIN CARE
DEVICES, BRUSHES AND CHARGERS
THEREFOR, AND KITS CONTAINING
SAME**

Investigation No. 337-TA-959

GENERAL EXCLUSION ORDER

The Commission has determined that there is a violation of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the unlawful importation, sale for importation, or sale within the United States after importation of certain electric skin care devices, brushes and chargers therefor, and kits containing same that infringe claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, 49 of United States Patent No. 7,320,691 ("the '691 patent") and claims 1-2, 4-5, and 7-15 of United States Patent No. 7,386,906 ("the '906 patent").

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has made its determinations on the issues of remedy, the public interest, and bonding. The Commission has determined that a general exclusion from entry for consumption is necessary to prevent circumvention of an exclusion order limited to products of named persons and because there is a pattern of violation of section 337 and it is difficult to identify the source of infringing products. Accordingly, the Commission has determined to issue a general exclusion order prohibiting the unlicensed importation of

infringing electric skin care devices, brushes and chargers therefor, and kits containing same ("covered products").

The Commission has also determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) do not preclude issuance of the general exclusion order, and that the bond during the Presidential review period shall be in the amount of one hundred (100) percent of entered value for all covered products.

Accordingly, the Commission hereby **ORDERS** that:

1. Electric skin care devices, brushes or chargers therefor, or kits containing same that infringe one or more of claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, 49 of the '691 patent and claims 1-2, 4-5, and 7-15 of the '906 patent are excluded from entry into the United States for consumption, entry for consumption from a foreign-trade zone, and withdrawal from a warehouse for consumption, except under license from, or with the permission of, the patent owner or as provided by law.
2. Notwithstanding paragraph 1 of this Order, the aforesaid electric skin care devices, brushes or chargers therefor, or kits containing same are entitled to entry into the United States for consumption, entry for consumption from a foreign-trade zone, and withdrawal from a warehouse for consumption, under a bond in the amount of one hundred (100) percent of entered value of the products pursuant to subsection (j) of Section 337 (19 U.S.C. § 1337(j)), and the Presidential Memorandum for the United States Trade Representative of July 21, 2005 (70 *Fed Reg.* 43251), from the day after this Order is received by the United States Trade Representative and until such time as the United States

Trade Representative notifies the Commission that this Order is approved or disapproved but, in any event, not later than sixty (60) days after the date of receipt of this Order.

3. At the discretion of U.S. Customs and Border Protection ("CBP") and pursuant to procedures it establishes, persons seeking to import electric skin care devices, brushes or chargers therefor, or kits containing same that are potentially subject to this Order may be required to certify that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the products being imported are not excluded from entry under paragraph 1 of this Order. At its discretion, CBP may require persons who have provided the certification described in this paragraph to furnish such records or analyses as are necessary to substantiate the certification.
4. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to electric skin care devices, brushes or chargers therefor, or kits containing same that are imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.
5. The Commission may modify this Order in accordance with the procedures described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).
6. The Commission Secretary shall serve copies of this Order upon each party of record in this investigation and U.S. Customs and Border Protection.

7. Notice of this Order shall be published in the *Federal Register*.

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton'.

Lisa R. Barton
Secretary to the Commission

Issued: February 6, 2017

**CERTAIN ELECTRIC SKIN CARE DEVICES, BRUSHES
AND CHARGERS THEREFOR, AND KITS CONTAINING
SAME**

Inv. No. 337-TA-959

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION ORDER** has been served by hand upon the Commission Investigative Attorney, Sarah J. Sladic, Esq., and the following parties as indicated, on **February 7, 2017**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

**On Behalf of Complainants Pacific Bioscience Laboratories,
Inc.:**

Robert M. Masters, Esq.

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP

801 17th St. NW

Washington, DC 20006

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Respondents:

Our Family Jewels, Inc. d/b/a Epipür Skincare

7770 E. Iliff Ave. Rm./Suite E

Denver, CO 80231

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Xnovi Electronic Co., Ltd.

Unit 6A, Block C1, Area G

Sha Jing Street, Min Zhu Industrial Estate,

Baoan District, Shenzhen City,

China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Shanghai Anzikang Electric Co., Ltd.

168 Ji Xin Road, Building 3, Room 401

Minhang District, Shanghai,

China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

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Beauty Tech, Inc.
1430 S. Dixie Hwy., Ste. 321
Coral Gables, FL 33146-3175

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

ANEX Corporation
#304-705 Bucheon Techno Park
345 Seokcheon-ro, Ojeong-gu
Bucheon City, Gyeonggi-do
421-741, Korea

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Korean Beauty Co., Ltd.
10 F, Pluszone Bldg. 700
Deungchon-Dong, Gangseo-Gu
Seoul, Korea

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Serious Skin Care, Inc.
112 N. Curry St.
Carson City, NV 89703-4934

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Wenzhou Ai Er Electrical Technology Co., Ltd. d/b/a CNAIER
1#, XiaSong Road, WanQuan Town
PingYang, ZheJiang
China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Coreana Cosmetics Co., Ltd.
204-1 Jeongchon-ri, eup, Seonggeo-eup
Seobuk-gu, Cheonan-si, Chungcheongnam-do
Korea

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Flageoli Classic Limited
7310 Smoke Ranch Road
Las Vegas, NV 89128

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

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

In the Matter of

**CERTAIN ELECTRIC SKIN CARE
DEVICES, BRUSHES AND CHARGERS
THEREFOR, AND KITS CONTAINING
SAME**

Investigation No. 337-TA-959

LIMITED EXCLUSION ORDER

The United States International Trade Commission ("Commission") has determined that there is a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the unlawful importation, sale for importation, or sale within the United States after importation by respondents Beauty Tech, Inc. of Coral Gables, Florida; Flageoli Classic Limited of Las Vegas, Nevada; Our Family Jewels, Inc. ("Our Family Jewels") of Denver, Colorado; Serious Skin Care, Inc. of Carson City, Nevada; and Shanghai Anzikang Electric Co., Ltd. ("Anzikang") of Shanghai, China (collectively, "Respondents") of certain electric skin care devices, brushes and chargers therefor, and kits containing same that infringe the claim of United States Patent No. D523,809 ("the D'809"). In addition, the Commission has found the Our Family Jewels and Anzikang Respondents in default pursuant to section 337(g) and 19 C.F.R. § 210.16 for failing to respond to the Notice of Investigation and a Complaint that alleged a violation of section 337 with respect to the importation into the United States or sale of certain electric skin care devices, brushes and chargers therefor, and kits containing same infringing one or more of the Clarisonic Device Trade Dress or Clarisonic Charging Station Trade Dress. The elements of the

Clarisonic Device Trade Dress are set forth in Exhibit 1 to this order.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has made its determination on the issues of remedy, public interest, and bonding. The Commission has determined that the appropriate form of relief is a limited exclusion order prohibiting the unlicensed entry of covered electric skin care devices, brushes or chargers therefor, or kits containing same, manufactured abroad by or on behalf of, or imported by or on behalf of, Respondents, as specified in items 1 – 3 below, or any of their affiliated companies, parents, subsidiaries, licensees, or other related business entities, or their successors or assigns.

The Commission has also determined that the public interest factors enumerated in 19 § 1337(d) do not preclude the issuance of the limited exclusion order, and that the bond during the Presidential review period shall be in the amount of one hundred (100) percent of the entered value of the electric skin care devices, brushes and chargers therefor, and kits containing same that are subject to this Order.

Accordingly, the Commission hereby **ORDERS** that:

1. Electric skin care devices, brushes or chargers therefor, or kits containing same that are covered by the claim of the D'809 patent and that are manufactured abroad by or on behalf of, or imported by or on behalf of, Respondents, or any of their affiliated companies, parents, subsidiaries, licensees, or other related business entities, or their successors or assigns, are excluded from entry for consumption into the United States, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for

consumption, for the remaining term of the patent, except under license of the patent owner or as provided by law.

2. Electric skin care devices, brushes or chargers therefor, or kits containing same that are covered by one or more of the Clarisonic Device Trade Dress or Clarisonic Charging Station Trade Dress and that are manufactured abroad by or on behalf of, or imported by or on behalf of, Our Family Jewels or Anzikang Respondents, or any of their affiliated companies, parents, subsidiaries, licensees, or other related business entities, or their successors or assigns, are excluded from entry for consumption into the United States, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, until the relevant Clarisonic Device Trade Dress or Clarisonic Charging Station Trade Dress has been abandoned or rendered invalid or unenforceable.
3. For the purpose of assisting U.S. Customs and Border Protection ("CBP") in the enforcement of this Order, and without in any way limiting the scope of the Order, the Commission has attached to this Order as Exhibit 1 copies of photographs of the Clarisonic Plus and Clarisonic Pro products and charging stations that feature the Clarisonic Device Trade Dress and Clarisonic Charging Station Trade Dress, and a description of the Trade Dress.
4. Notwithstanding paragraph 1 or 2 of this Order, the aforesaid electric skin care

devices, brushes or chargers therefor, or kits containing same are entitled to entry into the United States for consumption, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption under bond in the amount of one hundred (100) percent of the entered value of such products pursuant to subsection (j) of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337(j)), and the Presidential Memorandum for the United States Trade Representative of July 21, 2005 (70 *Fed. Reg.* 43251), from the day after this Order is received by the United States Trade Representative until such time as the United States Trade Representative notifies the Commission that this Order is approved or disapproved but, in any event, not later than sixty (60) days after the date of receipt of this Order.

5. At the discretion of CBP and pursuant to the procedures it establishes, persons seeking to import electric skin care devices, brushes or chargers therefor, or kits containing same that are potentially subject to this Order may be required to certify that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the products being imported are not excluded from entry under paragraph 1 or 2 of this Order. At its discretion, CBP may require persons who have provided the certification described in this paragraph to furnish such records or analyses to substantiate the certification.
6. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to electric skin care devices, brushes or chargers therefor, or kits

containing same that are imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.

7. Complainant Pacific Bioscience Laboratories, Inc. shall file a written statement with the Commission, made under oath, each year on the anniversary of the issuance of this Order stating whether Pacific Bioscience Laboratories, Inc. continues to use each of the aforesaid trade dress in commerce in the United States in connection with electric skin care devices, brushes and chargers therefor, and kits containing same, whether any of the aforesaid trademarks has been abandoned or rendered invalid or unenforceable, and whether Pacific Bioscience Laboratories, Inc. continues to satisfy the industry and injury requirements of Section 337(a)(1)(A).
8. The Commission may modify this Order in accordance with the procedures described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).
9. The Commission Secretary shall serve copies of this Order upon each party of record in this investigation and upon U.S. Customs and Border Protection.
10. Notice of this Order shall be published in the Federal Register.

By order of the Commission.

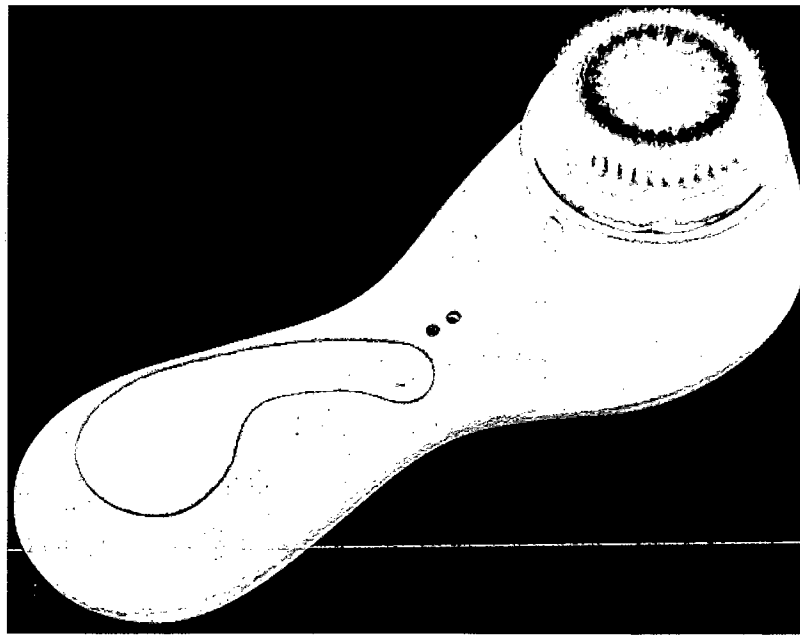
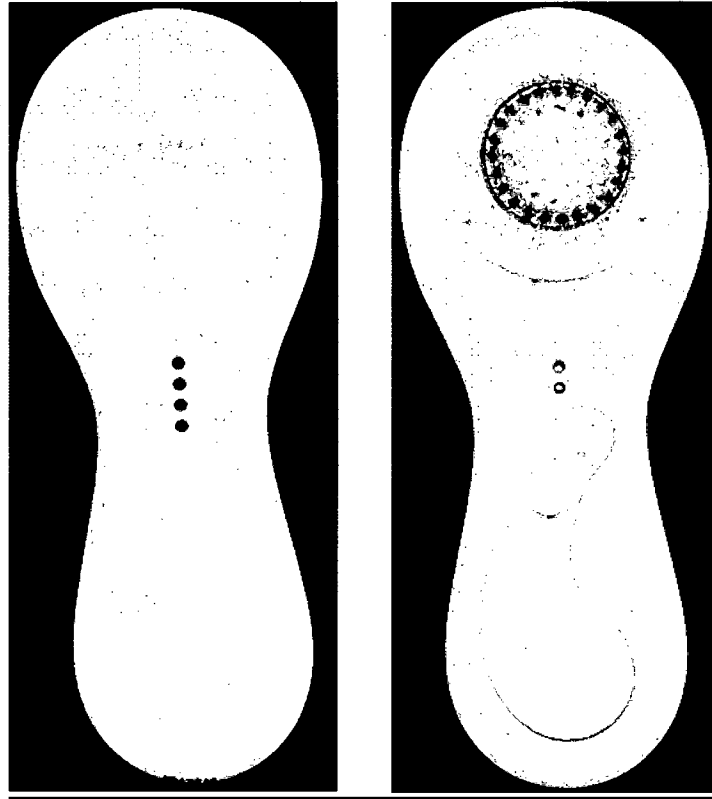


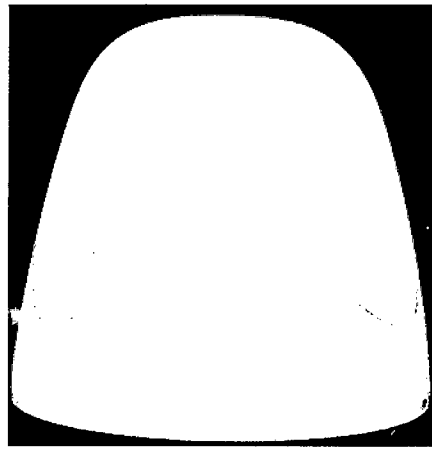
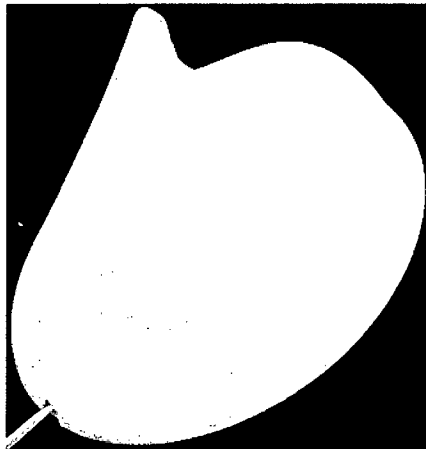
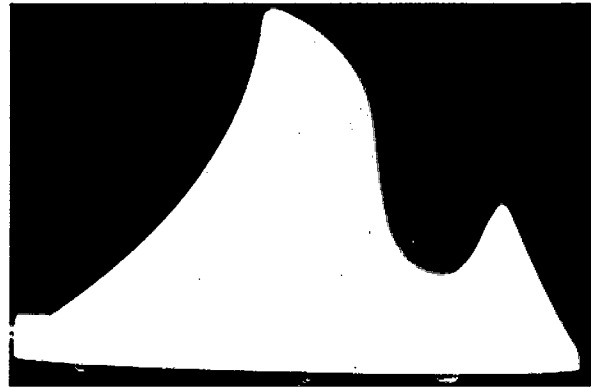
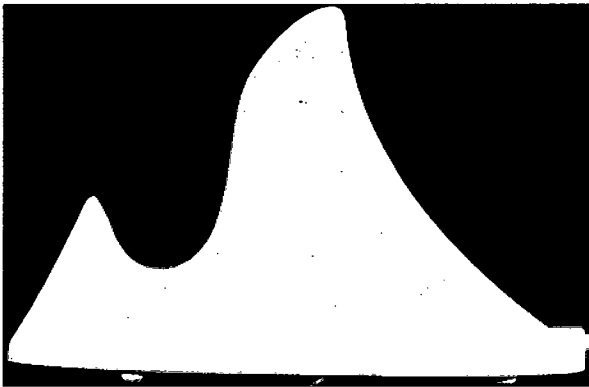
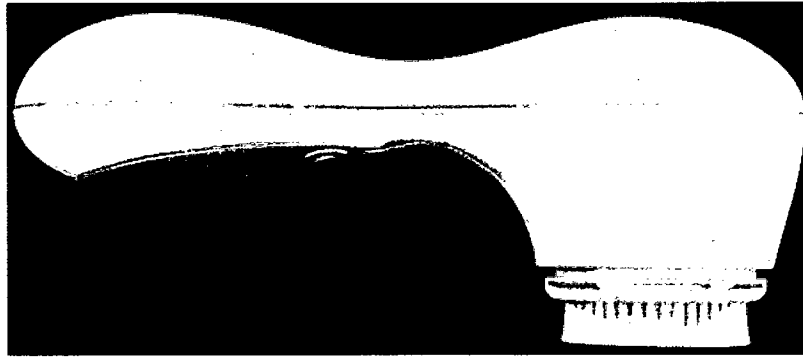
Lisa R. Barton
Secretary to the Commission

Issued: February 6, 2017

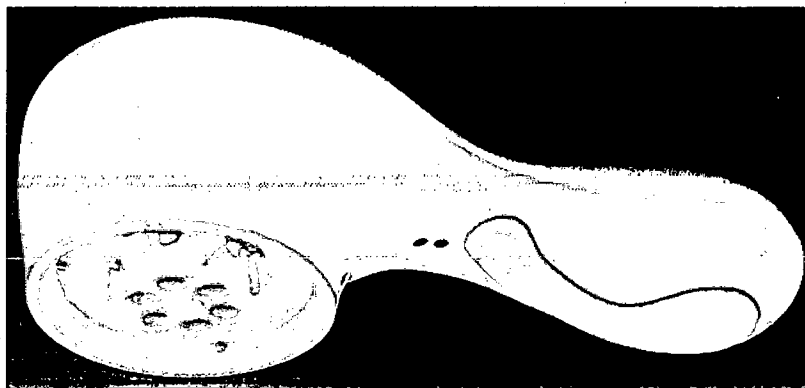
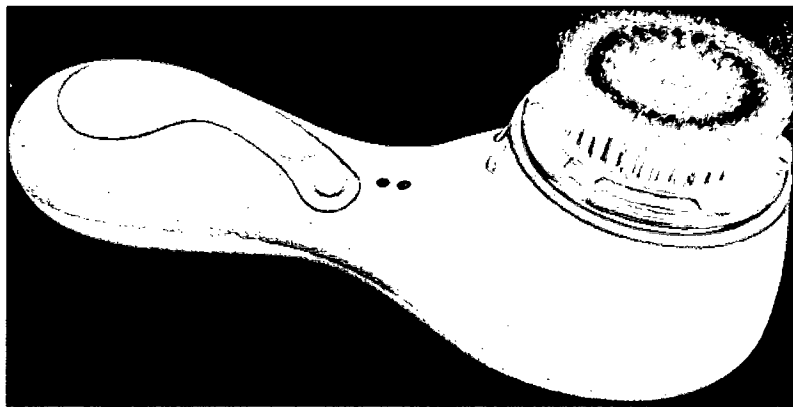
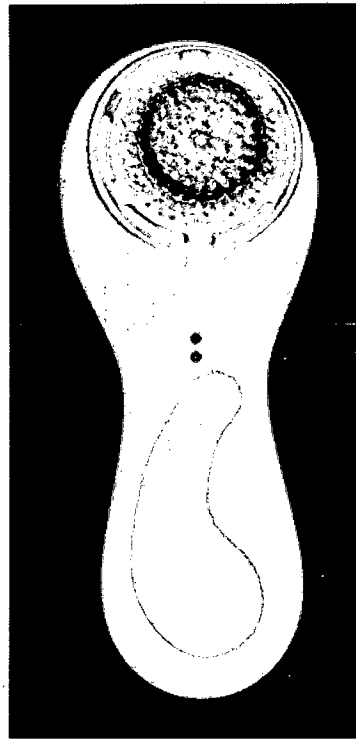
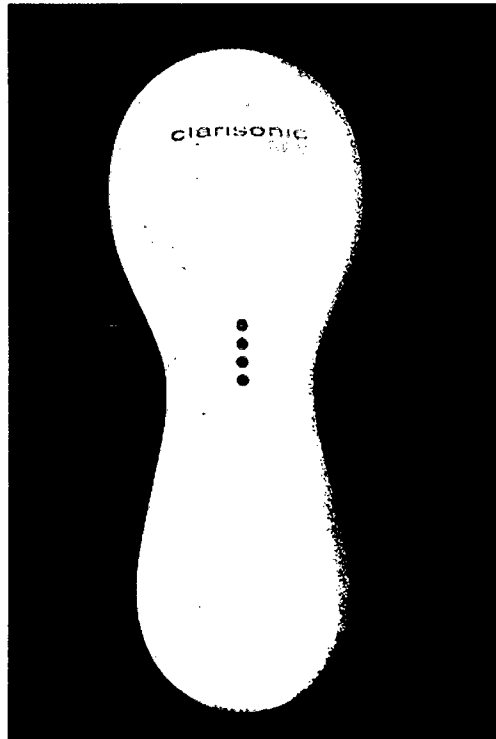
Exhibit 1

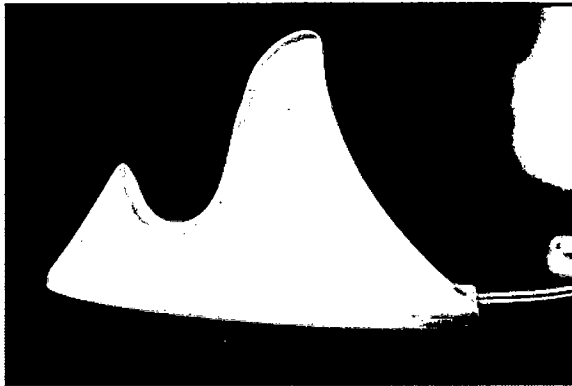
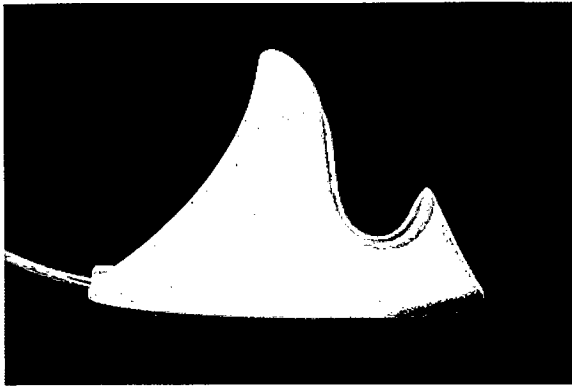
Clarisonic Plus Product and Charging Station

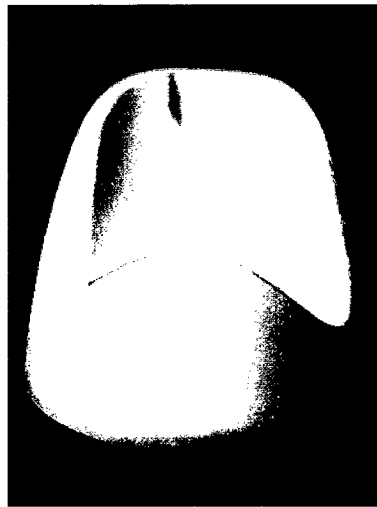
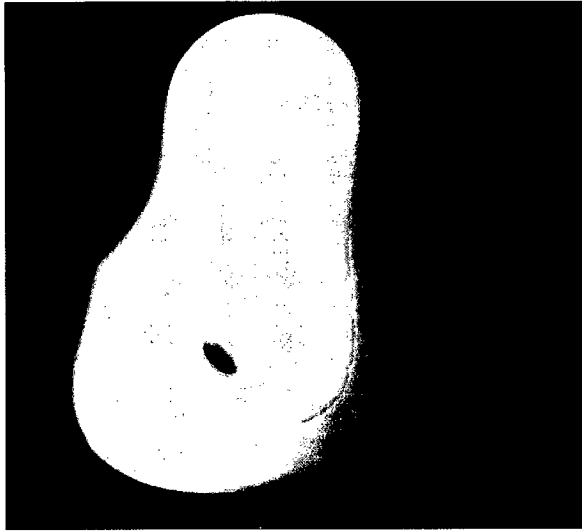




Clarisonic Pro Product and Charging Station







The elements of the Clarisonic Device Trade Dress are as follows:

The hourglass shape of the Clarisonic Plus and Clarisonic Pro products; shape of the head unit; identical molded arcs on each side of the head unit; a droplet (or "teardrop") shaped pad of contrasting texture on the front of the device; one or more control buttons located towards the top of the droplet, inside its perimeter; two round lights ("dots") located just above the droplet on the front of the device; four round lights ("dots") centered on the narrowest part of the back of the device; location of the Clarisonic Plus or Clarisonic Pro name at the widest part of the back of the device; contrasting-color ring of bristles located within the bristles on the brush head; the shape and contour of the ring surrounding the brush head, with alternating protrusions and indentations; and the brush cap, with six large holes spaced evenly on the face, around the perimeter of the cap.

The elements of the Clarisonic Charging Station Trade Dress are as follows:

The boot-last shape of the Clarisonic Plus and Clarisonic Pro products; front plane of product extending forward in exaggerated proportion; and cradle for product dramatically higher in front than in back.

**CERTAIN ELECTRIC SKIN CARE DEVICES, BRUSHES
AND CHARGERS THEREFOR, AND KITS CONTAINING
SAME**

Inv. No. 337-TA-959

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION ORDER** has been served by hand upon the Commission Investigative Attorney, Sarah J. Sladic, Esq., and the following parties as indicated, on **February 7, 2017**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

**On Behalf of Complainants Pacific Bioscience Laboratories,
Inc.:**

Robert M. Masters, Esq.

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP

801 17th St. NW

Washington, DC 20006

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Respondents:

Our Family Jewels, Inc. d/b/a Epipür Skincare

7770 E. Iliff Ave. Rm./Suite E

Denver, CO 80231

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Xnovi Electronic Co., Ltd.

Unit 6A, Block C1, Area G

Sha Jing Street, Min Zhu Industrial Estate,

Baoan District, Shenzhen City,

China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Shanghai Anzikang Electric Co., Ltd.

168 Ji Xin Road, Building 3, Room 401

Minhang District, Shanghai,

China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

**CERTAIN ELECTRIC SKIN CARE DEVICES, BRUSHES
AND CHARGERS THEREFOR, AND KITS CONTAINING
SAME**

Inv. No. 337-TA-959

Certificate of Service – Page 2

Beauty Tech, Inc.
1430 S. Dixie Hwy., Ste. 321
Coral Gables, FL 33146-3175

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

ANEX Corporation
#304-705 Bucheon Techno Park
345 Seokcheon-ro, Ojeong-gu
Bucheon City, Gyeonggi-do
421-741, Korea

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Korean Beauty Co., Ltd.
10 F, Pluszone Bldg. 700
Deungchon-Dong, Gangseo-Gu
Seoul, Korea

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Serious Skin Care, Inc.
112 N. Curry St.
Carson City, NV 89703-4934

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Wenzhou Ai Er Electrical Technology Co., Ltd. d/b/a CNAIER
1#, XiaSong Road, WanQuan Town
PingYang, ZheJiang
China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Coreana Cosmetics Co., Ltd.
204-1 Jeongchon-ri, eup, Seonggeo-eup
Seobuk-gu, Cheonan-si, Chungcheongnam-do
Korea

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Flageoli Classic Limited
7310 Smoke Ranch Road
Las Vegas, NV 89128

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC

In the Matter of

**CERTAIN ELECTRIC SKIN CARE
DEVICES, BRUSHES AND CHARGERS
THEREFOR, AND KITS CONTAINING
SAME**

Investigation No. 337-TA-959

CEASE AND DESIST ORDER

IT IS HEREBY ORDERED THAT RESPONDENT Anex Corporation of C-304 Seoul Hightech Venture Center, 647-26, Deungchon-dong, Gangseo-ku, Seoul, 157-030, Republic of Korea, cease and desist from conducting any of the following activities in the United States, including via the internet: importing, selling, offering for sale, marketing, advertising, distributing, transferring (except for exportation), soliciting United States agents or distributors, and aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of electric skin care devices, brushes or chargers therefor, or kits containing same that are covered by one or more of claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of United States Patent No. 7,320,691 ("the '691 patent") and claims 1, 2, 4, 5, and 7-15 of United States Patent No. 7,386,906 ("the '906 patent"), in violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337).

I. Definitions

As used in this order:

(A) "Commission" shall mean the United States International Trade Commission.

- (B) "Complainant" shall mean Pacific Biosciences Laboratories, Inc. of Redmond, Washington.
- (C) "Respondent" shall mean Anex Corporation of C-304 Seoul, Hightech Venture Center, 647-26, Deungchon-dong, Gangseo-ku, Seoul, 157-030, Republic of Korea.
- (D) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority-owned or controlled subsidiaries, successors, or assigns.
- (E) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.
- (F) The terms "import" and "importation" refer to importation for entry for consumption under the Customs laws of the United States.
- (G) The term "covered products" shall mean electric skin care devices, brushes or chargers therefor, or kits containing same of Respondent that are covered by one or more of claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of the '691 patent and claims 1, 2, 4, 5, and 7-15 of the '906 patent .

II. Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by section III, *infra*, for, with, or otherwise on behalf of, Respondent.

III. Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by this Order.

For the remaining term of the relevant one or more of the '691 patent and the '906 patent,

Respondent shall not:

- (A) import into the United States covered products;
- (B) market, distribute, sell, offer for sale, distribute or otherwise transfer (except for exportation) imported covered products;
- (C) market or advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

IV. Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the relevant '691 patent and/or the '906 patent licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

V. Reporting

For purposes of this requirement, the reporting periods shall commence on January 1 of each year and shall end on the subsequent December 31. The first report required under this section shall cover the period from the date of issuance of this order through December 31, 2016. This reporting requirement shall continue in force until such time as Respondent has truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of covered products that it has (i) imported and/or (ii) sold in the United States after importation during the reporting period, and (b) the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

When filing written submissions, Respondent must file the original document electronically on or before the deadlines stated above and submit eight (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 C.F.R. § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-959") in a prominent place on the cover pages 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). If Respondent desires to submit a document to the Commission in confidence, it must file the original and a public version of the original with the Office of the Secretary and must serve a copy of the confidential version on Complainant's counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

¹ Complainant must file a letter with the Secretary identifying the attorney to receive reports and bond information associated with this Order. The designated attorney must be on the protective order entered in the investigation.

VI. Record-Keeping and Inspection

- (A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.
- (B) For the purposes of determining or securing compliance with this Order and for no other purpose, subject to any privilege recognized by the federal courts of the United States, and upon reasonable written notice by the Commission or its staff, duly authorized representatives of the Commission shall be permitted access and the right to inspect and copy, in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, in detail and in summary form, that must be retained under subparagraph VI(A) of this Order.

VII. Service of Cease and Desist Order

Respondent is ordered and directed to:

- (A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;
- (B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this order, a copy of the Order upon each successor; and

- (C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the latest expiration date of the '691 patent and the D'809 patent.

VIII. Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to section VI of this order should be made in accordance with section 201.6 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 201.6). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX. Enforcement

Violation of this order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.75), including an action for civil penalties under section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(f)), as well as any other action that the Commission deems appropriate. In determining whether Respondent is in violation of this order, the Commission may infer facts adverse to Respondent if it fails to provide adequate or timely information.

X. Modification

The Commission may amend this order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

XI. Bonding

The conduct prohibited by section III of this order may be continued during the sixty-day period in which this Order is under review by the United States Trade Representative, as delegated by the President (70 *Fed. Reg.* 43,251 (Jul. 21, 2005)), subject to Respondent's posting of a bond in the amount of one hundred (100) percent of the entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by section IV of this Order. Covered products imported on or after the date of issuance of this Order are subject to the entry bond as set forth in the exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* 19 C.F.R. § 210.68. The bond and any accompanying documentation are to be provided to and approved by the Commission prior to the commencement of conduct that is otherwise prohibited by section III of this Order. Upon the Secretary's acceptance of the bond, (a) the Secretary will serve an acceptance letter on all parties, and (b) Respondent must serve a copy of the bond and accompanying documentation on Complainant's counsel.²

The bond is to be forfeited in the event that the United States Trade Representative approves this Order (or does not disapprove it within the review period), unless (i) the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or (ii) Respondent exports or destroys the products subject to this bond and provides certification to that effect that is satisfactory to the Commission.

² *See* Footnote 1.

This bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved (or not disapproved) by the United States Trade Representative, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By order of the Commission.

A handwritten signature in black ink, appearing to read "Lisa R. Barton", with a stylized, cursive script.

Lisa R. Barton
Secretary to the Commission

Issued: February 6, 2017

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC

In the Matter of

**CERTAIN ELECTRIC SKIN CARE
DEVICES, BRUSHES AND CHARGERS
THEREFOR, AND KITS CONTAINING
SAME**

Investigation No. 337-TA-959

CEASE AND DESIST ORDER

IT IS HEREBY ORDERED THAT RESPONDENT Beauty Tech, Inc., of 1430 S. Dixie Hwy., Ste. 321, Coral Gables, FL 33146-3175, cease and desist from conducting any of the following activities in the United States, including via the internet: importing, selling, offering for sale, marketing, advertising, distributing, transferring (except for exportation), soliciting United States agents or distributors, and aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of electric skin care devices, brushes or chargers therefor, or kits containing same that are covered by one or more of claims 31, 33, and 39-41 of United States Patent No. 7,320,691 ("the '691 patent"), and the claim of United States Patent No. D'523,809 ("the D'809 patent") in violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337).

I. Definitions

As used in this order:

(A) "Commission" shall mean the United States International Trade Commission.

- (B) "Complainant" shall mean Pacific Biosciences Laboratories, Inc. of Redmond, Washington.
- (C) "Respondent" shall mean Beauty Tech, Inc., of 1430 S. Dixie Hwy., Ste. 321, Coral Gables, FL 33146-3175.
- (D) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority-owned or controlled subsidiaries, successors, or assigns.
- (E) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.
- (F) The terms "import" and "importation" refer to importation for entry for consumption under the Customs laws of the United States.
- (G) The term "covered products" shall mean electric skin care devices, brushes or chargers therefor, or kits containing same of Respondent that are covered by one or more of claims 31, 33, and 39-41 of the '691 patent, and the claim of the D'809 patent.

II. Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by section III, *infra*, for, with, or otherwise on behalf of, Respondent.

III. Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by this Order.

For the remaining term of the relevant one or more of the '691 patent and the D'809 patent,

Respondent shall not:

- (A) import into the United States covered products;
- (B) market, distribute, sell, offer for sale, distribute or otherwise transfer (except for exportation) imported covered products;
- (C) market or advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

IV. Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the relevant '691 patent and/or the D'809 patent licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

V. Reporting

For purposes of this requirement, the reporting periods shall commence on January 1 of each year and shall end on the subsequent December 31. The first report required under this section shall cover the period from the date of issuance of this order through December 31, 2016. This reporting requirement shall continue in force until such time as Respondent has truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of covered products that it has (i) imported and/or (ii) sold in the United States after importation during the reporting period, and (b) the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

When filing written submissions, Respondent must file the original document electronically on or before the deadlines stated above and submit eight (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 C.F.R. § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-959") in a prominent place on the cover pages 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). If Respondent desires to submit a document to the Commission in confidence, it must file the original and a public version of the original with the Office of the Secretary and must serve a copy of the confidential version on Complainant's counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

¹ Complainant must file a letter with the Secretary identifying the attorney to receive reports and bond information associated with this Order. The designated attorney must be on the protective order entered in the investigation.

VI. Record-Keeping and Inspection

- (A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.
- (B) For the purposes of determining or securing compliance with this Order and for no other purpose, subject to any privilege recognized by the federal courts of the United States, and upon reasonable written notice by the Commission or its staff, duly authorized representatives of the Commission shall be permitted access and the right to inspect and copy, in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, in detail and in summary form, that must be retained under subparagraph VI(A) of this Order.

VII. Service of Cease and Desist Order

Respondent is ordered and directed to:

- (A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;
- (B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this order, a copy of the Order upon each successor; and

- (C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the latest expiration date of the '691 patent and the D'809 patent.

VIII. Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to section VI of this order should be made in accordance with section 201.6 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 201.6). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX. Enforcement

Violation of this order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.75), including an action for civil penalties under section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(f)), as well as any other action that the Commission deems appropriate. In determining whether Respondent is in violation of this order, the Commission may infer facts adverse to Respondent if it fails to provide adequate or timely information.

X. Modification

The Commission may amend this order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

XI. Bonding

The conduct prohibited by section III of this order may be continued during the sixty-day period in which this Order is under review by the United States Trade Representative, as delegated by the President (70 *Fed. Reg.* 43,251 (Jul. 21, 2005)), subject to Respondent's posting of a bond in the amount of one hundred (100) percent of the entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by section IV of this Order. Covered products imported on or after the date of issuance of this Order are subject to the entry bond as set forth in the exclusion order issued by the Commission, and are not subject to this bond provision.

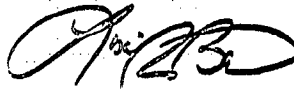
The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* 19 C.F.R. § 210.68. The bond and any accompanying documentation are to be provided to and approved by the Commission prior to the commencement of conduct that is otherwise prohibited by section III of this Order. Upon the Secretary's acceptance of the bond, (a) the Secretary will serve an acceptance letter on all parties, and (b) Respondent must serve a copy of the bond and accompanying documentation on Complainant's counsel.²

The bond is to be forfeited in the event that the United States Trade Representative approves this Order (or does not disapprove it within the review period), unless (i) the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or (ii) Respondent exports or destroys the products subject to this bond and provides certification to that effect that is satisfactory to the Commission.

² *See* Footnote 1.

This bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved (or not disapproved) by the United States Trade Representative, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton'.

Lisa R. Barton
Secretary to the Commission

Issued: February 6, 2017

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC

In the Matter of

**CERTAIN ELECTRIC SKIN CARE
DEVICES, BRUSHES AND CHARGERS
THEREFOR, AND KITS CONTAINING
SAME**

Investigation No. 337-TA-959

CEASE AND DESIST ORDER

IT IS HEREBY ORDERED THAT RESPONDENT Coreana Comestics Co., Ltd., of 204-1 Jeongchon-ri, Seonggeo-eup, Seobuk-gu, Cheonan-si, Chungcheongnam-do, Republic of Korea, cease and desist from conducting any of the following activities in the United States, including via the internet: importing, selling, offering for sale, marketing, advertising, distributing, transferring (except for exportation), soliciting United States agents or distributors, and aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of electric skin care devices, brushes or chargers therefor, or kits containing same that are covered by one or more of claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of United States Patent No. 7,320,691 ("the '691 patent") and claims 1, 2, 4, 5, and 7-14 of United States Patent No. 7,386, 906 ("the '906 patent"), in violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337).

I. Definitions

As used in this order:

(A) "Commission" shall mean the United States International Trade Commission.

- (B) "Complainant" shall mean Pacific Biosciences Laboratories, Inc. of Redmond, Washington.
- (C) "Respondent" shall mean Coreana Comestics Co., Ltd., of 204-1 Jeongchon-ri, Seonggeo-eup, Seobuk-gu, Cheonan-si, Chungcheongnam-do, Republic of Korea.
- (D) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority-owned or controlled subsidiaries, successors, or assigns.
- (E) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.
- (F) The terms "import" and "importation" refer to importation for entry for consumption under the Customs laws of the United States.
- (G) The term "covered products" shall mean electric skin care devices, brushes or chargers therefor, or kits containing same of Respondent that are covered by one or more of claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of the '691 patent and claims 1, 2, 4, 5, and 7-14 of the '906 patent.

II. Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by section III, *infra*, for, with, or otherwise on behalf of, Respondent.

III. Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by this Order.

For the remaining term of the relevant one or more of the '691 patent and the '906 patent,

Respondent shall not:

- (A) import into the United States covered products;
- (B) market, distribute, sell, offer for sale, distribute or otherwise transfer (except for exportation) imported covered products;
- (C) market or advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

IV. Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the relevant '691 patent and/or the '906 patent licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

V. Reporting

For purposes of this requirement, the reporting periods shall commence on January 1 of each year and shall end on the subsequent December 31. The first report required under this section shall cover the period from the date of issuance of this order through December 31, 2016. This reporting requirement shall continue in force until such time as Respondent has truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of covered products that it has (i) imported and/or (ii) sold in the United States after importation during the reporting period, and (b) the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

When filing written submissions, Respondent must file the original document electronically on or before the deadlines stated above and submit eight (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 C.F.R. § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-959") in a prominent place on the cover pages 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). If Respondent desires to submit a document to the Commission in confidence, it must file the original and a public version of the original with the Office of the Secretary and must serve a copy of the confidential version on Complainant's counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

¹ Complainant must file a letter with the Secretary identifying the attorney to receive reports and bond information associated with this Order. The designated attorney must be on the protective order entered in the investigation.

VI. Record-Keeping and Inspection

- (A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.
- (B) For the purposes of determining or securing compliance with this Order and for no other purpose, subject to any privilege recognized by the federal courts of the United States, and upon reasonable written notice by the Commission or its staff, duly authorized representatives of the Commission shall be permitted access and the right to inspect and copy, in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, in detail and in summary form, that must be retained under subparagraph VI(A) of this Order.

VII. Service of Cease and Desist Order

Respondent is ordered and directed to:

- (A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;
- (B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this order, a copy of the Order upon each successor; and

- (C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the latest expiration date of the '691 patent and the D'809 patent.

VIII. Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to section VI of this order should be made in accordance with section 201.6 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 201.6). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX. Enforcement

Violation of this order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.75), including an action for civil penalties under section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(f)), as well as any other action that the Commission deems appropriate. In determining whether Respondent is in violation of this order, the Commission may infer facts adverse to Respondent if it fails to provide adequate or timely information.

X. Modification

The Commission may amend this order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

XI. Bonding

The conduct prohibited by section III of this order may be continued during the sixty-day period in which this Order is under review by the United States Trade Representative, as delegated by the President (70 *Fed. Reg.* 43,251 (Jul. 21, 2005)), subject to Respondent's posting of a bond in the amount of one hundred (100) percent of the entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by section IV of this Order. Covered products imported on or after the date of issuance of this Order are subject to the entry bond as set forth in the exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* 19 C.F.R. § 210.68. The bond and any accompanying documentation are to be provided to and approved by the Commission prior to the commencement of conduct that is otherwise prohibited by section III of this Order. Upon the Secretary's acceptance of the bond, (a) the Secretary will serve an acceptance letter on all parties, and (b) Respondent must serve a copy of the bond and accompanying documentation on Complainant's counsel.²

The bond is to be forfeited in the event that the United States Trade Representative approves this Order (or does not disapprove it within the review period), unless (i) the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or (ii) Respondent exports or destroys the products subject to this bond and provides certification to that effect that is satisfactory to the Commission.

² *See* Footnote 1.

This bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved (or not disapproved) by the United States Trade Representative, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By Order of the Commission.

A handwritten signature in black ink, appearing to read "Lisa R. Barton".

Lisa R. Barton
Secretary to the Commission

Issued: February 6, 2017

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC**

In the Matter of

**CERTAIN ELECTRIC SKIN CARE
DEVICES, BRUSHES AND CHARGERS
THEREFOR, AND KITS CONTAINING
SAME**

Investigation No. 337-TA-959

CEASE AND DESIST ORDER

IT IS HEREBY ORDERED THAT RESPONDENT Flageoli Classic Limited, of 7310 Smoke Ranch Road, Las Vegas, NV 89128, cease and desist from conducting any of the following activities in the United States, including via the internet: importing, selling, offering for sale, marketing, advertising, distributing, transferring (except for exportation), soliciting United States agents or distributors, and aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of electric skin care devices, brushes or chargers therefor, or kits containing same that are covered by one or more of claims 31, 33, and 39-41 of United States Patent No. 7,320,691 ("the '691 patent"), and the claim of United States Patent No. D'523,809 ("the D'809 patent"), in violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337).

I. Definitions

As used in this order:

(A) "Commission" shall mean the United States International Trade Commission.

- (B) “Complainant” shall mean Pacific Biosciences Laboratories, Inc. of Redmond, Washington.
- (C) “Respondent” shall mean Flageoli Classic Limited, of 7310 Smoke Ranch Road, Las Vegas, NV 89128.
- (D) “Person” shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority-owned or controlled subsidiaries, successors, or assigns.
- (E) “United States” shall mean the fifty States, the District of Columbia, and Puerto Rico.
- (F) The terms “import” and “importation” refer to importation for entry for consumption under the Customs laws of the United States.
- (G) The term “covered products” shall mean electric skin care devices, brushes or chargers therefor, or kits containing same of Respondent that are covered by one or more of claims 31, 33, and 39-41 of the ’691 patent, and the claim of the D’809 patent.

II. Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by section III, *infra*, for, with, or otherwise on behalf of, Respondent.

III. Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by this Order.

For the remaining term of the relevant one or more of the '691 patent and the D'809 patent,

Respondent shall not:

- (A) import into the United States covered products;
- (B) market, distribute, sell, offer for sale, distribute or otherwise transfer (except for exportation) imported covered products;
- (C) market or advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

IV. Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the relevant '691 patent and/or the D'809 patent licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

V. Reporting

For purposes of this requirement, the reporting periods shall commence on January 1 of each year and shall end on the subsequent December 31. The first report required under this section shall cover the period from the date of issuance of this order through December 31, 2016.

This reporting requirement shall continue in force until such time as Respondent has truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of covered products that it has (i) imported and/or (ii) sold in the United States after importation during the reporting period, and (b) the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

When filing written submissions, Respondent must file the original document electronically on or before the deadlines stated above and submit eight (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 C.F.R. § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-959") in a prominent place on the cover pages and/or the first page. *See Handbook for Electronic Filing Procedures*, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf. Persons with questions regarding filing should contact the Secretary (202-205-2000). If Respondent desires to submit a document to the Commission in confidence, it must file the original and a public version of the original with the Office of the Secretary and must serve a copy of the confidential version on Complainant's counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

¹ Complainant must file a letter with the Secretary identifying the attorney to receive reports and bond information associated with this Order. The designated attorney must be on the protective order entered in the investigation.

VI. Record-Keeping and Inspection

- (A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.
- (B) For the purposes of determining or securing compliance with this Order and for no other purpose, subject to any privilege recognized by the federal courts of the United States, and upon reasonable written notice by the Commission or its staff, duly authorized representatives of the Commission shall be permitted access and the right to inspect and copy, in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, in detail and in summary form, that must be retained under subparagraph VI(A) of this Order.

VII. Service of Cease and Desist Order

Respondent is ordered and directed to:

- (A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;
- (B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this order, a copy of the Order upon each successor; and

- (C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the latest expiration date of the '691 patent and the D'809 patent.

VIII. Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to section VI of this order should be made in accordance with section 201.6 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 201.6). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX. Enforcement

Violation of this order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.75), including an action for civil penalties under section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(f)), as well as any other action that the Commission deems appropriate. In determining whether Respondent is in violation of this order, the Commission may infer facts adverse to Respondent if it fails to provide adequate or timely information.

X. Modification

The Commission may amend this order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

XI. Bonding

The conduct prohibited by section III of this order may be continued during the sixty-day period in which this Order is under review by the United States Trade Representative, as delegated by the President (70 *Fed. Reg.* 43,251 (Jul. 21, 2005)), subject to Respondent's posting of a bond in the amount of one hundred (100) percent of the entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by section IV of this Order. Covered products imported on or after the date of issuance of this Order are subject to the entry bond as set forth in the exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* 19 C.F.R. § 210.68. The bond and any accompanying documentation are to be provided to and approved by the Commission prior to the commencement of conduct that is otherwise prohibited by section III of this Order. Upon the Secretary's acceptance of the bond, (a) the Secretary will serve an acceptance letter on all parties, and (b) Respondent must serve a copy of the bond and accompanying documentation on Complainant's counsel.²

The bond is to be forfeited in the event that the United States Trade Representative approves this Order (or does not disapprove it within the review period), unless (i) the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or (ii) Respondent exports or destroys the products subject to this bond and provides certification to that effect that is satisfactory to the Commission.

² *See* Footnote 1.

This bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved (or not disapproved) by the United States Trade Representative, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

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: February 6, 2017

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC**

In the Matter of

**CERTAIN ELECTRIC SKIN CARE
DEVICES, BRUSHES AND CHARGERS
THEREFOR, AND KITS CONTAINING
SAME**

Investigation No. 337-TA-959

CEASE AND DESIST ORDER

IT IS HEREBY ORDERED THAT RESPONDENT Korean Beauty Co., Ltd., of 10 F, Pluszone Bldg 700, Deungchon-Dong, Gangseo-Gu, Seoul, Republic of Korea, cease and desist from conducting any of the following activities in the United States, including via the internet: importing, selling, offering for sale, marketing, advertising, distributing, transferring (except for exportation), soliciting United States agents or distributors, and aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of electric skin care devices, brushes or chargers therefor, or kits containing same that are covered by one or more of claims 31, 33, and 39-41 of United States Patent No. 7,320,691 ("the '691 patent"), in violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337).

I. Definitions

As used in this order:

(A) "Commission" shall mean the United States International Trade Commission.

- (B) "Complainant" shall mean Pacific Biosciences Laboratories, Inc. of Redmond, Washington.
- (C) "Respondent" shall mean Korean Beauty Co., Ltd., of 10 F, Pluszone Bldg 700, Deungchon-Dong, Gangseo-Gu, Seoul, Republic of Korea.
- (D) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority-owned or controlled subsidiaries, successors, or assigns.
- (E) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.
- (F) The terms "import" and "importation" refer to importation for entry for consumption under the Customs laws of the United States.
- (G) The term "covered products" shall mean electric skin care devices, brushes or chargers therefor, or kits containing same of Respondent that are covered by one or more of claims 31, 33, and 39-41 of the '691 patent.

II. Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by section III, *infra*, for, with, or otherwise on behalf of, Respondent.

III. Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by this Order.

For the remaining term of the '691 patent, Respondent shall not:

- (A) import into the United States covered products;
- (B) market, distribute, sell, offer for sale, distribute or otherwise transfer (except for exportation) imported covered products;
- (C) market or advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

IV. Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the '691 patent licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

V. Reporting

For purposes of this requirement, the reporting periods shall commence on January 1 of each year and shall end on the subsequent December 31. The first report required under this section shall cover the period from the date of issuance of this order through December 31, 2016. This reporting requirement shall continue in force until such time as Respondent has truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of covered products that it has (i) imported and/or (ii) sold in the United States after importation during the reporting period, and (b) the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

When filing written submissions, Respondent must file the original document electronically on or before the deadlines stated above and submit eight (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 C.F.R. § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-959") in a prominent place on the cover pages 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). If Respondent desires to submit a document to the Commission in confidence, it must file the original and a public version of the original with the Office of the Secretary and must serve a copy of the confidential version on Complainant's counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

¹ Complainant must file a letter with the Secretary identifying the attorney to receive reports and bond information associated with this Order. The designated attorney must be on the protective order entered in the investigation.

VI. Record-Keeping and Inspection

- (A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.
- (B) For the purposes of determining or securing compliance with this Order and for no other purpose, subject to any privilege recognized by the federal courts of the United States, and upon reasonable written notice by the Commission or its staff, duly authorized representatives of the Commission shall be permitted access and the right to inspect and copy, in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, in detail and in summary form, that must be retained under subparagraph VI(A) of this Order.

VII. Service of Cease and Desist Order

Respondent is ordered and directed to:

- (A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;
- (B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this order, a copy of the Order upon each successor; and

- (C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the latest expiration date of the '691 patent and the D'809 patent.

VIII. Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to section VI of this order should be made in accordance with section 201.6 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 201.6). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX. Enforcement

Violation of this order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.75), including an action for civil penalties under section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(f)), as well as any other action that the Commission deems appropriate. In determining whether Respondent is in violation of this order, the Commission may infer facts adverse to Respondent if it fails to provide adequate or timely information.

X. Modification

The Commission may amend this order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

XI. Bonding

The conduct prohibited by section III of this order may be continued during the sixty-day period in which this Order is under review by the United States Trade Representative, as delegated by the President (70 *Fed. Reg.* 43,251 (Jul. 21, 2005)), subject to Respondent's posting of a bond in the amount of one hundred (100) percent of the entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by section IV of this Order. Covered products imported on or after the date of issuance of this Order are subject to the entry bond as set forth in the exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* 19 C.F.R. § 210.68. The bond and any accompanying documentation are to be provided to and approved by the Commission prior to the commencement of conduct that is otherwise prohibited by section III of this Order. Upon the Secretary's acceptance of the bond, (a) the Secretary will serve an acceptance letter on all parties, and (b) Respondent must serve a copy of the bond and accompanying documentation on Complainant's counsel.²

The bond is to be forfeited in the event that the United States Trade Representative approves this Order (or does not disapprove it within the review period), unless (i) the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or (ii) Respondent exports or destroys the products subject to this bond and provides certification to that effect that is satisfactory to the Commission.

² *See* Footnote 1.

This bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved (or not disapproved) by the United States Trade Representative, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

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: February 6, 2017

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC

In the Matter of

**CERTAIN ELECTRIC SKIN CARE
DEVICES, BRUSHES AND CHARGERS
THEREFOR, AND KITS CONTAINING
SAME**

Investigation No. 337-TA-959

CEASE AND DESIST ORDER

IT IS HEREBY ORDERED THAT Our Family Jewels, Inc. d/b/a Epipür Skincare of 7770 E. Iliff Ave., Rm./Suite E, Denver, CO 80231 cease and desist from conducting any of the following activities in the United States, including via the internet: importing, selling, offering for sale, marketing, advertising, distributing, transferring (except for exportation), soliciting United States agents or distributors, and aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of electric skin care devices, brushes or chargers therefor, or kits containing same that are covered by one or more of claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of United States Patent No. 7,320,691 ("the '691 patent"); claims 1, 2, 4, 5, and 7-15 of United States Patent No. 7,386, 906 ("the '906 patent"); the claim of United States Patent No. D'523,809 ("the D'809 patent"); and bear the Clarisonic Device Trade Dress or Clarisonic Charging Station Trade Dress or any trade dress confusingly similar thereto or that are otherwise misleading as to source, origin or sponsorship, in violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337).

I. Definitions

As used in this order:

- (A) "Commission" shall mean the United States International Trade Commission.
- (B) "Complainant" shall mean Pacific Biosciences Laboratories, Inc. of Redmond, Washington.
- (C) "Respondent" shall mean Our Family Jewels, Inc. d/b/a Epiptir Skincare of 7770 E. Iliff Ave., Rm./Suite E, Denver, CO 80231
- (D) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority-owned or controlled subsidiaries, successors, or assigns.
- (E) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.
- (F) The terms "import" and "importation" refer to importation for entry for consumption under the Customs laws of the United States.
- (G) The term "covered products" shall mean electric skin care devices, brushes or chargers therefor, or kits containing same of Respondent that are covered by one or more of claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of the '691 patent; claims 1, 2, 4, 5, and 7-15 of the '906 patent; the claim of the D'809 patent; and bear the Clarisonic Device Trade Dress or Clarisonic Charging Station Trade Dress or any trade dress confusingly similar thereto or that are otherwise misleading as to source, origin or sponsorship. The elements of the Clarisonic Device Trade Dress are set forth in Exhibit 1 to this order.

II. Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by section III, *infra*, for, with, or otherwise on behalf of, Respondent.

III. Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by this Order. For the remaining term of the relevant one or more of the '691 patent, the '906 patent, and the D'809 patent, and until the relevant Clarisonic Device Trade Dress or Clarisonic Charging Station Trade Dress has been abandoned or rendered invalid or unenforceable, Respondent shall not:

- (A) import into the United States covered products;
- (B) market, distribute, sell, offer for sale, distribute or otherwise transfer (except for exportation) imported covered products;
- (C) market or advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

IV. Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the relevant '691 patent, '906 patent, D'809 patent, Clarisonic Device Trade Dress, and/or Clarisonic

Charging Station Trade Dress licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

V. Reporting

For purposes of this requirement, the reporting periods shall commence on January 1 of each year and shall end on the subsequent December 31. The first report required under this section shall cover the period from the date of issuance of this order through December 31, 2016. This reporting requirement shall continue in force until such time as Respondent has truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of covered products that it has (i) imported and/or (ii) sold in the United States after importation during the reporting period, and (b) the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

When filing written submissions, Respondent must file the original document electronically on or before the deadlines stated above and submit eight (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 C.F.R. § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-959") in a prominent place on the cover pages and/or the first page. *See Handbook for Electronic Filing Procedures*, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf. Persons with questions regarding filing should contact the Secretary (202-205-2000). If

Respondent desires to submit a document to the Commission in confidence, it must file the original and a public version of the original with the Office of the Secretary and must serve a copy of the confidential version on Complainant's counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

VI. Record-Keeping and Inspection

- (A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.
- (B) For the purposes of determining or securing compliance with this Order and for no other purpose, subject to any privilege recognized by the federal courts of the United States, and upon reasonable written notice by the Commission or its staff, duly authorized representatives of the Commission shall be permitted access and the right to inspect and copy, in Respondent's principal offices during office

¹ Complainant must file a letter with the Secretary identifying the attorney to receive reports and bond information associated with this Order. The designated attorney must be on the protective order entered in the investigation.

hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, in detail and in summary form, that must be retained under subparagraph VI(A) of this Order.

VII. Service of Cease and Desist Order

Respondent is ordered and directed to:

- (A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;
- (B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this order, a copy of the Order upon each successor; and
- (C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the latest expiration date of the '691 patent, '906 patent, and the D'809 patent and until Clarisonic Device Trade Dress and Clarisonic Charging Station Trade Dress have been abandoned or rendered invalid or unenforceable.

VIII. Confidentiality

Any request for confidential treatment of information obtained by the Commission

pursuant to section VI of this order should be made in accordance with section 201.6 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 201.6). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX. Enforcement

Violation of this order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.75), including an action for civil penalties under section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(f)), as well as any other action that the Commission deems appropriate. In determining whether Respondent is in violation of this order, the Commission may infer facts adverse to Respondent if it fails to provide adequate or timely information.

X. Modification

The Commission may amend this order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

XI. Bonding

The conduct prohibited by section III of this order may be continued during the sixty-day period in which this Order is under review by the United States Trade Representative, as delegated by the President (70 *Fed. Reg.* 43,251 (Jul. 21, 2005)), subject to Respondent's posting of a bond in the amount of one hundred (100) percent of the entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by section

IV of this Order. Covered products imported on or after the date of issuance of this Order are subject to the entry bond as set forth in the exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* 19 C.F.R. § 210.68. The bond and any accompanying documentation are to be provided to and approved by the Commission prior to the commencement of conduct that is otherwise prohibited by section III of this Order. Upon the Secretary's acceptance of the bond, (a) the Secretary will serve an acceptance letter on all parties, and (b) Respondent must serve a copy of the bond and accompanying documentation on Complainant's counsel.²

The bond is to be forfeited in the event that the United States Trade Representative approves this Order (or does not disapprove it within the review period), unless (i) the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or (ii) Respondent exports or destroys the products subject to this bond and provides certification to that effect that is satisfactory to the Commission.

This bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved (or not disapproved) by the United States Trade Representative, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

² *See* Footnote 1.

By order of the Commission.

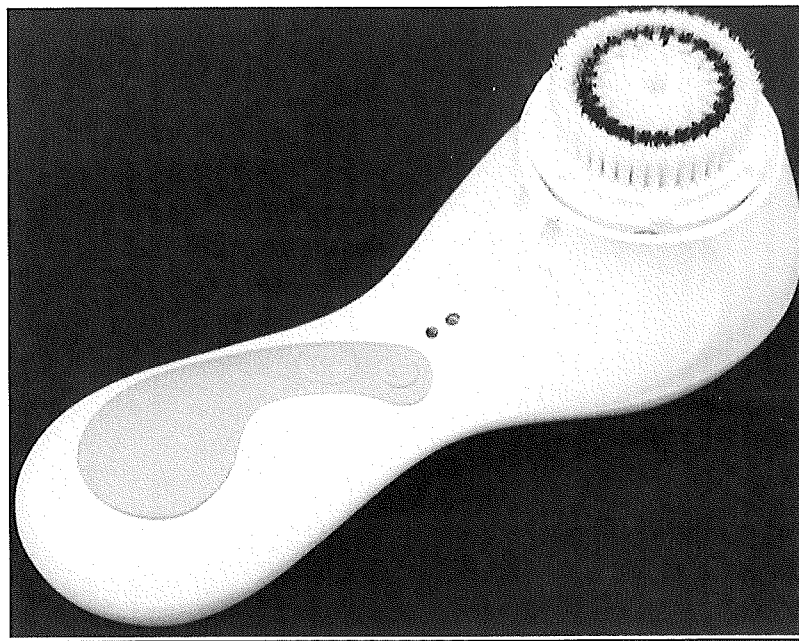
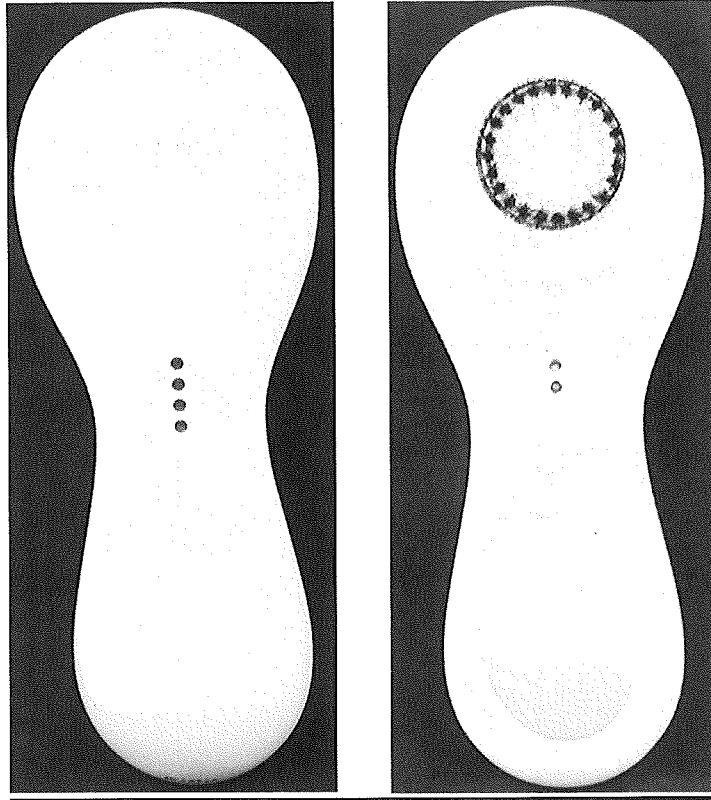
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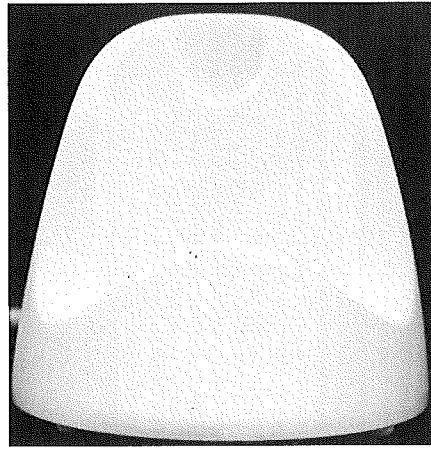
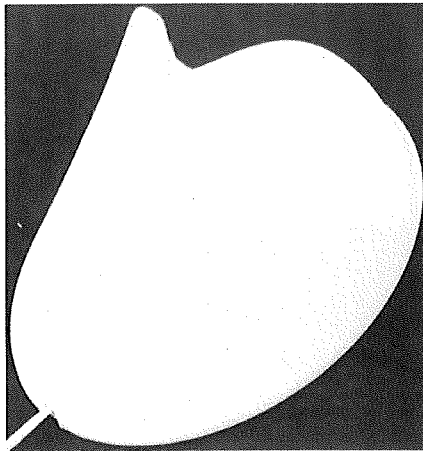
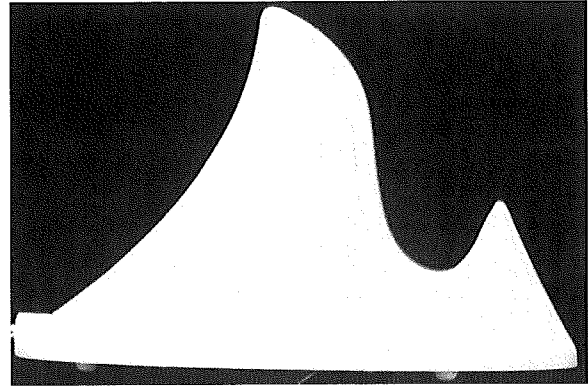
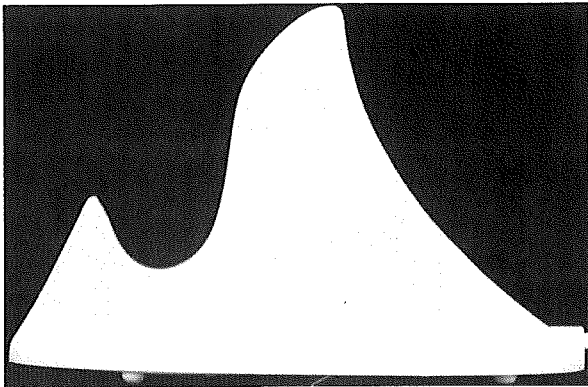
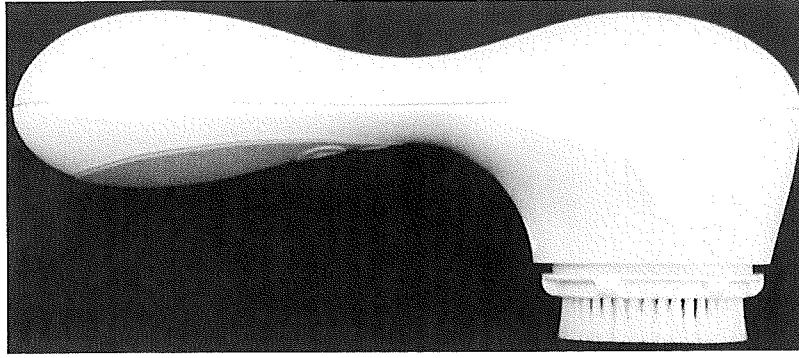
Lisa R. Barton
Secretary to the Commission

February 6, 2017

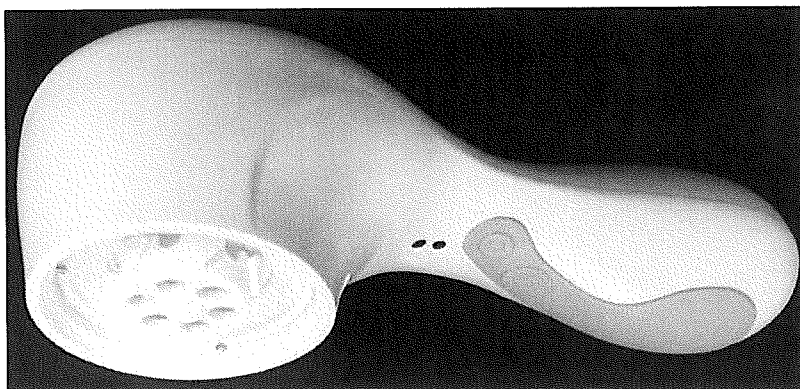
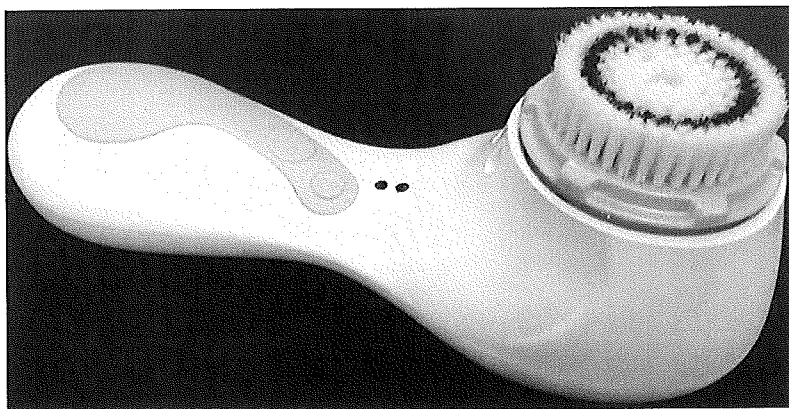
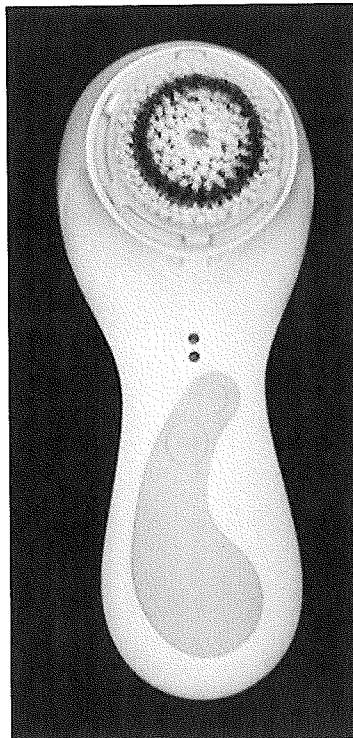
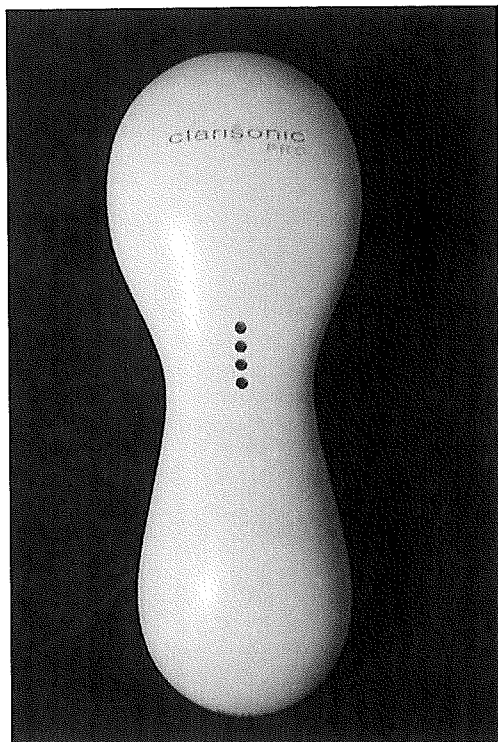
Exhibit 1

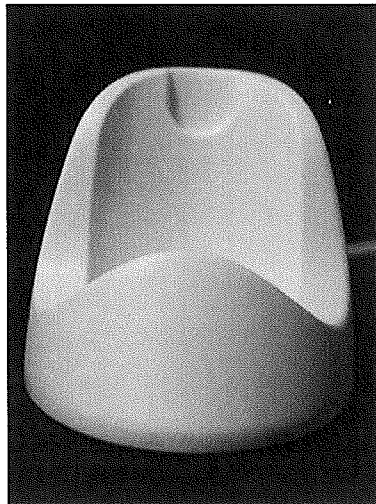
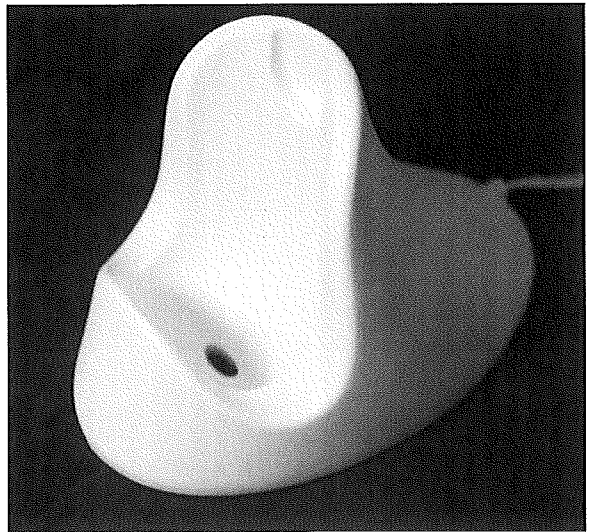
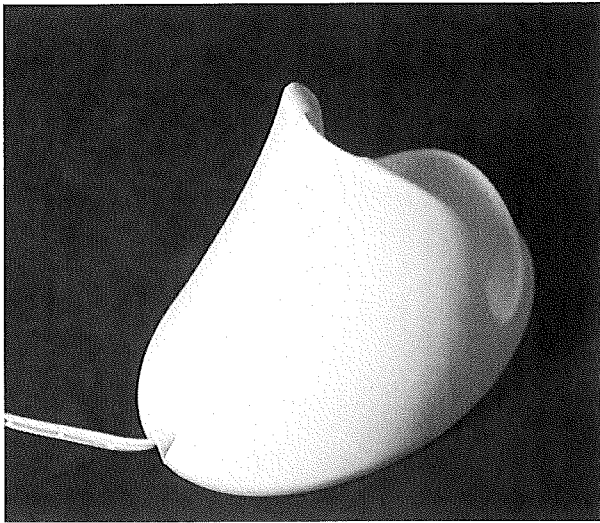
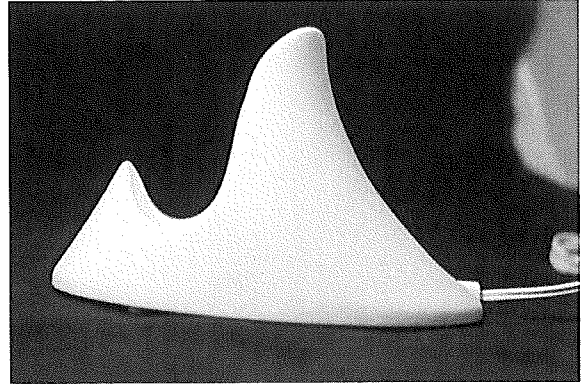
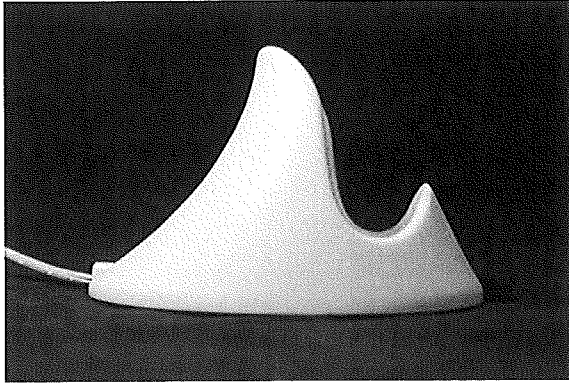
Clarisonic Plus Product and Charging Station





Clarisonic Pro Product and Charging Station





The elements of the Clarisonic Device Trade Dress are as follows:

The hourglass shape of the Clarisonic Plus and Clarisonic Pro products; shape of the head unit; identical molded arcs on each side of the head unit; a droplet (or “teardrop”) shaped pad of contrasting texture on the front of the device; one or more control buttons located towards the top of the droplet, inside its perimeter; two round lights (“dots”) located just above the droplet on the front of the device; four round lights (“dots”) centered on the narrowest part of the back of the device; location of the Clarisonic Plus or Clarisonic Pro name at the widest part of the back of the device; contrasting-color ring of bristles located within the bristles on the brush head; the shape and contour of the ring surrounding the brush head, with alternating protrusions and indentations; and the brush cap, with six large holes spaced evenly on the face, around the perimeter of the cap.

The elements of the Clarisonic Charging Station Trade Dress are as follows:

The boot-last shape of the Clarisonic Plus and Clarisonic Pro products; front plane of product extending forward in exaggerated proportion; and cradle for product dramatically higher in front than in back.

**UNITED STATES INTERNATIONAL TRADE
COMMISSION
Washington, DC**

In the Matter of

**CERTAIN ELECTRIC SKIN CARE
DEVICES, BRUSHES AND CHARGERS
THEREFOR, AND KITS CONTAINING
SAME**

Investigation No. 337-TA-959

CEASE AND DESIST ORDER

IT IS HEREBY ORDERED THAT Shanghai Anzikang Electric Co., Ltd., of 168 Ji Xin Road, Building 3, Room 401, Minhang District, Shanghai, China, cease and desist from conducting any of the following activities in the United States, including via the internet: importing, selling, offering for sale, marketing, advertising, distributing, transferring (except for exportation), soliciting United States agents or distributors, and aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of electric skin care devices, brushes or chargers therefor, or kits containing same that are covered by one or more of claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of United States Patent No. 7,320,691 ("the '691 patent"); claims 1, 2, 4, 5, and 7-15 of United States Patent No. 7,386, 906 ("the '906 patent"); the claim of United States Patent No. D'523,809 ("the D'809 patent"); and bear the Clarisonic Device Trade Dress or Clarisonic Charging Station Trade Dress or any trade dress confusingly similar thereto or that are otherwise misleading as to source, origin or sponsorship, in violation of section 337 of the

Tariff Act of 1930, as amended (19 U.S.C. § 1337).

I. Definitions

As used in this order:

- (A) “Commission” shall mean the United States International Trade Commission.
- (B) “Complainant” shall mean Pacific Biosciences Laboratories, Inc. of Redmond, Washington.
- (C) “Respondent” shall mean Shanghai Anzikang Electric Co., Ltd., of 168 Ji Xin Road, Building 3, Room 401, Minhang District, Shanghai, China.
- (D) “Person” shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority-owned or controlled subsidiaries, successors, or assigns.
- (E) “United States” shall mean the fifty States, the District of Columbia, and Puerto Rico.
- (F) The terms “import” and “importation” refer to importation for entry for consumption under the Customs laws of the United States.
- (G) The term “covered products” shall mean electric skin care devices, brushes or chargers therefor, or kits containing same of Respondent that are covered by one or more of claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of the ’691 patent; claims 1, 2, 4, 5, and 7-15 of the ’906 patent; the claim of the D’809 patent; and bear the Clarisonic Device Trade Dress or Clarisonic Charging Station Trade Dress or any trade dress confusingly similar thereto or that are otherwise misleading as to source, origin or sponsorship. The elements of the

Clarisonic Device Trade Dress are set forth in Exhibit 1 to this order.

II. Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by section III, *infra*, for, with, or otherwise on behalf of, Respondent.

III. Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by this Order. For the remaining term of the relevant one or more of the '691 patent, the '906 patent, and the D'809 patent, and until the relevant Clarisonic Device Trade Dress or Clarisonic Charging Station Trade Dress has been abandoned or rendered invalid or unenforceable, Respondent shall not:

- (A) import into the United States covered products;
- (B) market, distribute, sell, offer for sale, distribute or otherwise transfer (except for exportation) imported covered products;
- (C) market or advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

IV. Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited

by the terms of this Order shall be permitted if, in a written instrument, the owner of the relevant '691 patent, '906 patent, D'809 patent, Clarisonic Device Trade Dress, and/or Clarisonic Charging Station Trade Dress licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

V. Reporting

For purposes of this requirement, the reporting periods shall commence on January 1 of each year and shall end on the subsequent December 31. The first report required under this section shall cover the period from the date of issuance of this order through December 31, 2016. This reporting requirement shall continue in force until such time as Respondent has truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of covered products that it has (i) imported and/or (ii) sold in the United States after importation during the reporting period, and (b) the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

When filing written submissions, Respondent must file the original document electronically on or before the deadlines stated above and submit eight (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 C.F.R. § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-959") in a prominent place on the cover pages 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). If Respondent desires to submit a document to the Commission in confidence, it must file the original and a public version of the original with the Office of the Secretary and must serve a copy of the confidential version on Complainant's counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

VI. Record-Keeping and Inspection

- (A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.
- (B) For the purposes of determining or securing compliance with this Order and for no other purpose, subject to any privilege recognized by the federal courts of the United States, and upon reasonable written notice by the Commission or its staff, duly authorized representatives of the Commission shall be permitted access and the right to inspect and copy, in Respondent's principal offices during office

¹ Complainant must file a letter with the Secretary identifying the attorney to receive reports and bond information associated with this Order. The designated attorney must be on the protective order entered in the investigation.

hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, in detail and in summary form, that must be retained under subparagraph VI(A) of this Order.

VII. Service of Cease and Desist Order

Respondent is ordered and directed to:

- (A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;
- (B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this order, a copy of the Order upon each successor; and
- (C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the latest expiration date of the '691 patent, '906 patent, and the D'809 patent and until Clarisonic Device Trade Dress and Clarisonic Charging Station Trade Dress have been abandoned or rendered invalid or unenforceable.

VIII. Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to section VI of this order should be made in accordance with section 201.6 of the

Commission's Rules of Practice and Procedure (19 C.F.R. § 201.6). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX. Enforcement

Violation of this order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.75), including an action for civil penalties under section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(f)), as well as any other action that the Commission deems appropriate. In determining whether Respondent is in violation of this order, the Commission may infer facts adverse to Respondent if it fails to provide adequate or timely information.

X. Modification

The Commission may amend this order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

XI. Bonding

The conduct prohibited by section III of this order may be continued during the sixty-day period in which this Order is under review by the United States Trade Representative, as delegated by the President (70 *Fed. Reg.* 43,251 (Jul. 21, 2005)), subject to Respondent's posting of a bond in the amount of one hundred (100) percent of the entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by section IV of this Order. Covered products imported on or after the date of issuance of this Order are subject to the entry bond as set forth in the exclusion order issued by the Commission, and are

not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* 19 C.F.R. § 210.68. The bond and any accompanying documentation are to be provided to and approved by the Commission prior to the commencement of conduct that is otherwise prohibited by section III of this Order. Upon the Secretary's acceptance of the bond, (a) the Secretary will serve an acceptance letter on all parties, and (b) Respondent must serve a copy of the bond and accompanying documentation on Complainant's counsel.²

The bond is to be forfeited in the event that the United States Trade Representative approves this Order (or does not disapprove it within the review period), unless (i) the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or (ii) Respondent exports or destroys the products subject to this bond and provides certification to that effect that is satisfactory to the Commission.

This bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved (or not disapproved) by the United States Trade Representative, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

² *See* Footnote 1.

By Order of the Commission.

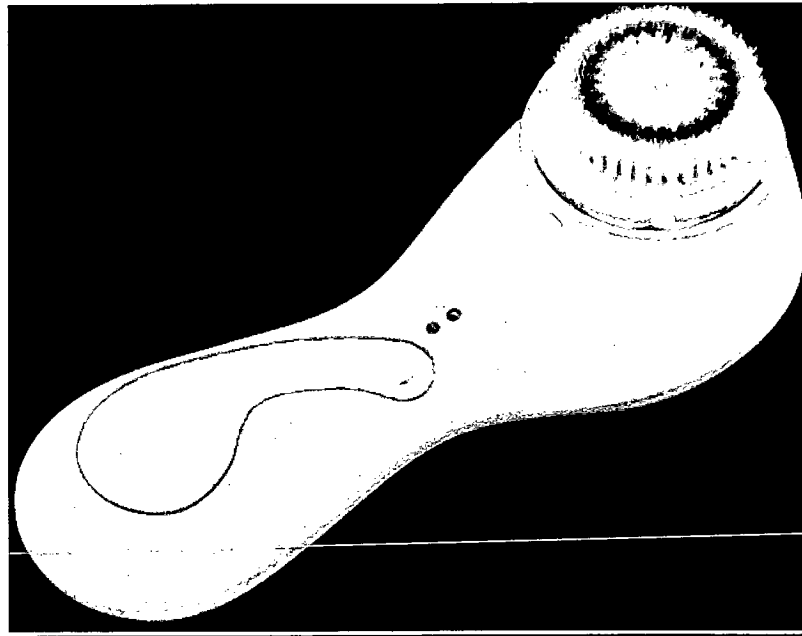
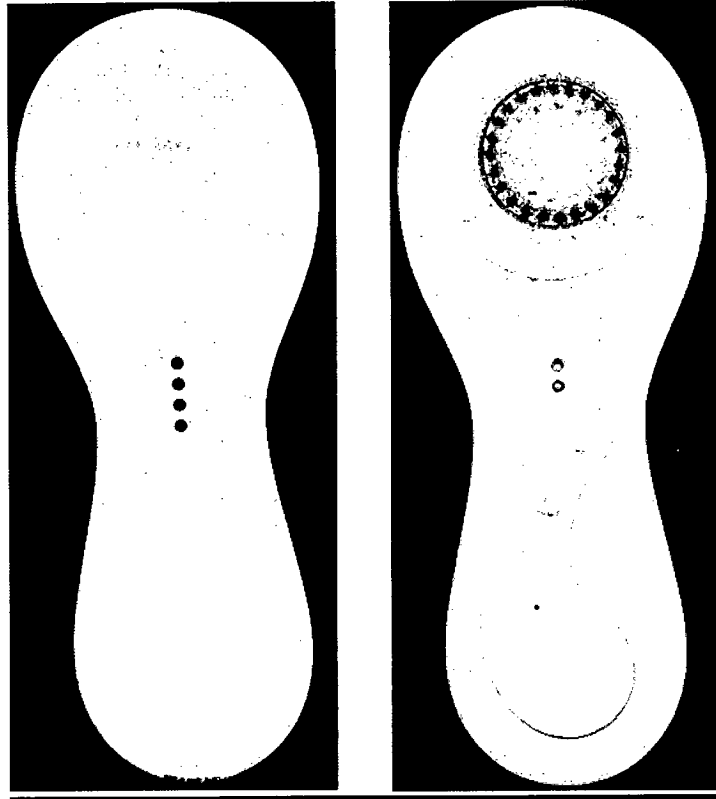
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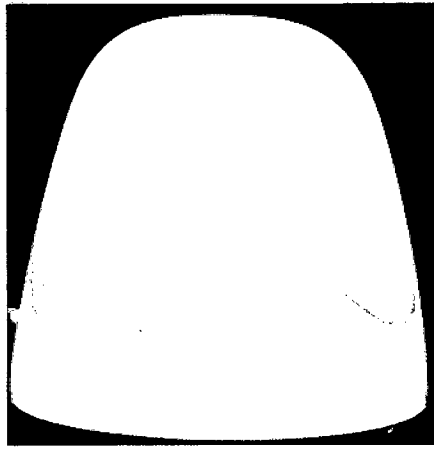
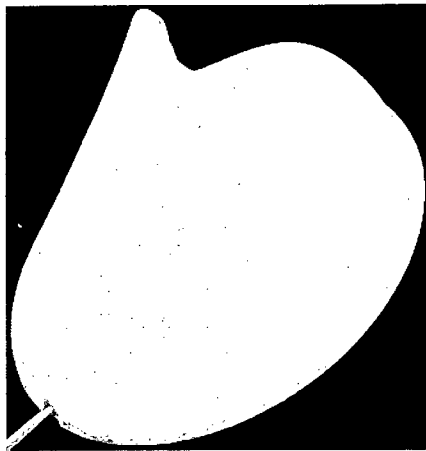
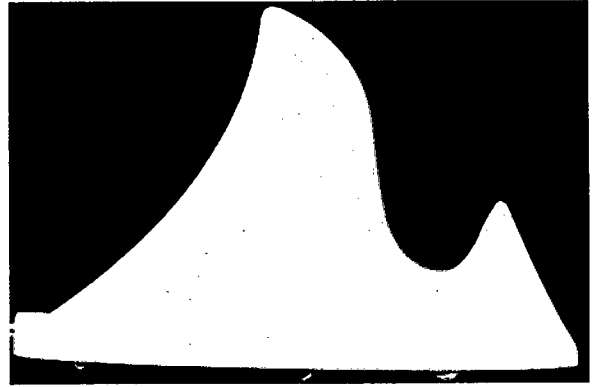
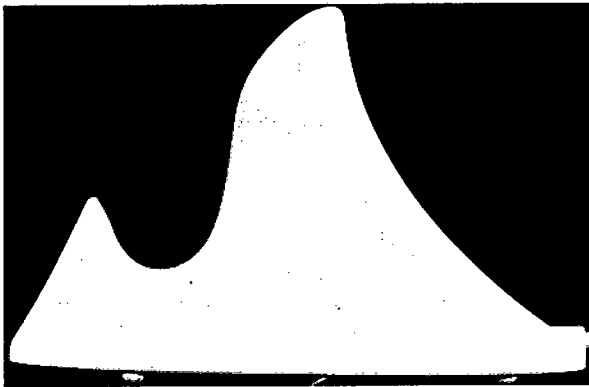
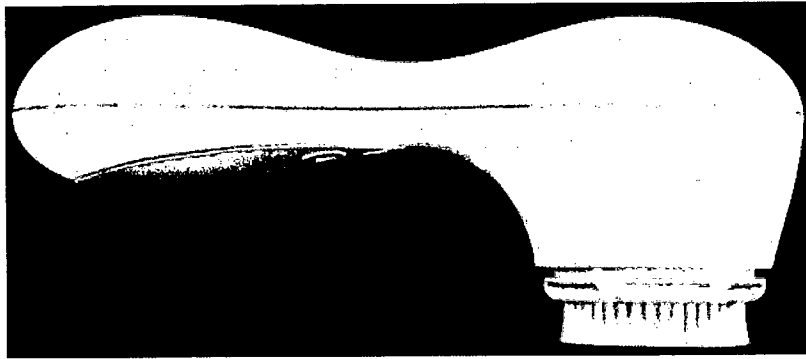
Lisa R. Barton
Secretary to the Commission

Issued: February 6, 2017

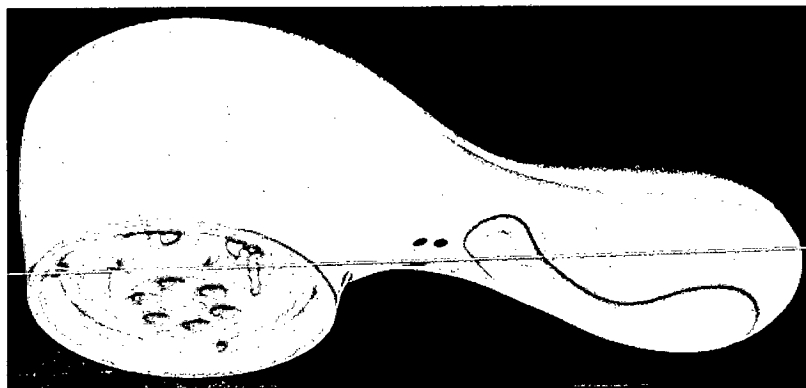
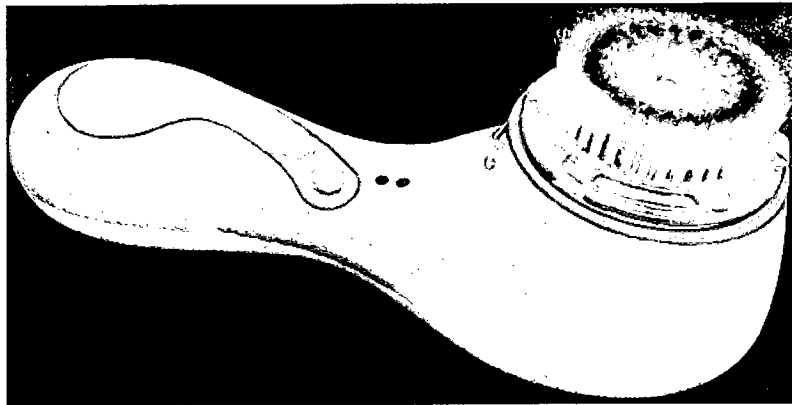
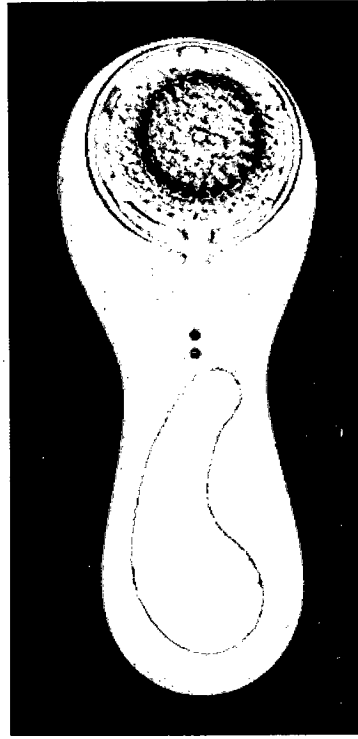
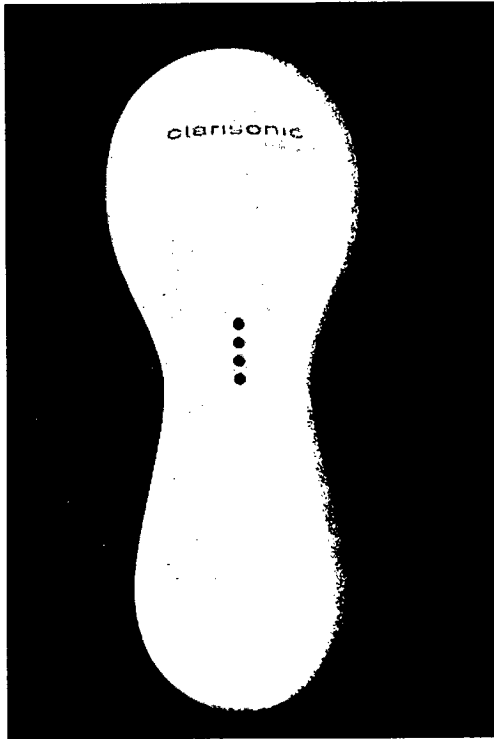
Exhibit 1

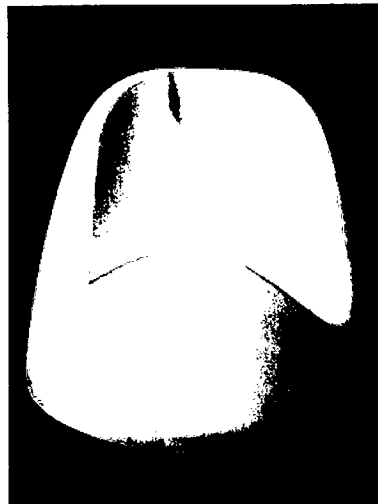
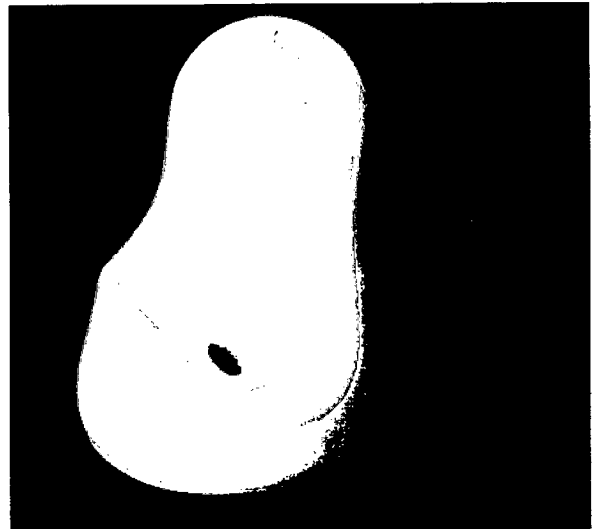
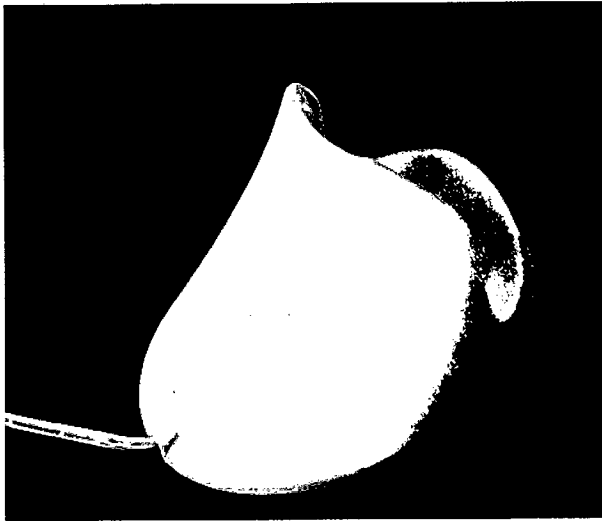
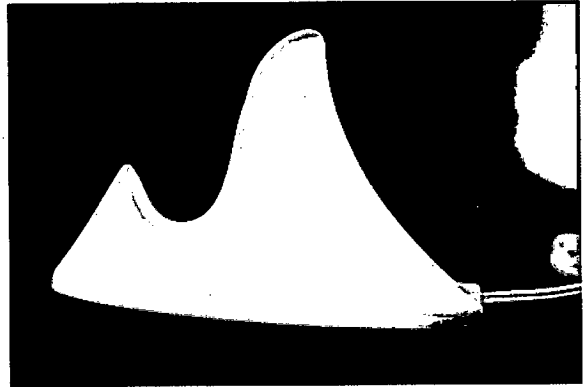
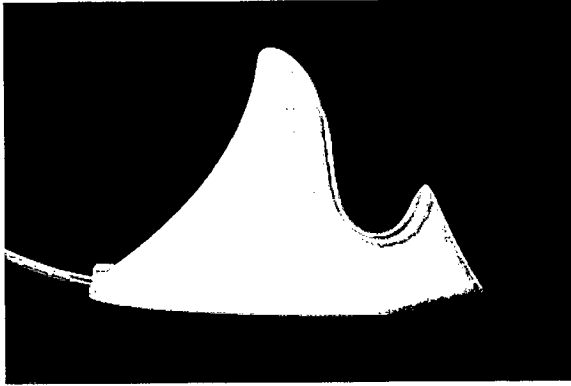
Clarisonic Plus Product and Charging Station





Clarisonic Pro Product and Charging Station





The elements of the Clarisonic Device Trade Dress are as follows:

The hourglass shape of the Clarisonic Plus and Clarisonic Pro products; shape of the head unit; identical molded arcs on each side of the head unit; a droplet (or "teardrop") shaped pad of contrasting texture on the front of the device; one or more control buttons located towards the top of the droplet, inside its perimeter; two round lights ("dots") located just above the droplet on the front of the device; four round lights ("dots") centered on the narrowest part of the back of the device; location of the Clarisonic Plus or Clarisonic Pro name at the widest part of the back of the device; contrasting-color ring of bristles located within the bristles on the brush head; the shape and contour of the ring surrounding the brush head, with alternating protrusions and indentations; and the brush cap, with six large holes spaced evenly on the face, around the perimeter of the cap.

The elements of the Clarisonic Charging Station Trade Dress are as follows:

The boot-last shape of the Clarisonic Plus and Clarisonic Pro products; front plane of product extending forward in exaggerated proportion; and cradle for product dramatically higher in front than in back.

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC**

In the Matter of

**CERTAIN ELECTRIC SKIN CARE
DEVICES, BRUSHES AND CHARGERS
THEREFOR, AND KITS CONTAINING
SAME**

Investigation No. 337-TA-959

CEASE AND DESIST ORDER

IT IS HEREBY ORDERED THAT RESPONDENT Serious Skin Care, Inc., of 112 N. Curry St., Carson City, NV 89703-4934, cease and desist from conducting any of the following activities in the United States, including via the internet: importing, selling, offering for sale, marketing, advertising, distributing, transferring (except for exportation), soliciting United States agents or distributors, and aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of electric skin care devices, brushes or chargers therefor, or kits containing same that are covered by one or more of claims 31, 33, and 39-41 of United States Patent No. 7,320,691 ("the '691 patent"), and the claim of United States Patent No. D'523,809 ("the D'809 patent") in violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337).

I. Definitions

As used in this order:

(A) "Commission" shall mean the United States International Trade Commission.

- (B) "Complainant" shall mean Pacific Biosciences Laboratories, Inc. of Redmond, Washington.
- (C) "Respondent" shall mean Serious Skin Care, Inc., of 112 N. Curry St., Carson City, NV 89703-4934.
- (D) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority-owned or controlled subsidiaries, successors, or assigns.
- (E) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.
- (F) The terms "import" and "importation" refer to importation for entry for consumption under the Customs laws of the United States.
- (G) The term "covered products" shall mean electric skin care devices, brushes or chargers therefor, or kits containing same of Respondent that are covered by one or more of claims 31, 33, and 39-41 of the '691 patent, and the claim of the D'809 patent.

II. Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by section III, *infra*, for, with, or otherwise on behalf of, Respondent.

III. Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by this Order.

For the remaining term of the relevant one or more of the '691 patent and the D'809 patent,

Respondent shall not:

- (A) import into the United States covered products;
- (B) market, distribute, sell, offer for sale, distribute or otherwise transfer (except for exportation) imported covered products;
- (C) market or advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

IV. Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the relevant '691 patent and/or the D'809 patent licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

V. Reporting

For purposes of this requirement, the reporting periods shall commence on January 1 of each year and shall end on the subsequent December 31. The first report required under this section shall cover the period from the date of issuance of this order through December 31, 2016.

This reporting requirement shall continue in force until such time as Respondent has truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of covered products that it has (i) imported and/or (ii) sold in the United States after importation during the reporting period, and (b) the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

When filing written submissions, Respondent must file the original document electronically on or before the deadlines stated above and submit eight (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 C.F.R. § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-959") in a prominent place on the cover pages and/or the first page. *See Handbook for Electronic Filing Procedures*, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf. Persons with questions regarding filing should contact the Secretary (202-205-2000). If Respondent desires to submit a document to the Commission in confidence, it must file the original and a public version of the original with the Office of the Secretary and must serve a copy of the confidential version on Complainant's counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

¹ Complainant must file a letter with the Secretary identifying the attorney to receive reports and bond information associated with this Order. The designated attorney must be on the protective order entered in the investigation.

VI. Record-Keeping and Inspection

- (A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.
- (B) For the purposes of determining or securing compliance with this Order and for no other purpose, subject to any privilege recognized by the federal courts of the United States, and upon reasonable written notice by the Commission or its staff, duly authorized representatives of the Commission shall be permitted access and the right to inspect and copy, in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, in detail and in summary form, that must be retained under subparagraph VI(A) of this Order.

VII. Service of Cease and Desist Order

Respondent is ordered and directed to:

- (A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;
- (B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this order, a copy of the Order upon each successor; and

- (C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the latest expiration date of the '691 patent and the D'809 patent.

VIII. Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to section VI of this order should be made in accordance with section 201.6 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 201.6). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

IX. Enforcement

Violation of this order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.75), including an action for civil penalties under section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(f)), as well as any other action that the Commission deems appropriate. In determining whether Respondent is in violation of this order, the Commission may infer facts adverse to Respondent if it fails to provide adequate or timely information.

X. Modification

The Commission may amend this order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

XI. Bonding

The conduct prohibited by section III of this order may be continued during the sixty-day period in which this Order is under review by the United States Trade Representative, as delegated by the President (70 *Fed. Reg.* 43,251 (Jul. 21, 2005)), subject to Respondent's posting of a bond in the amount of one hundred (100) percent of the entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by section IV of this Order. Covered products imported on or after the date of issuance of this Order are subject to the entry bond as set forth in the exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* 19 C.F.R. § 210.68. The bond and any accompanying documentation are to be provided to and approved by the Commission prior to the commencement of conduct that is otherwise prohibited by section III of this Order. Upon the Secretary's acceptance of the bond, (a) the Secretary will serve an acceptance letter on all parties, and (b) Respondent must serve a copy of the bond and accompanying documentation on Complainant's counsel.²

The bond is to be forfeited in the event that the United States Trade Representative approves this Order (or does not disapprove it within the review period), unless (i) the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or (ii) Respondent exports or destroys the products subject to this bond and provides certification to that effect that is satisfactory to the Commission.

² *See* Footnote 1.

This bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved (or not disapproved) by the United States Trade Representative, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton'.

Lisa R. Barton
Secretary to the Commission

Issued: February 6, 2017

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC

In the Matter of

**CERTAIN ELECTRIC SKIN CARE
DEVICES, BRUSHES AND CHARGERS
THEREFOR, AND KITS CONTAINING
SAME**

Investigation No. 337-TA-959

CEASE AND DESIST ORDER

IT IS HEREBY ORDERED THAT Wenzhou Ai Er Electrical, Technology Co., Ltd d/b/a CNAIER, of 1#, XiaSong Road, WanQuan Town, PingYang, ZheJiang, China, cease and desist from conducting any of the following activities in the United States, including via the internet: importing, selling, offering for sale, marketing, advertising, distributing, transferring (except for exportation), soliciting United States agents or distributors, and aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of electric skin care devices, brushes or chargers therefor, or kits containing same that are covered by one or more of claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of United States Patent No. 7,320,691 ("the '691 patent"); and claims 1, 2, 4, 5, and 7-15 of United States Patent No. 7,386, 906 ("the '906 patent").

I. Definitions

As used in this order:

(A) "Commission" shall mean the United States International Trade Commission.

- (B) "Complainant" shall mean Pacific Biosciences Laboratories, Inc. of Redmond, Washington.
- (C) "Respondent" shall mean Wenzhou Ai Er Electrical, Technology Co., Ltd d/b/a CNAIER, of 1#, XiaSong Road, WanQuan Town, PingYang, ZheJiang, China.
- (D) "Person" shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority-owned or controlled subsidiaries, successors, or assigns.
- (E) "United States" shall mean the fifty States, the District of Columbia, and Puerto Rico.
- (F) The terms "import" and "importation" refer to importation for entry for consumption under the Customs laws of the United States.
- (G) The term "covered products" shall mean electric skin care devices, brushes or chargers therefor, or kits containing same of Respondent that are covered by one or more of claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of the '691 patent, and claims 1, 2, 4, 5, and 7-15 of the '906 patent.

II. Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by section III, *infra*, for, with, or otherwise on behalf of, Respondent.

III. Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by this Order.

For the remaining term of the relevant one or more of the '691 patent and the '906 patent,

Respondent shall not:

- (A) import into the United States covered products;
- (B) market, distribute, sell, offer for sale, distribute or otherwise transfer (except for exportation) imported covered products;
- (C) market or advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

IV. Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the relevant '691 patent and /or the '906 patent, licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

IV. Reporting

For purposes of this requirement, the reporting periods shall commence on January 1 of each year and shall end on the subsequent December 31. The first report required under this section shall cover the period from the date of issuance of this order through December 31, 2016.

This reporting requirement shall continue in force until such time as Respondent has truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in

the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of covered products that it has (i) imported and/or (ii) sold in the United States after importation during the reporting period, and (b) the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

When filing written submissions, Respondent must file the original document electronically on or before the deadlines stated above and submit eight (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 C.F.R. § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-959") in a prominent place on the cover pages 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). If Respondent desires to submit a document to the Commission in confidence, it must file the original and a public version of the original with the Office of the Secretary and must serve a copy of the confidential version on Complainant's counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

¹ Complainant must file a letter with the Secretary identifying the attorney to receive reports and bond information associated with this Order. The designated attorney must be on the protective order entered in the investigation.

V. Record-Keeping and Inspection

- (A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.
- (B) For the purposes of determining or securing compliance with this Order and for no other purpose, subject to any privilege recognized by the federal courts of the United States, and upon reasonable written notice by the Commission or its staff, duly authorized representatives of the Commission shall be permitted access and the right to inspect and copy, in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, in detail and in summary form, that must be retained under subparagraph VI(A) of this Order.

VI. Service of Cease and Desist Order

Respondent is ordered and directed to:

- (A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;
- (B) Serve, within fifteen (15) days after the succession of any persons referred to in

subparagraph VII(A) of this order, a copy of the Order upon each successor; and

- (C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the latest expiration date of the '691 patent, '906 patent, and the D'809 patent.

VII. Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to section VI of this order should be made in accordance with section 201.6 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 201.6). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

VIII. Enforcement

Violation of this order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.75), including an action for civil penalties under section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(f)), as well as any other action that the Commission deems appropriate. In determining whether Respondent is in violation of this order, the Commission may infer facts adverse to Respondent if it fails to provide adequate or timely information.

IX. Modification

The Commission may amend this order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

X. Bonding

The conduct prohibited by section III of this order may be continued during the sixty-day period in which this Order is under review by the United States Trade Representative, as delegated by the President (70 *Fed. Reg.* 43,251 (Jul. 21, 2005)), subject to Respondent's posting of a bond in the amount of one hundred (100) percent of the entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by section IV of this Order. Covered products imported on or after the date of issuance of this Order are subject to the entry bond as set forth in the exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* 19 C.F.R. § 210.68. The bond and any accompanying documentation are to be provided to and approved by the Commission prior to the commencement of conduct that is otherwise prohibited by section III of this Order. Upon the Secretary's acceptance of the bond, (a) the Secretary will serve an acceptance letter on all parties, and (b) Respondent must serve a copy of the bond and accompanying documentation on Complainant's counsel.²

² *See* Footnote 1.

The bond is to be forfeited in the event that the United States Trade Representative approves this Order (or does not disapprove it within the review period), unless (i) the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or (ii) Respondent exports or destroys the products subject to this bond and provides certification to that effect that is satisfactory to the Commission.

This bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved (or not disapproved) by the United States Trade Representative, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

By order of the Commission.

A handwritten signature in black ink, appearing to read "Lisa R. Barton".

Lisa R. Barton
Secretary to the Commission

Issued: February 6, 2017

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC

In the Matter of

**CERTAIN ELECTRIC SKIN CARE
DEVICES, BRUSHES AND CHARGERS
THEREFOR, AND KITS CONTAINING
SAME**

Investigation No. 337-TA-959

CEASE AND DESIST ORDER

IT IS HEREBY ORDERED THAT Xnovi Electronic Co., Ltd., of Room 915, GuanLiDa Mansion, QianJin 1st Road, Zone 30 Bao'An, Shenzhen, China, cease and desist from conducting any of the following activities in the United States, including via the internet: importing, selling, offering for sale, marketing, advertising, distributing, transferring (except for exportation), soliciting United States agents or distributors, and aiding or abetting other entities in the importation, sale for importation, sale after importation, transfer (except for exportation), or distribution of electric skin care devices, brushes or chargers therefor, or kits containing same that are covered by one or more of claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of United States Patent No. 7,320,691 ("the '691 patent"); and claims 1, 2, 4, 5, and 7-15 of United States Patent No. 7,386, 906 ("the '906 patent").

I. Definitions

As used in this order:

- (A) “Commission” shall mean the United States International Trade Commission.
- (B) “Complainant” shall mean Pacific Biosciences Laboratories, Inc. of Redmond, Washington.
- (C) “Respondent” shall mean Xnovi Electronic Co., Ltd., of Room 915, GuanLiDa Mansion, QianJin 1st Road, Zone 30 Bao’An, Shenzhen, China.
- (D) “Person” shall mean an individual, or any non-governmental partnership, firm, association, corporation, or other legal or business entity other than Respondent or its majority-owned or controlled subsidiaries, successors, or assigns.
- (E) “United States” shall mean the fifty States, the District of Columbia, and Puerto Rico.
- (F) The terms “import” and “importation” refer to importation for entry for consumption under the Customs laws of the United States.
- (G) The term “covered products” shall mean electric skin care devices, brushes or chargers therefor, or kits containing same of Respondent that are covered by one or more of claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of the ’691 patent, and claims 1, 2, 4, 5, and 7-15 of the ’906 patent.

II. Applicability

The provisions of this Cease and Desist Order shall apply to Respondent and to any of its principals, stockholders, officers, directors, employees, agents, licensees, distributors, controlled (whether by stock ownership or otherwise) and majority-owned business entities, successors, and assigns, and to each of them, insofar as they are engaging in conduct prohibited by section III, *infra*, for, with, or otherwise on behalf of, Respondent.

III. Conduct Prohibited

The following conduct of Respondent in the United States is prohibited by this Order. For the remaining term of the relevant one or more of the '691 patent and the '906 patent, Respondent shall not:

- (A) import into the United States covered products;
- (B) market, distribute, sell, offer for sale, distribute or otherwise transfer (except for exportation) imported covered products;
- (C) market or advertise imported covered products;
- (D) solicit U.S. agents or distributors for imported covered products; or
- (E) aid or abet other entities in the importation, sale for importation, sale after importation, transfer, or distribution of covered products.

IV. Conduct Permitted

Notwithstanding any other provision of this Order, specific conduct otherwise prohibited by the terms of this Order shall be permitted if, in a written instrument, the owner of the relevant '691 patent and /or the '906 patent, licenses or authorizes such specific conduct, or such specific conduct is related to the importation or sale of covered products by or for the United States.

IV. Reporting

For purposes of this requirement, the reporting periods shall commence on January 1 of each year and shall end on the subsequent December 31. The first report required under this section shall cover the period from the date of issuance of this order through December 31, 2016. This reporting requirement shall continue in force until such time as Respondent has truthfully reported, in two consecutive timely filed reports, that it has no inventory of covered products in the United States.

Within thirty (30) days of the last day of the reporting period, Respondent shall report to the Commission: (a) the quantity in units and the value in dollars of covered products that it has (i) imported and/or (ii) sold in the United States after importation during the reporting period, and (b) the quantity in units and value in dollars of reported covered products that remain in inventory in the United States at the end of the reporting period.

When filing written submissions, Respondent must file the original document electronically on or before the deadlines stated above and submit eight (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 C.F.R. § 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-959") in a prominent place on the cover pages 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). If Respondent desires to submit a document to the Commission in confidence, it must file the original and a public version of the original with the Office of the Secretary and must serve a copy of the confidential version on Complainant's counsel.¹

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Order, and the submission of a false or inaccurate report may be referred to the U.S. Department of Justice as a possible criminal violation of 18 U.S.C. § 1001.

¹ Complainant must file a letter with the Secretary identifying the attorney to receive reports and bond information associated with this Order. The designated attorney must be on the protective order entered in the investigation.

V. Record-Keeping and Inspection

- (A) For the purpose of securing compliance with this Order, Respondent shall retain any and all records relating to the sale, offer for sale, marketing, or distribution in the United States of covered products, made and received in the usual and ordinary course of business, whether in detail or in summary form, for a period of three (3) years from the close of the fiscal year to which they pertain.
- (B) For the purposes of determining or securing compliance with this Order and for no other purpose, subject to any privilege recognized by the federal courts of the United States, and upon reasonable written notice by the Commission or its staff, duly authorized representatives of the Commission shall be permitted access and the right to inspect and copy, in Respondent's principal offices during office hours, and in the presence of counsel or other representatives if Respondent so chooses, all books, ledgers, accounts, correspondence, memoranda, and other records and documents, in detail and in summary form, that must be retained under subparagraph VI(A) of this Order.

VI. Service of Cease and Desist Order

Respondent is ordered and directed to:

- (A) Serve, within fifteen (15) days after the effective date of this Order, a copy of this Order upon each of its respective officers, directors, managing agents, agents, and employees who have any responsibility for the importation, marketing, distribution, or sale of imported covered products in the United States;
- (B) Serve, within fifteen (15) days after the succession of any persons referred to in subparagraph VII(A) of this order, a copy of the Order upon each successor; and

- (C) Maintain such records as will show the name, title, and address of each person upon whom the Order has been served, as described in subparagraphs VII(A) and VII(B) of this order, together with the date on which service was made.

The obligations set forth in subparagraphs VII(B) and VII(C) shall remain in effect until the latest expiration date of the '691 patent, '906 patent, and the D'809 patent.

VII. Confidentiality

Any request for confidential treatment of information obtained by the Commission pursuant to section VI of this order should be made in accordance with section 201.6 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 201.6). For all reports for which confidential treatment is sought, Respondent must provide a public version of such report with confidential information redacted.

VIII. Enforcement

Violation of this order may result in any of the actions specified in section 210.75 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.75), including an action for civil penalties under section 337(f) of the Tariff Act of 1930 (19 U.S.C. § 1337(f)), as well as any other action that the Commission deems appropriate. In determining whether Respondent is in violation of this order, the Commission may infer facts adverse to Respondent if it fails to provide adequate or timely information.

IX. Modification

The Commission may amend this order on its own motion or in accordance with the procedure described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

X. Bonding

The conduct prohibited by section III of this order may be continued during the sixty-day period in which this Order is under review by the United States Trade Representative, as delegated by the President (70 *Fed. Reg.* 43,251 (Jul. 21, 2005)), subject to Respondent's posting of a bond in the amount of one hundred (100) percent of the entered value of the covered products. This bond provision does not apply to conduct that is otherwise permitted by section IV of this Order. Covered products imported on or after the date of issuance of this Order are subject to the entry bond as set forth in the exclusion order issued by the Commission, and are not subject to this bond provision.

The bond is to be posted in accordance with the procedures established by the Commission for the posting of bonds by complainants in connection with the issuance of temporary exclusion orders. *See* 19 C.F.R. § 210.68. The bond and any accompanying documentation are to be provided to and approved by the Commission prior to the commencement of conduct that is otherwise prohibited by section III of this Order. Upon the Secretary's acceptance of the bond, (a) the Secretary will serve an acceptance letter on all parties, and (b) Respondent must serve a copy of the bond and accompanying documentation on Complainant's counsel.²

² *See* Footnote 1.

The bond is to be forfeited in the event that the United States Trade Representative approves this Order (or does not disapprove it within the review period), unless (i) the U.S. Court of Appeals for the Federal Circuit, in a final judgment, reverses any Commission final determination and order as to Respondent on appeal, or (ii) Respondent exports or destroys the products subject to this bond and provides certification to that effect that is satisfactory to the Commission.

This bond is to be released in the event the United States Trade Representative disapproves this Order and no subsequent order is issued by the Commission and approved (or not disapproved) by the United States Trade Representative, upon service on Respondent of an order issued by the Commission based upon application therefore made by Respondent to the Commission.

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: February 6, 2017

**CERTAIN ELECTRIC SKIN CARE DEVICES, BRUSHES
AND CHARGERS THEREFOR, AND KITS CONTAINING
SAME**

Inv. No. 337-TA-959

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION ORDER** has been served by hand upon the Commission Investigative Attorney, Sarah J. Sladic, Esq., and the following parties as indicated, on **February 7, 2017**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

**On Behalf of Complainants Pacific Bioscience Laboratories,
Inc.:**

Robert M. Masters, Esq.

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP

801 17th St. NW

Washington, DC 20006

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Respondents:

Our Family Jewels, Inc. d/b/a Epipür Skincare

7770 E. Iliff Ave. Rm./Suite E

Denver, CO 80231

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Xnovi Electronic Co., Ltd.

Unit 6A, Block C1, Area G

Sha Jing Street, Min Zhu Industrial Estate,

Baoan District, Shenzhen City,

China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Shanghai Anzikang Electric Co., Ltd.

168 Ji Xin Road, Building 3, Room 401

Minhang District, Shanghai,

China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

**CERTAIN ELECTRIC SKIN CARE DEVICES, BRUSHES
AND CHARGERS THEREFOR, AND KITS CONTAINING
SAME**

Inv. No. 337-TA-959

Certificate of Service – Page 2

Beauty Tech, Inc.
1430 S. Dixie Hwy., Ste. 321
Coral Gables, FL 33146-3175

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

ANEX Corporation
#304-705 Bucheon Techno Park
345 Seokcheon-ro, Ojeong-gu
Bucheon City, Gyeonggi-do
421-741, Korea

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Korean Beauty Co., Ltd.
10 F, Pluszone Bldg. 700
Deungchon-Dong, Gangseo-Gu
Seoul, Korea

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Serious Skin Care, Inc.
112 N. Curry St.
Carson City, NV 89703-4934

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Wenzhou Ai Er Electrical Technology Co., Ltd. d/b/a CNAIER
1#, XiaSong Road, WanQuan Town
PingYang, ZheJiang
China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Coreana Cosmetics Co., Ltd.
204-1 Jeongchon-ri, eup, Seonggeo-eup
Seobuk-gu, Cheonan-si, Chungcheongnam-do
Korea

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Flageoli Classic Limited
7310 Smoke Ranch Road
Las Vegas, NV 89128

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

PUBLIC VERSION

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

In the Matter of

**CERTAIN ELECTRIC SKIN CARE
DEVICES, BRUSHES AND CHARGERS
THEREFOR, AND KITS CONTAINING
THE SAME**

Investigation No. 337-TA-959

COMMISSION OPINION

I. BACKGROUND

The Commission instituted this investigation on June 25, 2015, based on a complaint filed by complainant Pacific Bioscience Laboratories, Inc. ("PBL," or Complainant), alleging a violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337) ("section 337") in the importation, sale for importation, and sale within the United States after importation of certain electric skin care devices, brushes and chargers therefor, and kits containing same by reason of infringement of one or more of claims 1, 4-6, 12-16, 22, 31, 33, 39-42, 44-46, 49, 51, and 52 of U.S. Patent No. 7,320,691 ("the '691 patent"); claims 1, 2, 4, 5, and 7-15 of U.S. Patent No. 7,386,906 ("the '906 patent"); and the claim of U.S. Design Patent No. D523,809 ("the D'809 patent"), and infringement of trade dress. *See* Notice of Investigation, 80 *Fed. Reg.* 36576 (Jun. 25, 2015).

The Notice of Investigation named the following twenty-one entities as respondents: Our Family Jewels, Inc. of Parker, Colorado ("Our Family Jewels"); Accord Media, LLC of New York, New York ("Accord Media"); Xnovi Electronic Co., Ltd. of Shenzhen, China ("Xnovi");

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Michael Todd True Organics LP of Port St. Lucie, Florida (“Michael Todd LP”);¹ MTTO LLC of Port St. Lucie, Florida (“MTTO”); Shanghai Anzikang Electronic Co., Ltd. of Shanghai, China (“Anzikang”); Nutra-Luxe M.D., LLC of Fort Myers, Florida (“Nutra-Luxe”); Beauty Tech, Inc. of Coral Gables, Florida (“Beauty Tech”); ANEX Corp. of Seoul, Republic of Korea (“Anex”); RN Ventures Ltd. of London, United Kingdom (“RN Ventures”); Korean Beauty Co., Ltd. of Seoul, Republic of Korea (“Korean Beauty”); H2Pro BeautyLife, Inc. of Placentia, California (“H2Pro”); Serious Skin Care, Inc. of Carson City, Nevada (“Serious Skin Care”); Home Skinovations, Inc. (“Skinovations Inc.”) of Richmond Hill, Ontario, Canada; Home Skinovations Ltd. of Yokneam, Israel (“Skinovations, Ltd.”); Wenzhou Ai Er Electrical Technology Co., Ltd. d/b/a CNAIER of ZheJiang, China (“Wenzhou Ai Er”); Coreana Cosmetics Co., Ltd. of Chungcheongnam-do, Republic of Korea (“Coreana”); Flageoli Classic Ltd. of Las Vegas, Nevada (“Flageoli”); Jewlzie of New York, New York (“Jewlzie”); Unicos USA, Inc. of LaHabra, California (“Unicos”); and SkincarebyAlana of Dana Point, California (“SkincarebyAlana”). 80 *Fed. Reg.* 36576-77. A Commission investigative attorney (“IA,” or “Staff”) is participating in this investigation. *Id.*

During the course of the investigation, eight of the respondents were terminated by consent order: Nutra-Luxe M.D. (Order No. 10; consent order issued Jan. 5, 2016); SkincarebyAlana (Order No. 11; consent order issued Oct. 6, 2015); Unicos (Order No. 15; consent order issued Oct. 20, 2015); H2Pro (Order No. 19; consent order issued Oct. 22, 2015);

¹ Pursuant to Order No. 22, the complaint and notice of investigation were amended to change the name of respondent “Michael Todd True Organics LP” to “Michael Todd LP.” Order No. 22 (Oct. 2, 2015). The Commission determined not to review the ID. Notice (Oct. 26, 2015).

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Jewlzie (Order No. 20; consent order issued Oct. 22, 2015); Home Skinovations Inc. and Home Skinovations Ltd. (Order No. 30; consent order issued Dec. 23, 2015); and Accord Media (Order No. 31; consent order issued Dec. 23, 2015). RN Ventures was terminated based on a settlement agreement (Order No. 36, *unreviewed* Feb. 4, 2016). Respondents Michael Todd LP and MTTO were also terminated based on a settlement agreement (Order No. 37, *unreviewed* Mar. 3, 2016).

The remaining ten respondents were found in default: Coreana; Flageoli; Serious Skin Care; Anzikang; and Wenzhou (Order No. 13, as modified by Order No. 15, *unreviewed* Oct. 20, 2015); ANEX; Korean Beauty; and Our Family Jewels (Order No. 18, *unreviewed* Oct. 22, 2015); Beauty Tech (Order No. 24, *unreviewed* Nov. 13, 2015); and Xnovi (Order No. 32, *unreviewed* Dec. 23, 2015) (collectively, “the Defaulting Respondents”).

On February 18, 2016, PBL filed a motion for summary determination (“Mot.”) of violation of section 337 by the Defaulting Respondents, and seeking entry of a general exclusion order (“GEO”), limited exclusion orders (“LEOs”), cease and desist orders (“CDOs”), and a bond in the amount of 100 percent of the value of the accused products. Mot. at 1-2; Mem. at 1.

Upon filing its motion, PBL attached a memorandum (“Mem.”) in support of the motion and a statement of undisputed material facts (“SUMF”). PBL further attached declarations from the following individuals: Lilac Muller (Mot. Ex. 7, “Muller Decl.”); Robert Hennessy (Mot. Ex. 32, “Hennessy Decl.”); Zane Miller (Mot. Ex. 33, “Miller Decl.”); Dr. Zoe D. Draelos (Mot. Ex. 34, “Draelos Decl.”); Dr. Brian C. Fabien (Mot. Ex. 35, “Fabien Decl.”); and Dr. Robert Akridge (Mot. Ex. 82, “Akridge Decl.”). On March 11, 2016, PBL submitted supplemental declarations from Zane Miller (Supp. Ex. A., “Miller Supp. Decl.”) and Robert Hennessy (Supp. Ex. B,

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“Hennessy Supp. Decl.”). The Commission investigative attorney (“the IA”)² filed a response in support of the motion on March 14, 2016 (“Staff Resp.” or “IAResp”). On March 14, 2016, settled respondents Michael Todd LP and MTTO (collectively, settled respondent “Michael Todd”) filed a motion for leave to file a response, which was denied pursuant to Order No. 41 (Mar. 30, 2016). No other pleadings were filed in response to the motion.

On April 11, 2016, the ALJ issued an initial determination (“ID”) (Order No. 42) granting Complainant’s motion for summary determination. On April 21, 2016, the IA filed a petition for review-in-part of the ID. On April 26, 2016, Complainant filed a response to the petition for review.

The Commission determined to review the final ID in part on May 26, 2016, and issued its “Notice Of A Commission Determination To Review In Part An Initial Determination Granting Complainant’s Motion For Summary Determination Of Violation Of Section 337; Request For Written Submissions On Remedy, The Public Interest, And Bonding” (“the Commission Notice”), in which the Commission specified the issues under review. *See 81 Fed. Reg. 35377-79* (Jun. 2, 2016). In particular, the Commission determined to “review the ID’s findings on the economic prong of the domestic industry requirement as to the patent-based allegations, all issues related to violation of the asserted trade dress, and to correct certain minor typographical errors.” *Id.* at 35378. The Commission did not request any submissions on the issues under review.

The Commission requested written submissions on remedy, public interest, and bonding.

²We use “the IA” interchangeably with “OUII” (*i.e.*, the Office of Unfair Import Investigations) in this Opinion.

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Id. at 3. PBL and the IA timely filed their submissions pursuant to the Commission Notice. Settled respondent Michael Todd filed a Written Submission on the Issue of Remedy and a Reply to PBL's Written Submission. No other parties filed any submissions in response to the Commission Notice, and no submissions were received from the public.

II. COMMISSION REVIEW

Commission review of an initial determination is limited to the issues set forth in the notice of review and all subsidiary issues therein. *Certain Bar Clamps, Bar Clamp Pads, and Related Packaging Display and Other Materials*, Inv. No. 337-TA-429, Comm'n Op. at 3 (Jan. 4, 2001). Once the Commission determines to review an initial determination, its review is conducted under a de novo standard. *Certain Polyethylene Terephthalate Yarn and Products Containing Same*, Inv. No. 337-TA-457, Comm'n Op. at 9 (June 18, 2002). Upon review the "Commission has 'all the powers which it would have in making the initial determination,' except where the issues are limited on notice or by rule." *Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, Comm'n Op. on the Issues Under Review and on Remedy, the Public Interest, and Bonding at 9-10 (Jun. 2, 1997), USITC Pub. 3046 (Jul. 1997) (quoting *Certain Acid-Washed Denim Garments and Accessories*, Inv. No. 337-TA-324, Comm'n Op. at 5 (Nov. 1992)).

On review, "the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge. The Commission may also make any findings or conclusions that in its judgment are proper based on the record in the proceeding." 19 C.F.R. § 210.45(c).

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III. DISCUSSION OF THE ISSUES UNDER COMMISSION REVIEW

A. Whether PBL satisfied the economic prong of the domestic industry requirement with regard to the asserted patents

Sections 337(a)(2) and (3) set forth the requirements for determining the existence of a domestic industry in investigations instituted under section 337(a)(1)(B)-(E) as follows:

(2) Subparagraphs (B), (C), (D), and (E) of paragraph (1) apply only if an industry in the United States, relating to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established.

(3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned –

(A) significant investment in plant and equipment;

(B) significant employment of labor or capital; or

(C) substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. §§ 1337(a)(2), (3). The domestic industry requirement consists of an “economic prong” and a “technical prong.” *See, e.g., Alloc, Inc. v. Int’l Trade Comm’n*, 342 F.3d 1361, 1375 (Fed. Cir. 2003). To meet the economic prong of the domestic industry requirement, the complainant must establish that at least one of the criteria listed in subparagraph (a)(3) is satisfied “with respect to the articles protected by the patent.” 19 U.S.C. § 1337(a)(3); *Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376, USITC Pub. No. 3003 (Nov. 1996), Comm’n Op. at 21 (Sep. 23, 1996), remanded on other

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grounds, *Enercon GmbH v. Int'l Trade Comm'n*, 113 F.3d 1256 (Fed. Cir. 1997).³

PBL asserted before the ALJ that a domestic industry exists for the Asserted Patents in relation to the Clarisonic Mia 1, Mia 2, Mia 3, Pro, Plus, Smart Profile, Mia Fit, and Alpha Fit products (collectively, the “DI products”), and that the economic prong of the domestic industry requirement is satisfied in this investigation through (i) significant investment in plant and equipment under subsection (A) of section 337(a)(3)), (ii) significant employment of labor and capital under subsection (B) of section 337(a)(3)), and (iii) substantial investment in exploitation of the patent, including engineering, research and development, or licensing under subsection (C) of section 337(a)(3)). ID/RD at 21.

The ALJ analyzed the evidence produced by Complainant PBL and found that:

(1) PBL’s investment in the DI products is significant in the context of its operations in the United States and worldwide. *See* ID/RD at 21-22.

(2) PBL made significant investments in plant and equipment related to its DI products and thus satisfied the requirement of subsection (A) of section 337(a)(3) (19 U.S.C. § 1337(a)(3)(A)). *See* ID/RD at 23-26.

(3) PBL made significant investments in labor and capital related to its DI products and thus satisfied the requirement of subsection (B) of section 337(a)(3) (19 U.S.C. § 1337(a)(3)(B)). *See* ID/RD at 26-28.

(4) PBL failed to demonstrate that it made substantial investments in engineering, research, and development or licensing of the Clarisonic system that exploits the Asserted Patents and thus failed to satisfy the requirement of subsection (C) of section 337(a)(3) (19 U.S.C. § 1337(a)(3)(C)). *See* ID/RD at 28-30.

The ALJ also determined that the “non-manufacturing expenditures would need to be

³ In the present investigation, the Commission determined not to review the ID’s finding that Complainant proved the technical prong of the domestic industry requirement based on the products it asserted to demonstrate domestic industry. 81 *Fed. Reg.* at 35378.

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backed out of the calculation of qualifying investments under subsections (A) as well as (B).” ID/RD at 25.

The IA petitioned for review of the ID’s economic prong analysis, asking the Commission to vacate the finding in the ID that expenditures related to design, engineering, and research and development must be “backed out of the calculation of qualifying investments under subsections (A) as well as (B).” IAPet. at 10. Complainant PBL responded that it agreed with the IA’s arguments, but stated that regardless of the status of research and development expenditures under the various prongs of the economic domestic industry analysis, it satisfies, at least, prongs (A) and (B) of the economic prong of the domestic industry requirement. ComplResp at 2 (citing ID/RD at 23-30).

The ID correctly found that PBL satisfies the economic prong of the domestic industry requirement under subsections (A) and (B) based upon PBL’s significant investments in plant and equipment and labor and capital for the domestic manufacture of its domestic industry products. *See* ID/RD at 23-28, 30. The ID found that the Clarisonic products that practice the asserted patents are manufactured [[]] at PBL’s headquarters in Redmond, Washington, and that PBL invested many millions of dollars in manufacturing equipment to produce components of these products. ID/RD at 23, 26. Further, PBL invested [[]] manufacturing and operations personnel and invested [[]] in capital and related manufacturing costs and, as a result, the ID correctly found that the manufacturing and labor and capital investments alone are sufficient to satisfy the requirements of 19 U.S.C. § 1337(a)(3)(A) and (B). ID/RD at 25-26, 28. The Commission,

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however, takes no position on the ID's discussions on pages 24-26 and 27-28 of the ID relating to the ID's determination that the "non-manufacturing expenditures would need to be backed out of the calculation of qualifying investments under subsections (A) as well as (B)." ID/RD at 25. *See Beloit Corporation v. Valmet Oy*, 742 F.2d 1421, 1423 (Fed.Cir.1984) ("*Beloit*").

We also note that a separate subsection in the ID's economic prong analysis is titled "1. Significant Investment." ID/RD at 21-22. Under Commission precedent, the issue of significance is part of the economic prong analysis. *See, e.g., Certain Marine Sonar Imaging Devices, Including Downscan and Sidescan Devices, Products Containing the Same and Components Thereof*, Inv. No. 337-TA-921, Comm. Op. at 62 (Jan. 6, 2016) ("The remaining issue for resolution under subparagraph (B) is whether Navico's investment in labor and capital is 'significant.'" (emphasis added), *see id.* at 52-66; *see also Certain Optoelectronic Devices for Fiber Optic Communications, Components Thereof and Products Containing the Same*, Inv. No. 337-TA-860, Comm'n Op. at 14-22 (May 9, 2014). The ID at 21-22 may create an incorrect impression that "significant" within the meaning of section 337(a)(3) relates to the significance of the domestic industry products independent of the economic prong analysis required under 19 U.S.C. §1337(a)(3) with respect to the asserted investments. Accordingly, we vacate the ID's subsection titled "1. Significant Investment." *See* ID/RD at 21-22.

Furthermore, the ID finds that the evidence PBL put forth with respect to its exploitation of the asserted patents is insufficient to establish that PBL is entitled as a matter of law to summary determination of a domestic industry under 19 U.S.C. § 1337(a)(3)(C).

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We, however, do not need to reach this issue because the record shows, and the ID finds, that PBL satisfied the economic prong of the domestic industry requirement under subsections (A) and (B) of section 337(a)(3) with respect to its domestic manufacturing activities. *See* discussion *supra*. Accordingly, the Commission takes no position on the ID's finding on whether PBL satisfied the economic prong under subsection (C) of section 337(a)(3). *See Beloit*, 742 F.2d at 1423.

Based on the foregoing, with regard to the economic prong of the domestic industry we determine to:

1. Vacate the subsection labeled "Significant Investment." on pages 21-22 of the ID, and find that PBL made significant investments under prongs (A) and (B), as detailed above.
2. Take no position on, and therefore vacate, the ID's analysis and findings pertaining to the ID's determination that the "non-manufacturing expenditures would need to be backed out of the calculation of qualifying investments under subsections (A) as well as (B)." ID/RD at 25.
3. Affirm the ID's finding that PBL satisfied the economic prong requirement under subsections 337(a)(3)(A) and (B).
4. Take no position on, and therefore vacate, the ID's analysis and findings regarding whether PBL satisfied the economic prong requirement under subsection (C) of section 337(a)(3). *See Beloit*, 742 F.2d at 1423.

B. The ID's finding of a violation of section 337 with respect to the Clarisonic trade dress

PBL asserted infringement of the trade dress for its Clarisonic products by the Our Family Jewels Episonic and Anzikang Dione devices and charging stations. ID/RD at 6; 13-14, 18;

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Mem. at 6. Both respondents Our Family Jewels and Anzikang failed to appear and were found in default. ID/RD at 3. PBL seeks an LEO and two CDOs directed at the products of Our Family Jewels and Anzikang that infringe the asserted Clarisonic trade dress.

ComplRemedyOpen at 1.

The ID finds that there is no evidence in the record to contradict PBL's evidence of infringement, and, accordingly, that the Our Family Jewels Episonic and Anzikang Dione devices and charging stations infringe the Clarisonic trade dress. ID/RD at 45-46. The ID further finds that "sufficient evidence of the extent and nature of the trade dress violations has been adduced to support a finding that there is a threat of substantial injury in the future." ID/RD at 20 (citing 19 U.S.C. § 1337 (a)(1)(A) (prohibiting unfair methods and acts "the threat *or* effect of which" is to substantially injure an industry in the United States)) (emphasis added by the ALJ). The ID concludes that PBL thus has presented "reliable, probative, and substantial evidence," of the threat of future injury. However, the ID does not actually find that a domestic industry exists as to the asserted trade dress. The Commission determined to review all issues related to violation of the asserted trade dress. It is not necessary for us to reach the trade dress issues on the merits. As the IA pointed out before the ALJ, PBL seeks only a limited exclusion order and cease and desist order directed to two defaulted respondents, Anzikang and Our Family Jewels, with respect to the asserted trade dress. The IA specifically argued as follows:

Because PBL only seeks a limited exclusion order with respect to the asserted trade dress, no [summary] determination [of violation] is necessary. Memo at 1, 102-103. Indeed, when only a limited exclusion order is sought against a defaulting respondent, "the Commission shall presume the facts alleged in the complaint to be true and shall, upon request, issue an exclusion from entry or a cease and desist order, or both." 19 U.S.C. § 1337(g)(1).

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Accordingly, in this Response, the Staff does not address whether there is a violation of Section 337 based upon PBL's trade dress claims.

IA's Response at 2 n. 1. *See also* 19 C.F.R. § 210.16(c)(1).

Based on the foregoing, we take no position on the ID's evidentiary findings concerning PBL's asserted trade dress, *see Beloit* 742 F.2d at 1423. The only respondents accused of infringing the Clarisonic trade dress, Our Family Jewels and Anzikang, failed to appear and were found in default. Under such circumstances, "the Commission shall presume the facts alleged in the complaint to be true and shall, upon request, issue an exclusion from entry or a cease and desist order, or both." 19 U.S.C. § 1337(g)(1). Therefore, the trade dress claim is deemed established based on the allegations in the complaint rendering summary determination based on "substantial, reliable, and probative evidence" unnecessary. *See, e.g.,* Complaint 12, 14, 24, 46, 208, 209, 213; 254; 257; 262-268; 19 U.S.C. § 1337(g)(1); 19 C.F.R. § 210.16(c)(1).

C. Correcting Minor Typographical Errors

It appears that there is a typographical error in the citation provided in the last paragraph on page 38 of the ID which incorrectly refers to "*Id.* ¶¶ 31, 35" (*i.e.*, "Mot. Ex. 34 (Draelos Decl.) ¶¶ 31,35") instead of "Mot. Ex. 35 (Fabien Decl.) ¶¶ 31, 35". Accordingly, we correct this error by substituting "Mot. Ex. 35 (Fabien Decl.) ¶¶ 31, 35" for "*Id.* ¶¶ 31, 35" in the last paragraph on page 38 of the ID.

Likewise, it appears that there is a typographical error in the citation provided in the last paragraph on page 31 of the ID which incorrectly refers to "*Id.* ¶¶ 31, 35" (*i.e.*, "Mot. Ex. 34 (Draelos Decl.) ¶¶ 31,35") instead of referring to "Mot. Ex. 35 (Fabien Decl.) ¶¶ 31, 35". Accordingly, we correct this error by substituting "Mot. Ex. 35 (Fabien Decl.) ¶¶ 31, 35" for "*Id.*

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¶¶ 31, 35” in the last paragraph on page 31 of the ID.

IV. Remedy, the Public Interest, and Bonding

A. Remedy

Complainant PBL seeks a GEO covering products that infringe the ‘691 and the ‘906 patents; an LEO covering products that infringe the D’809 patent and the Clarisonic Trade Dress; and CDOs as to each defaulting respondent, foreign and domestic. ComplRemedyOpen at 1.

In a Section 337 proceeding, the Commission has “broad discretion in selecting the form, scope, and extent of the remedy.” *Viscofan, S.A. v. United States Int’l Trade Comm’n*, 787 F.2d 544, 548 (Fed. Cir. 1986). The remedies available under section 337 include GEOs, LEOs, and CDOs.

1. GEO Covering Products That Infringe the ‘691 and the ‘906 Patents

Section 337 (d)(2) authorizes the Commission to issue a GEO to bar entry of infringing goods regardless of source provided that certain statutory requirements are met:

The authority of the Commission to issue an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that –

(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or

(B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19 U.S.C. § 1337(d)(2). In determining whether either criterion is satisfied the Commission may look not only to the activities of active respondents, but also to those of non-respondents as well as respondents who have defaulted or been terminated from an investigation. *Certain Electronic Paper Towel Dispensing Devices and Components Thereof*, Inv. No. 337-TA-718, Comm’n Op.

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at 16 (Dec. 1, 2011); *Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same*, Inv. No. 337-TA-650, Comm'n Op. at 59 (April 14, 2010).

Under section 337, the Commission is authorized to issue a GEO excluding all infringing goods regardless of the source when the conditions of section 337(d)(2) or (g)(2) are met. *See* 19 U.S.C. § 1337 (d)(2), (g)(2). Section 337(g)(2) requires that no person appears to contest the investigation. In the present investigation, certain respondents appeared before the Commission prior to being terminated from the investigation.⁴ Under these circumstances, issuance of a GEO under section 337(d)(2) is appropriate. *See Certain Sildenafil or Any Pharmaceutically Acceptable Salt Thereof, such as Sildenafil Citrate, and Products Containing Same*, Inv. No. 337-TA-489, Comm'n Op. at 4 (Jul. 23, 2004) (finding that the issuance of a GEO under section 337(d)(2) was appropriate when some respondents appeared to contest the investigation); *Certain Toner Cartridges and Components Thereof*, Inv. No. 337-TA-740, USITC Pub. No. 4376, Comm'n Op. at 24 (Feb. 2013).

As detailed below, the record in this investigation warrants the issuance of a GEO under both subparagraph (A) and subparagraph (B) of subsection 337(d)(2).

(a) Subparagraph (A) – Circumvention Of An LEO

The record shows the presence of facts that indicate the need for preventing

⁴*See e.g.* ALJ Order No. 34 (Markman Order) at 1 (“A Markman hearing was held in this Investigation on October 21, 2015. Counsel for the parties appeared at the hearing representing Complainant Pacific Bioscience Laboratories, Inc. (‘PBL’), Respondents Michael Todd LP and MTTO LLC (collectively, ‘MT Respondents’), Respondent RN Ventures Ltd. (‘RN Ventures’), and the Commission Investigative Staff (‘Staff’)). Subsequently, respondent RN Ventures Ltd. was terminated based on a settlement agreement (Order No. 36) (*not reviewed* Feb. 4, 2016). Respondents Michael Todd LP and MTTO LLC were also terminated based on a settlement agreement (Order No. 37) (*not reviewed* Mar. 3, 2016). ID/RD at 2-3.

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circumvention of an LEO by the named respondents.

The record indicates that respondents change their corporate names to escape detection. For example, defaulting respondent Xnovi changed its name and location several times during the course of this investigation. Mem. at 87; SUMF ¶¶ 179-182. According to the uncontroverted information provided by PBL, when the Complaint was filed Xnovi was believed to be at an address in Shenzhen, China, but it turned out that Xnovi actually was operating as a different company, Zherui Electronics Co., Ltd., with numerous possible addresses. ID/RD at 50. Xnovi eventually was served at an address in Shenzhen City, China, *see* Order No. 37 (Nov. 16, 2015), but PBL has since been unable to serve the company at that address. *Id.*; SUMF at ¶ 182.

Likewise, respondents operate under multiple names and distribute the subject articles through multiple entities. [[

]] SUMF at ¶¶ 55-56, 239. Respondent Our Family Jewels, Inc. also does business as Epipür Skincare; respondent Beauty Tech, Inc. also does business as 5th Avenue Buzz; and respondent Wenzhou Ai Er Electrical Technology Co., Ltd., also does business as CNAIER. Mem. at 85; SUMF ¶ 236.

As the ALJ noted, similar circumstances in other investigations have led the Commission to issue GEOs. ID/RD at 48-49. The undisputed evidence discussed *supra* supports issuance of a GEO with respect to the '691 and '906 patents in the present investigation.

Furthermore, the record shows that the market conditions in the United States indicate a high likelihood of circumvention of an LEO by the named respondents. According to PBL's unrebutted assertions, demand for the infringing products is strong and profits are high. ID/RD

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at 50; Mem. at 88-89. A price comparison shows that infringing products range in price from \$19.99 to \$129, while PBL's products range from \$99 to \$265. Mem. at 88-89; *see* SUMF ¶¶ 241-242.

The record also indicates that there are low barriers to entry into the market. ID/RD at 51. The components of the infringing devices are easy to assemble, Mem. at 89-90; SUMF ¶ 244, and the low cost of production makes it easy to enter into the market, ID/RD at 51. Once the cheap devices are manufactured, they are immediately ready for shipment into the United States, Mem. at 90; SUMF ¶¶ 247, 248, and the anonymous sale of infringing products on the Internet, including on popular websites such as Amazon.com, provides a ready market for retailers who source infringing goods from overseas suppliers, *see* SUMF ¶¶ 193, 195, 199, 203, 207, 214, 218, 221, 224, 229, 234-235.

The record indicates that the types of business practices engaged in by the defaulting respondents further supports the finding that an LEO would likely be circumvented. ID/RD at 51. For example, the source of the infringing products are unknown or difficult to identify. SUMF ¶¶ 145-146. Respondent Xnovi, for example, appears to be marketing many infringing devices with the same packaging and instruction manuals under different names. SUMF at ¶¶ 196, 198, 200, 202; *see* Supp. Ex. A (Miller Supp. Decl.) at ¶¶ 12-23. As the recommended determination ("RD") notes, widespread availability of these products online compounds the problem. ID/RD at 51; *see* Ex. 7 (Mueller Decl.); Ex. 33 (Miller Decl.); Supp. Ex. A (Miller Supp. Decl.).

The record shows that infringing devices may be relabeled or rebadged versions of other infringing products. For example, respondent Beauty Tech sells the NuSonic product, which is

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manufactured by an unknown foreign manufacturer. Mem. at 85; SUMF ¶¶ 145-146. Beauty Tech then repackages the NuSonic product as the Beauty Buzz, which was provided to Serious Skin Care. SUMF at ¶ 237. Serious Skin Care packaged the product as being distributed by Flageoli, the only identified seller of the product. SUMF ¶ 238. Infringing products have been purchased by PBL from Kmart.com and Amazon.com that were “the exact same device as [Xnovi’s] Lemonsonic, with the same accompanying manual and similar packaging,” but were sold under different names. Mem. at 86; SUMF ¶¶ 196, 198, 202. ID/RD at 51-52.

In sum, the evidence establishes that the named respondents engage in business practices that would make it difficult to detect a violation if only an LEO were issued, justifying issuance of a GEO with respect to the ‘691 and ‘906 patents. See ID/RD at 50-53.

(b) Subparagraph (B) – A Pattern Of Violation Of Section 337 Where It Is Difficult To Identify The Source Of Infringing Products

Undisputed record evidence shows a widespread pattern of infringement by both respondents and non-respondents. The record indicates that there is “an unending stream of infringing products from foreign manufacturers - mainly from China and South Korea.” Mem. at 74; see SUMF ¶¶ 142, 146, 154, 159, 163, 167, 171, 176, 185. ID/RD at 52. The record shows that it is relatively easy to register new companies in China and other countries, meaning that other companies in addition to those identified in the Complaint in this investigation currently may be producing infringing goods for the U.S. market or may be likely to do so in the future, unless a GEO is imposed. See Mem. at 85; ID/RD at 52. [[

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Mem. at 87; SUMF at ¶ 240. Furthermore, as already noted *supra*, during the course of the

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investigation, eight of the respondents were terminated by consent order (Nutra-Luxe M.D., LLC; SkincarebyAlana; Unicos; H2PRO Beautylife, Inc.; Jewlzie; Home Skinovations Inc. and Home Skinovations Ltd.; and Accord Media). Respondent RN Ventures, as well as respondents Michael Todd LP and MTTO, were terminated based on a settlement agreement. ID/RD at 2-3.

PBL instituted litigation against infringing devices in U.S. district court in 2010 and 2015. Mem. at 74-75; SUMF ¶¶ 54, 56, 57, 61. PBL also instituted enforcement actions against at least five Chinese manufacturers for infringement of a Chinese patent that is a counterpart to the '906 patent, obtaining relief through judgment or settlement against all five. Mem. at 75; SUMF ¶¶ 188-190. PBL also sought relief against another set of respondents in Great Britain. Mem. at 75; SUMF at ¶¶ 191-192. PBL asserts that "[t]here are a myriad of other infringing brush heads that can be found on Amazon.com." Mem. at 83; SUMF ¶ 233.

In sum, the record shows that a pattern of violation exists and that it is difficult to identify the source of infringing products, thus satisfying the requirement of 19 U.S.C. § 1337(d)(2)(B), and justifying a GEO directed to products that infringe the '691 and '906 patents. See ID/RD at 52-53.

(c) Michael Todd's Submission

Michael Todd requests that the GEO recommended by the ALJ include a carve-out provision for Michael Todd's products because, as a result of its settlement agreement with PBL, its products are either licensed or subject to a covenant not to sue by PBL.

MichaelToddRemedyOpen at 1-2. Michael Todd further argues that:

[I]t is not uncommon for the Commission to tailor exclusion orders to create express exceptions for licensed parties. See, e.g., *Certain Devices for Connecting Computers Via Telephone Lines*, Notice of

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Issuance of General Exclusion Order, Inv. No. 337-TA-360, USITC Pub. No. 2843, 1994 WL 932382, at *3 (Dec. 1994) (excluding covered devices “except under license of the patent owner or as provided by law”); *cf. Certain Two-Handle Centerset Faucets and Escutcheons*, Notice of Issuance of General Exclusion Order; Termination of the Investigation, Inv. No. 337-TA-442, USITC Pub. No. 3332, 2000 WL 1159298, at *3 (Jun. 19, 2000) (expressly stating that “nothing in the [General Exclusion] Order shall apply” to respondents who had entered consent orders).

MichaelToddRemedyOpen at 4.

The GEO that the Commission has determined to issue states that infringing products are to be “excluded ... except under license from, or with the permission of, the patent owner or as provided by law.” GEO at ¶1. We find that no additional carve-out provision expressly naming Michael Todd and/or its products is necessary. The language in the GEO provides Michael Todd the same protection for its products that are licensed or otherwise permitted to be imported under Michael Todd’s settlement agreement with PBL as the requested express carve-out, making such a carve-out redundant and unnecessary. The GEO includes a certification provision that would permit Michael Todd to certify that its products are not covered by the GEO, and it would be able to provide U.S. Customs and Border Protection with a copy of the settlement agreement to substantiate its certification.

2. LEOs Covering Products That Infringe the D’809 Patent and the Clarisonic Trade Dress

The ID finds that PBL’s uncontroverted evidence shows the accused products infringe the D’809 patent, and that the IA supports a finding of infringement. ID/RD at 43 (citing Staff Resp. at 44-48). The ID therefore finds that the Our Family Jewels Episonic, Anzikang Dione, Beauty Tech NuSonic, and Serious Skin Care/Flageoli Beauty Buzz products infringe the D’809 patent.

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Id. The Commission determined not to review the ID's infringement determination with respect to the D'809 patent. 81 *Fed. Reg.* at 35378.

Complainant PBL agrees with the ALJ's recommendation that the Commission issue an LEO covering products that infringe the D'809 patent. *See* ComplRemedyOpen at 1; ComplRemedyReply at 8; ID/RD at 53. Accordingly, we have decided to issue an LEO directed at the products of defaulting respondents Beauty Tech, Flageoli, Our Family Jewels, Serious Skin Care, and Anzikang that infringe the D'809 patent.

Complainant seeks only an LEO with respect to the asserted trade dress. We have decided to issue an LEO with respect to the asserted trade dress. The respondents accused of infringing the Clarisonic trade dress, Our Family Jewels and Anzikang, failed to appear and were found in default. Under such circumstances, "the Commission shall presume the facts alleged in the complaint to be true and shall, upon request, issue an exclusion from entry or a cease and desist order, or both." 19 U.S.C. § 1337(g)(1). Thus, the Commission has determined to issue an LEO directed to defaulting respondents, Our Family Jewels and Anzikang with respect to the asserted trade dress.

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3. CDOs^{5,6}

In addition to the exclusion orders discussed above, Complainant seeks cease and desist orders against all domestic and foreign defaulting respondents. ComplRemedyOpen at 1. OUII opposed the issuance of cease and desist orders to foreign defaulting respondents.

IARemedyOpen at 1. The ALJ recommends issuance of cease and desist orders against all defaulting respondents. ID/RD at 55. Based on the record of this investigation, the Commission finds that issuance of cease and desist orders directed to all defaulting respondents is appropriate.

We look to the statute's remedial framework in assessing our authority to provide an appropriate remedy in the form of cease and desist orders against the defaulting respondents to address the unlawful acts found in this investigation. Under three remedial provisions, Section 337(d), (f)(1), and (g), the Commission has the power to provide permanent relief in the form of an exclusion order and/or a cease and desist order upon finding a violation of Section 337.⁷ 19 U.S.C. §§ 1337(d), (f)(1), (g).

In investigations involving respondents that have participated in an investigation, the

⁵ Chairman Schmidlein agrees with the Commission's decision to issue the cease and desist orders, but she does not agree with the Commission's basis for issuing the orders. Chairman Schmidlein therefore does not join section IV.A.3 of the Commission's opinion. She writes separately to explain her views.

⁶ Commissioner Kieff joins the Commission's determination to issue CDOs directed to each of the defaulting respondents in this case, but respectfully does not agree with the statutory interpretation of the Commission Majority concerning this remedy or with the underlying reasoning offered by the Commission Majority to the extent it suggests presumptions, practice, burdens and the like. Commissioner Kieff therefore does not join section IV.A.3. of the Commission's Opinion. *See Separate Views of Commissioner F. Scott Kieff Concurring as to Remedy for Respondents in Default.*

⁷ Temporary relief is available in an expedited proceeding under Section 337(e), 19 U.S.C. § 1337(e).

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Commission is required to provide some form of relief under Section 337(d) and/or (f)(1) unless such relief is contrary to the public interest. As the Federal Circuit explained in *Viscofan*,

Section 337 requires the Commission, upon determining a violation of the section, either to “direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States” (subsection (d)) or to direct any person violating the section “to cease and desist from engaging in the unfair methods or acts involved, unless after considering the effect of such order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such order should not be issued.” (Subsection (f)(1)).

787 F.2d at 548.

Indeed, the statute provides the Commission discretion to choose whether to issue an exclusion order, or a cease and desist order, or both where participating respondents are found in violation of Section 337. 19 U.S.C. §§ 1337(d) and (f)(1). Although the language of Section 337(d)(1) states that the Commission “shall” issue an exclusion order in an investigation in which a violation is found, other provisions of Section 337 indicate that the use of “shall” in Section 337(d) does not mandate issuance of an exclusion order in all investigations where a violation by participating respondents is found. Specifically, Section 337(f)(1) clarifies that the Commission retains discretion as to whether or not to issue an exclusion order under (d)(1), and may deny an exclusion order in lieu of other relief. 19 U.S.C. § 1337(f)(1) (“In addition to, or in lieu of, taking action under subsection (d) or (e) of this section, the Commission may issue and cause to be served on any person violating this section, or believed to be violation this section, as the case may be, an order directing such person to cease and desist from engaging in the unfair methods or acts involved”). Moreover, in reciting the standard of review applicable to

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Commission findings concerning remedies under Sections 337(d), (e), (f), and (g), Section 337(c) specifically refers to Commission findings regarding “the appropriate remedy” as to each of these remedial provisions. 19 U.S.C. § 1337(c) (“Notwithstanding the foregoing provisions of this subsection, Commission determinations under subsections (d), (e), (f), and (g) of this section with respect to its findings on the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the amount and nature of bond, or the appropriate remedy shall be reviewable in accordance with section 706 of Title 5.”).

The legislative history of Section 337(f) confirms the Commission’s authority to issue either, or both, forms of relief the Commission finds appropriate under the facts of the investigation. In 1988, Section 337(f) was amended to clarify the Commission’s authority to issue both an exclusion order and a cease and desist order for the same unfair act because in some investigations the Commission interpreted the prior law as authorizing only the issuance of an exclusion order or a cease and desist order, but not both forms of relief to remedy the unfair acts found. As the House and Senate Reports note:

The Commission has interpreted the current language as prohibiting it from issuing both an exclusion order and a cease and desist order to remedy the same unfair act. There are circumstances, however, where it is in the public interest to issue both. For example, a cease and desist order prohibiting a domestic respondent from selling the imported infringing product in the United States may be appropriate when the product has been stockpiled during the pendency of an investigation and an exclusion order may be appropriate to prevent future shipments of the infringing product. When the Commission determines that both remedies are necessary, it should be without legal question that the Commission has authority to order such relief. This amendment provides that authority.

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S. Rep. No. 100-71, at 131 (1987); *accord* H.R. Rep. No. 100-40, at 159-60.

Turning to investigations in which a respondent is found in default for failure to respond to the complaint and notice of investigation, Section 337(g)(1) authorizes Commission action regarding alleged violations by defaulting respondents and provides remedial authority directed to such defaulters when requested. Section 337(g), entitled “*Exclusion from entry or cease and desist order; conditions and procedures applicable*,” provides that “the Commission shall presume the facts alleged in the complaint to be true and shall, upon request, issue an exclusion from entry or a cease and desist order, or both, limited to that person” unless the Commission determines that it is not in the public interest to issue such relief.⁸ 19 U.S.C. § 1337(g)(1). Thus, the mandatory language of this provision (“shall”), coupled with the use of the coordinating conjunction “or,” requires the Commission to issue relief as to the defaulting respondent in the form of three alternative choices – an exclusion order, a cease and desist order, or both – when the conditions and applicable procedures of this provision are satisfied.

This default judgment provision was added to Section 337 in 1988 at the same time that Section 337(f) was amended to clarify the Commission’s authority to choose an appropriate remedy, whether it be an exclusion order, a cease and desist order, or both. The legislative history of Section 337(g) notes that the addition of the provision for “Default Judgments” was motivated by the fact that discovery is usually difficult, if not impossible, to obtain from named respondents who have chosen not to participate in an investigation. *See* S. Rep. No. 100-71, at

⁸Section 337(g)(2) authorizes the issuance of a general exclusion order where no respondent appears to contest an investigation, a violation is established by substantial, reliable, and probative evidence, and the requirements of Section 337(d)(2) are satisfied. 19 U.S.C. § 1337(g)(2).

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132; *accord* H.R. Rep. No. 100-40, at 160-61. Thus, Congress recognized that without participation, it is difficult for a complainant to establish sufficient facts to warrant a finding of a violation of Section 337 or what relief is applicable. Therefore, the legislative history notes that the default provision “authorizes the Commission to presume the facts alleged in the complaint to be true insofar as they involve a defaulting respondent, and to then issue relief limited to those respondents.” *See* S. Rep. No. 100-71, at 132; *accord* H.R. Rep. No. 100-40, at 161. The Conference Committee Report, noting the identical default provisions in the House and Senate bills, clarified that under the new default provision, the Commission has authority to issue “appropriate relief” for defaulting respondents. H. Conf. Rep. No. 100-576, at 636 (“... when a respondent fails to appear, the ITC shall presume the facts alleged in the complaint to be true and shall, upon request, issue appropriate relief solely against that person.”). This reference to the Commission’s authority to issue “appropriate relief” to defaulting respondents refers to the language of Section 337(g)(1) setting forth the types of relief the Commission may choose from (“an exclusion from entry or a cease and desist order, or both”), and echoes the House and Senate Report statements quoted above concerning the Commission’s authority to select “appropriate” relief as to participating respondents depending on the circumstances in connection with the concurrent amendment to Section 337(f). Moreover, as noted above, Section 337(c) recites Section 337(g) within the list of statutory provisions concerning “the appropriate remedy” that is subject to judicial review under Section 706 of Title 5.⁹

⁹This interpretation of Section 337(g) does not render Sections 337(d) and (f) superfluous. The Commission’s interpretation of the statute distinguishes between default situations, in which the remedy is governed by Section 337(g), and contested situations, in which the remedy is governed by Sections 337(d) and (f). As discussed above, Section 337(g) was added to enable

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In accordance with the language of Sections 337(d) and (f) and the legislative guidance provided in the legislative history, the Commission examines the facts in the evidentiary record to select the appropriate relief in the form of either an exclusion order or a cease and desist order, or both, to address the unfair acts of the participating respondents. Cease and desist orders are generally issued when, with respect to the imported infringing products, respondents maintain commercially significant inventories in the United States or have significant domestic operations that could undercut the remedy provided by an exclusion order. *See, e.g., Certain Protective Cases and Components Thereof*, Inv. No. 337-TA-780, USITC Pub. No. 4405 (July 2013), Comm'n Op. at 28 (Nov. 19, 2012) (citing *Certain Laser Bar Code Scanners and Scan Engines, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-551, Comm'n Op. at 22 (June 14, 2007)). A complainant seeking a cease and desist order must demonstrate, based on the record, that this remedy is necessary to address the violation found in the investigation so as to not undercut the relief provided by the exclusion order. *Certain Integrated Repeaters*,

the Commission to better address violation and remedy where one or more respondents are found in default. Congress' inclusion of a remedy provision in that section, as opposed to merely referring to Sections 337(d) and (f), makes sense since the presumptions the Commission is allowed to apply under Section 337(g) pertain both to issues of violation and of remedy as to defaulting respondents. For example, unlike under Sections 337(d) and (f), which make no mention of presumptions, under section 337(g)(1) the Commission may make evidentiary findings based on the complaint allegations, drawing presumptions in favor of the complainant based on the record, in support of the issuance of an appropriate remedy consisting of at least one of three remedial options (a limited exclusion order, a cease and desist order, or both). This is supported by the statutory use of the word "shall" along with the use of "or" and "or both" and the grant of this appropriate relief can be overcome only by evidence pertaining to the statutory public interest factors. Thus, we do not read Congress' inclusion of explicit remedy provisions in Section 337(g) as mandating against giving the Commission discretion to consider the appropriate relief in default circumstances. So long as agency action is consistent with these requirements, the Commission retains the discretion to determine the appropriate remedy as to defaulting respondents under Section 337(g)(1).

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Switches, Transceivers, and Products Containing Same, Inv. No. 337-TA-435, USITC Pub. No. 3547 (Oct. 2002), Comm'n Op. at 27 (Aug. 16, 2002) (“[C]omplainants bear the burden of proving that respondent has such an inventory. Because complainants failed to sustain their burden, we have determined not to issue a cease and desist order.”). *See also* H.R. Rep. No. 100-40, at 160 (“When the Commission determines that both remedies [i.e., an exclusion order and cease and desist order] are necessary, it should be without legal question that the Commission has authority to order such relief.”); S. Rep. No. 100-71, at 131 (same).

As discussed above, the Federal Circuit has repeatedly noted that “the Commission has broad discretion in selecting the form, scope, and extent of the remedy” in Section 337 investigations. *See, e.g., Viscofan*, 787 F.2d at 548; *Hyundai Electronics Industries Co., Ltd. v. U.S. Int’l Trade Comm’n*, 899 F.2d 1204, 1209 (Fed. Cir. 1990). Indeed, in reviewing the relief granted in the *EPROMs* investigation, 337-TA-276, the Federal Circuit observed that “[t]he Commission fashioned the remedy with sensitivity and objectivity” where the Commission narrowly tailored the scope of its exclusion order, including the certification provision thereof, and “refused to issue Hyundai a cease and desist order, *see* 19 U.S.C.A. § 1337(f), (g), because there was no evidence that Hyundai maintained significant inventories of infringing articles in the United States.” *Hyundai*, 899 F.2d at 1209-10. Likewise, in reviewing the *Lens-Fitted Film Packages* determination, the Court upheld the Commission’s refusal to issue cease and desist orders against foreign respondents with no inventory in the United States and rejected complainant’s argument that the Commission’s reliance on Customs to bar the entry of infringing goods is “unrealistic and thus legally unjustified.” *Fuji Photo Film Co., Ltd. v. Int’l Trade Comm’n*, 386 F.3d 1095, 1106-08 (Fed. Cir. 2004). In so ruling, the Court noted “what the

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Commission described as its standard practice of not issuing cease and desist orders against respondents who have no domestic inventory. This practice is based on the Commission's view that ordinarily exclusion orders enforced by Customs should be sufficient to prevent entry of articles into the United States, whereas an order to Customs is ineffective with regard to existing stockpiles of domestic inventory." *Id.* at 1107.

In determining whether to issue a cease and desist order in default cases, the Commission has examined similar facts to determine appropriate relief in any investigation in which a violation is found, namely whether defaulting respondents maintain commercially significant inventories in the United States or have significant domestic operations that could undercut the remedy provided by an exclusion order. However, as the legislative history notes, in investigations in which a default is found, discovery may be difficult, if not impossible, to obtain from the parties, and hence there are limited facts available in the record. In these investigations, the Commission examines the record, including facts alleged in the complaint that are deemed to be true, as well as any other information the complainant has been able to obtain, and has found it appropriate to draw certain inferences from this evidence in favor of the complainant to provide the necessary relief.¹⁰ Specifically, in cases where the respondent is located in the United States and defaulted under Section 337(g)(1), the Commission has consistently inferred the presence of commercially significant inventories in the United States based on the facts of

¹⁰ The Commission's longstanding practice concerning the issuance of cease and desist orders against defaulting respondents thus is consistent with the purpose of the 1988 amendments to Section 337 "to make it a more effective remedy for the protection of United States intellectual property rights." Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, § 1341(b), 102 Stat. 1212 (1988).

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record. *See Certain Agricultural Tractors, Lawn Tractors, Riding Lawnmowers, And Components Thereof* (“Agricultural Tractors”), Inv. No. 337-TA-486, USITC Pub. No. 3625, Comm’n Op. at 17-18 (July 14, 2003).¹¹ Due to the domestic presence and lack of participation, the Commission has historically granted a complainant’s request for relief in the form of a cease and desist order regarding U.S. based activities for domestic respondents found in default.

As for defaulting respondents located outside the United States, the Commission has declined to automatically presume the presence of domestic inventories in the United States to support the issuance of a cease and desist order. *See id.* at 18-20. Rather, the Commission has examined, for example, whether the complaint alleges facts that support the inference that the defaulting foreign respondent or its agents maintain commercially significant inventories in the United States with respect to the articles found in violation. *Id.* (declining to issue a cease and desist order against foreign defaulting respondents because the complaint allegations did not aver commercially significant inventories nor support such an inference).¹² Similarly, the

¹¹*See also Certain Agricultural Tractors Under 50 Power Take-Off Horsepower*, Inv. No. 337-TA-380, USITC Pub. 3026, Comm’n Op. at 44 n.124 (March 1997), *aff’d sub nom.*, *Gamut Trading Co. v. U.S. Int’l Trade Comm’n*, 200 F.3d 775 (Fed. Cir. 1999); *Certain Video Game Systems, Accessories and Components Thereof*, Inv. No. 337-TA-473, Comm’n Op. at 2 (Dec. 24, 2002); *Certain Digital Multimeters, and Products with Multimeter Functionality*, Inv. No. 337-TA-588, Comm’n Op. at 7 (June 3, 2008); *Certain Toner Cartridges and Components Thereof*, Inv. No. 337-TA-740, Comm’n Op. at 6-7 (Sept. 27, 2011); *Certain Digital Photo Frames and Image Display Devices and Components Thereof*, Inv. No. 337-TA-807, Comm’n Op. at 10-11 (March 27, 2013); *Certain Toner Cartridges, and Components Thereof*, Inv. No. 337-TA-918, Comm’n Op. at 12 (Oct. 1, 2015); *Certain Personal Transporters*, Inv. No. 337-TA-935, Comm’n Op. at 13 (Apr. 20, 2016); *Certain Ink Cartridges and Components Thereof*, Inv. No. 337-TA-946, Comm’n Op. at 14 (June 29, 2016).

¹²*Certain Toner Cartridges and Components Thereof*, Inv. No. 337-TA-740, USITC Pub. No. 4376 (Feb. 2013), Comm’n Op. at 7-8 (Oct. 5, 2011) (issuing cease and desist orders against foreign defaulting respondents where the evidence showed that their distributors included the

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Commission has examined allegations in the complaint that foreign defaulting respondents maintain commercially significant U.S. inventories and/or are engaging in significant commercial business operations in the United States supported by available circumstantial evidence of online offers for sale, sales, and distribution of infringing products (as well as corresponding supporting documents relating to those sales) by foreign defaulting respondents demonstrating such significant domestic presence. *See Certain Digital Photo Frames and Image Display Devices and Components Thereof*, Inv. No. 337-TA-807, Comm'n Op. at 10-11 (March 27, 2013) ("*Digital Photo Frames*").

These decisions recognize that because the foreign respondents have defaulted, it is difficult for complainants to obtain detailed discovery to establish record evidence regarding the foreign respondents' U.S. business operations and agents, including the magnitude, ownership, and distribution channels for U.S. inventories of infringing products, and all reasonable inferences should be granted in favor of the complainant. However, without support in the record, the Commission has declined such requested relief against foreign defaulters.¹³ We

domestic respondents that were agents of the foreign respondents and that maintained commercially significant inventories in the United States for those foreign entities).

¹³*See Agricultural Tractors*, Inv. No. 337-TA-486, Comm'n Op. at 19-20 ("Section 337(g)(1) provides that, when a respondent is found in default for failure to respond to the complaint and notice of investigation, 'the Commission shall presume the facts alleged in the complaint to be true.' . . . The complaint at issue here does not contain an allegation that Futian maintains commercially significant inventory of the accused products in the United States, and the allegations in the complaint do not support such an inference."); *Certain Agricultural Tractors Under 50 Power Take-Off Horsepower*, Inv. No. 337-TA-380, Comm'n Op. at 44 n.124 (Mar. 1997) (issuing cease and desist orders against domestic defaulting respondents based on presumption of significant inventories, while issuing only GEO as to defaulting foreign respondents); *Certain Audible Diver Alarms*, Inv. No. 337-TA-365, Comm'n Op. at 6, USITC Pub. No. 2903 (Aug. 1995) (declining to grant complainant's request for a CDO against

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believe this is a sensible and reasonable approach, particularly due to the potential challenges to enforcement of a domestic order against a foreign company without any commercially significant inventory or business operations in the United States. In fact, in many investigations, complainants do not request such relief against defaulting foreign respondents.

As discussed herein, we find that the record supports issuance of CDOs directed against each of the defaulting respondents, including the foreign defaulting respondents. As noted above, under Commission precedent, it is appropriate to infer that domestic defaulting respondents Flageoli, Serious Skin Care, Our Family Jewels, and Beauty Tech maintain significant inventories of infringing products in the U.S. and to issue CDOs against each of them. *See Certain Toner Cartridges and Components Thereof*, Inv. No. 337-TA-829, Comm'n. Op. at 9 (July 29, 2013); *Digital Photo Frames*, Comm'n Op. at 8-9 (citing *Agricultural Tractors*, Inv. No. 337-TA-486, Comm'n Op. at 18). ID/RD at 54-55.

The record likewise supports issuance of CDOs directed to the foreign defaulting respondents Xnovi, Anzikang, ANEX, Korean Beauty, Wenzhou, and Coreana. The RD cites record evidence to support the finding that the foreign defaulting respondents maintain commercially significant inventories of the accused products in the United States through their use of online retailers as well as U.S. business operations through U.S. based retailers and distributors. For example, the evidence includes proof of many U.S. distributors selling infringing products, including those of the foreign defaulting respondents, through online retailers. ID/RD at 55 (citing Mot. Exs. 7A1-2, 7C1-2, 7E1-2, 7H1-2, 7I1-2, 7J1-2, 7K1-2, 7L1-2,

defaulting foreign respondent due to a lack of a showing of stockpiled inventories in U.S. or that any activities by Duton in the United States would have any effect on complainant).

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7Ml-2, 7Nl-2, 7Pl-2). *See also* Mem. at 97-98; Complaint ¶¶ 45, 115, 206; ComplRemedyReply at 2-4. These documents demonstrate short lead times between order placement and delivery, low shipping costs, and other indications that support the inference that the U.S. purchases of the foreign respondents' infringing products were made from U.S. inventories. *See, e.g.,* Mot. Exs. 7Cl (Xnovi); 7El (Anzikang); 7Il (ANEX); 7Kl (Korean Beauty); 7Ml (Coreana); 7Pl (Wenzhou). Moreover, as discussed above, the record shows the foreign defaulting respondents appear to be involved in U.S. business operations with respect to infringing devices, such as relabeling or rebadging versions of infringing products. For example, foreign defaulting respondent Xnovi appears to be marketing many infringing devices with the same packaging and instruction manuals under different names. SUMF at ¶¶ 196, 198, 200, 202; *see* Supp. Ex. A (Miller Supp. Decl.) at ¶¶ 12-23. Xnovi's infringing products have been purchased by PBL from Kmart.com and Amazon.com that were "the exact same device as [Xnovi's] Lemonsonic, with the same accompanying manual and similar packaging," but were sold under different names. Mem. at 86; SUMF ¶¶ 196, 198, 202. ID/RD at 51-52.

Furthermore, as the ALJ notes, there is widespread availability of these foreign defaulting respondents' infringing products via online retailers. ID/RD at 51; *see* Ex. 7 (Mueller Decl.); Ex. 33 (Miller Decl.); Supp. Ex. A (Miller Supp. Decl.). Indeed, the record indicates there is "an unending stream of infringing products from foreign manufacturers - mainly from China and South Korea." Mem. at 74; *see* SUMF ¶¶ 142, 146, 154, 159, 163, 167, 171, 176, 185. ID/RD at 52. The anonymous sale of infringing products on the Internet, including on popular websites such as Amazon.com, provides a ready market for retailers and distributors who source

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infringing goods from overseas suppliers. See SUMF ¶¶ 93, 195, 199, 203, 207, 214, 218, 221, 224, 229, 234-235.

Although discovery concerning these foreign defaulting respondents' U.S. inventories and U.S. business operations was not available due to their default, the complaint allegations and other information that complainant was able to gather constitute an adequate record to support the conclusion that the foreign defaulting respondents possess or control commercially significant inventory in the United States and have significant domestic operations. Therefore, the issuance of CDOs directed to the foreign defaulting respondents is appropriate.

Accordingly, we have decided to issue CDOs directed against each of the defaulting respondents, both domestic and foreign.

B. Public Interest

Before issuing a remedy for a violation of Section 337, the Commission must consider the effect of the remedy on certain public interest considerations: (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) the U.S. production of articles that are like or directly competitive with those which are the subject of the investigation, and (4) U.S. consumers. 19 U.S.C. §§ 1337(d), (f), (g). Both the IA and PBL submit that the public interest factors do not weigh against the proposed remedy in this investigation.

We find that the evidentiary record in this investigation indicates that none of the section 337 public interest factors raises concerns that would preclude issuance of the remedial orders in this investigation. First, the evidence in the record indicates that the remedial orders would not have an adverse effect on health and welfare. See *e.g. Certain Toner Cartridges and*

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Components Thereof, Inv. No. 337-TA-918, Comm'n Op. at 13-14 (Aug. 31, 2015). The record indicates that the remedial orders will benefit public health, safety, or welfare by removing lesser-quality, knock-off products from the marketplace. SUMF ¶¶ 111, 258; Mem. at 100. The evidence shows that PBL devotes significant sums of its annual revenues to research and development, including university-based clinical studies, to ensure that its Clarisonic line of electric skin care brushes are as safe and effective as possible. Mem. at 100 (citing SUMF ¶ 111). PBL submits that many of the accused products, while copying proprietary elements of PBL's patents, are of inferior construction and design. PBL points out that its experts, Dr. Draelos and Prof. Fabien, had difficulties operating certain infringing products that appeared to suddenly stop working. *Id.* (citing SUMF ¶ 258).

Second, there is no evidence that issuance of the remedial orders will have any effect on competitive conditions in the U.S. economy. *See* Mem. at 100-101; IARes at 76.

Third, the record evidence indicates that the orders would have a positive effect on the production of electric skin care devices in the United States. PBL represented that should the accused products be excluded from the United States marketplace, it can meet the demand for electric skin care devices. [[

]] *See*

Certain Cellular Radiotelephones and Subassemblies and Component Parts Thereof,

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337-TA-297, Comm'n Op. on Remedy, Public Interest and Bonding at 8 (Aug. 29, 1989); *see also Certain Toner Cartridges and Components Thereof*, Inv. No. 337-TA-918, Comm'n Op. at 14 (Aug. 31, 2015).

Fourth, the record indicates that U.S. customers will not be adversely affected by the remedial orders. The infringing products relate to the treatment of acne, a non-life-threatening and largely cosmetic skin condition. Relief provided by the remedial orders will not deprive the public of treatment options because, *inter alia*, PBL anticipates that it can meet the demand for any excluded products, and consumers have a variety of commercial alternatives for the treatment of acne, such as manual cleansing with soap, topical creams and ointments, and orally-administered medications. Mem. at 101. *See also Certain Integrated Telecommunication Chips and Products Containing Same*, 337-TA-337, Comm'n Op. at 40 (Jun. 30, 1993).

Based on the foregoing, we find that entry of the Commission's remedial orders would not be contrary to the public interest.

C. Bond During the Period of Presidential Review

Pursuant to section 337(j)(3), the Commission must determine the amount of bond to be required of a respondent during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to issue a remedy. The purpose of the bond is to protect the complainant from injury during the Presidential review period. 19 U.S.C. § 1337(j)(3); 19 C.F.R. §§ 210.42(a)(1)(h), 210.50(a)(3). The complainant bears the burden of establishing its request for an appropriate bond amount to be imposed on respondents' continued activities during the Presidential review period based on the record. *Certain Rubber*

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Antidegradants, Components Thereof, and Products Containing Same, Inv. 337-TA-533, Comm'n Op. at 39-40 (July 21, 2004) ("In our view, the complainant has the burden of supporting any proposition it advances, including the amount of the bond."). Both PBL and the IA argue that, given the state of the evidentiary record, the bond amount should be set at 100 percent of the entered value of the accused products as no reliable price differential can be determined. *See* Mem. at 101-102, IARemedyOpen at 18-19.

The Commission ordinarily sets the Presidential review period bond based on the price differential between the domestic and the accused products, or based on a reasonable royalty. *See e.g. Certain Microsphere Adhesives, the Process for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Op. at 24, USITC Pub. No. 2949 (Jan. 1996) (setting bond based on price differentials). In this case, there is no reliable pricing information because the respondents defaulted and failed to participate in discovery. Nor is there any evidence concerning royalty rates. The Commission has set bond rates at 100 percent of the entered value of the accused product where the available pricing or royalty information is insufficient. *See e.g. Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing Same*, Inv. No. 337-TA-372, Comm'n Op. on Remedy, the Public Interest, and Bonding at 15, USITC Pub. 2964 (May 1996). Since the record in the present investigation lacks sufficient evidence of either pricing information or a reasonable royalty rate, we have determined to set the bond amount at 100 percent of the entered value of the accused products during the period of Presidential review. *See also* ID/RD at 56.

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V. CONCLUSION

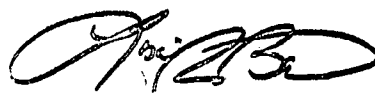
Having considered the ALJ's Initial Determination and Recommended Determination, the parties' submissions filed in response to the Commission's Notice, and the evidentiary record, the Commission has determined to issue: (a) a GEO prohibiting the unlicensed importation of certain electric skin care devices, brushes or chargers therefor, or kits containing same that infringe one or more of claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, 49 of the '691 patent and claims 1-2, 4-5, and 7-15 of the '906 patent; (b) an LEO prohibiting the unlicensed entry of infringing electric skin care devices, brushes or chargers therefor, or kits containing same (i) that are covered by the claim of the D'809 patent and that are manufactured abroad by or on behalf of, or imported by or on behalf of respondents Beauty Tech; Flageoli; Our Family Jewels; Serious Skin Care; or Anzikang, or any of their affiliated companies, parents, subsidiaries, licensees, or other related business entities, or their successors or assigns, or (ii) that are covered by one or more of the Clarisonic Device Trade Dress or Clarisonic Charging Station Trade Dress and that are manufactured abroad by or on behalf of, or imported by or on behalf of, respondents Our Family Jewels or Anzikang, or any of their affiliated companies, parents, subsidiaries, licensees, or other related business entities, or their successors or assigns; and (c) CDOs directed against each of the Defaulting Respondents, including domestic and foreign Defaulting Respondents.

The Commission has further determined that the public interest factors enumerated in subsections (d)(l), (f)(1), and (g)(1) (19 U.S.C. §§ 1337(d)(l), (f)(1), (g)(1)) do not preclude issuance of these remedial orders. Finally, the Commission has determined that a bond in the

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amount of 100 percent of the entered value of the infringing products is required to permit temporary importation of the articles in question during the period of Presidential review (19 U.S.C. § 1337(j)).

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: February 13, 2017

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

In the Matter of

**CERTAIN ELECTRIC SKIN CARE
DEVICES, BRUSHES AND CHARGERS
THEREFOR, AND KITS CONTAINING
THE SAME**

Investigation No. 337-TA-959

**SEPARATE VIEWS OF CHAIRMAN
RHONDA K. SCHMIDTLEIN ON CEASE AND DESIST ORDERS**

I agree with the Commission's decision to issue the remedial orders in this investigation, but I do not join the Commission's opinion with regard to the basis for issuing the cease and desist orders.¹ As explained in more detail below, given that all of the defaulting respondents² failed to answer the complaint and notice, the question of a cease and desist order as remedial relief in this case is governed by 19 U.S.C. § 1337(g)(1). Under section 337(g)(1), issuance of the cease and desist orders is mandated for the defaulting respondents, where all of the statutory requirements of that provision are met. The majority, however, interprets section 337(g)(1) as conferring discretion on the Commission to decide whether to issue cease and desist orders, which, in my view, is contrary to the language of the statute and inconsistent with the statutory purpose articulated in the legislative history. I therefore respectfully disagree with the majority's approach of drawing inferences from the complaint to assume facts not alleged in order to determine whether a cease and desist order is appropriate as that approach is premised on the exercise of discretion.

Two provisions of section 337 of the Tariff Act of 1930, as amended, govern the issuance of cease and desist orders as remedial relief for violation determinations: section 337(f)(1) and section 337(g)(1). Section 337(f)(1), on one hand, broadly provides that the Commission "*may* issue and cause to be served on any person violating this section or believed to be violating this section, as the case may be, an order directing such person to cease and desist from engaging in the unfair methods or acts involved" after consideration of the statutory public interest factors. 19 U.S.C. § 1337(f)(1) (emphasis added). This provision leaves it to the discretion of the Commission and does not establish any particular test or standard for issuing a cease and desist order against a party in violation aside from consideration of the public interest factors.

¹ I agree with the Commission that the public interest factors do not preclude remedial relief in this investigation.

² The defaulting respondents are Flageoli Classic Limited ("Flageoli"); Serious Skin Care, Inc. ("Serious Skin Care"); Our Family Jewels, Inc. ("Our Family Jewels"); Beauty Tech, Inc. ("Beauty Tech"); Xnovi Electronic Co., Ltd. ("Xnovi"); Shanghai Anzikang Electronic Co., Ltd. ("Anzikang"); ANEX Corp. ("ANEX"); Korean Beauty Co., Ltd. ("Korean Beauty"); Wenzhou Ai Er Electrical Technology Co., Ltd. ("Wenzhou Ai Er"); and Coreana Cosmetics Co., Ltd. ("Coreana").

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In contrast, section 337(g)(1) reads as follows:

(1) If—

- (A) a complaint is filed against a person under this section;
- (B) the complaint and a notice of investigation are served on the person;
- (C) the person fails to respond to the complaint and notice or otherwise fails to appear to answer the complaint and notice;
- (D) the person fails to show good cause why the person should not be found in default; and
- (E) the complainant seeks relief limited solely to that person;

the Commission shall presume the facts alleged in the complaint to be true and *shall, upon request, issue* an exclusion from entry or *a cease and desist order*, or both, limited to that person unless, after considering the effect of such exclusion or order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the Commission finds that such exclusion or order should not be issued.

19 U.S.C. § 1337(g)(1) (emphasis added).

Section 337(g)(1) on its face directs the Commission to issue a requested cease and desist order when the conditions listed in subsections (A)-(E) are met unless such relief is contrary to the public interest. If the conditions in subsections (A)-(E) are not satisfied (*e.g.*, due to the fact that the respondent participates in the investigation) then section 337(f)(1) is the operative provision, wherein the Commission has broad discretion to decide whether to issue a cease and desist order against a party found to be in violation. Neither provision mentions inventory nor establishes a commercially significant inventory requirement in order for the Commission to issue a cease and desist order.

There is no dispute in this case that the predicate requirements in subsections (A)-(E) of section 337(g)(1) have been satisfied for each of the defaulting respondents. Specifically, the complainant filed a complaint alleging violations of section 337 and naming the defaulting respondents. *See* Notice of Investigation, 80 *Fed. Reg.* 36576-77 (Jun. 25, 2015). The defaulting respondents were served with the complaint. *See* Order No. 13; Order No. 17; Order No. 18; Order No. 24; and Order No. 32; 19 C.F.R. § 210.11. The defaulting respondents failed to respond to the complaint and notice. *See* Order No. 13; Order No. 18; Order No. 24; and Order No. 32. Moreover, despite the ALJ's orders requiring the defaulting respondents to show cause why they should not be found in default, they did not respond. *See id.* The Commission found

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the defaulting respondents in default and today they are found to be in violation of section 337. And the complainant has requested a cease and desist order directed to each of the defaulting respondents.³

The use of the term “shall” in section 337(g)(1) indicates that Congress did not intend for the Commission to exercise discretion on deciding whether to issue a cease and desist order if the conditions laid out in the statute are satisfied. *See Farrel Corp. v. U.S. Int’l Trade Comm’n*, 949 F.2d 1147, 1153 (Fed. Cir. 1991) (“The use of ‘shall’ in a statute is ‘the language of command,’ and where ‘the directions of a statute are mandatory, then strict compliance with the statutory terms is essential to the validity of the administrative action.’”), *superseded on other grounds by statute*, Uruguay Round Agreements Act, Pub. L. 103–465 (1994). Notably, the “shall” language used in section 337(g)(1) contrasts with the permissive language used in section 337(f)(1) concerning the issuance of cease and desist orders against participating respondents, which states that “the Commission *may* issue . . . an order directing such person to cease and desist.” 19 U.S.C. § 1337 (f)(1) (emphasis added). In my view, Congress’ use of different terms in provisions addressing the same subject matter but in a different context (defaulting respondents verses participating respondents) underscores that they were intended to have different meanings. *See Anderson v. Yungkau*, 329 U.S. 482, 485 (1947) (“[W]hen the same Rule uses both ‘may’ and ‘shall’, the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory.”); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (“Congress’ use of the permissive ‘may’ . . . contrasts with the legislators’ use of a mandatory ‘shall’ in the very same section.”). Congress knows how to confer discretion upon the Commission when it so wishes; it did so in section 337(f)(1) with its use of the term “may” but it chose not to use that term in section 337(g)(1).

The majority contends that the “or” language in section 337(g)(1) (*i.e.*, “The Commission . . . shall, upon request, issue an exclusion from entry *or* a cease and desist order, *or* both”) is an indication of a grant of Commission discretion. On the contrary, that language is merely a recognition of the different remedial relief that may be requested by the complainant. Again, the “shall” language of section 337(g)(1) contrasted with the “may” language of section 337(f)(1) is a compelling indication that those provisions were intended to have different meanings. Further, use of the “upon request” language in section 337(g)(1) is unnecessary if Congress intended to codify the majority’s interpretation of conferring discretion upon the Commission.

The legislative history of section 337(g)(1) supports the interpretation that cease and desist orders are mandated if the statutory conditions therein are satisfied. Section 337(g) was added to the statute as part of the Omnibus Trade and Competitiveness Act of 1988. The fundamental purpose of the section 337 amendments under the Act was to strengthen section 337’s effectiveness against the importation of articles which infringe U.S. intellectual property rights. *See H.R. Rep. No. 100-40*, at 153 (1987); *S. Rep. No. 100-71*, at 127 (1987). The House committee report on the bill amending the statute reads as follows on the addition of section 337(g):

³ A cease and desist order is a personal order. It is limited solely to the party identified. *See* 19 U.S.C. § 1337(f) (defining cease and desist order as an order directing “any person violating this section, or believed to be violating this section . . . to cease and desist from engaging in the unfair methods or acts involved”).

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Default Judgments

Present law

No provision.

Explanation of provision

Section 172(a)(5)(c) adds a new subsection to the Act which requires the Commission, in cases involving defaulting respondents, to presume the facts alleged in the complaint to be true and, upon request, to issue relief against the defaulting respondents, unless the enumerated public interest factors (the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers) preclude relief. However, a general exclusion order prohibiting the entry of unfairly traded articles regardless of their sources may not be issued unless a violation of the Act has been established by substantial, reliable, and probative evidence.

Reasons for change

This amendment is motivated by the fact that discovery is usually difficult or impossible to obtain from respondents who have chosen not to participate in a section 337 investigation. For this reason, the bill authorizes the Commission to presume the facts alleged in the complaint to be true insofar as they involve a defaulting respondent, and to then issue relief limited to that respondent. The amendment will therefore not affect participating respondents. Relief in the form of a general exclusion order must be supported by a Commission finding of violations of the Act based on substantial, reliable, and probative evidence. Complainants would declare at the time the last remaining respondent is found to be in default whether they are pursuing a general exclusion order.

H.R. Rep. No. 100-40, at 160-61.

Significantly, the House report states that the “new subsection . . . **requires** the Commission . . . **upon request**, to issue relief against the defaulting respondents” unless the enumerated public interest factors preclude relief. H.R. Rep. No. 100-40 at 160 (emphasis added). The Senate committee report on the Senate version of the bill includes nearly identical language as the House report. S. Rep. No. 100-71, at 132. The legislative history thus illustrates Congressional intent that section 337(g)(1) is to provide the maximum relief requested against defaulters because discovery is difficult or impossible to obtain when a respondent chooses not to participate.

The majority interprets the remedial language of section 337(g)(1) to effectively be the same as sections 337(d)(1) and (f)(1). Specifically, under the majority’s interpretation, the

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Commission is required to provide some remedial relief in the case of a defaulting respondent, while leaving it to the discretion of the Commission to decide whether to issue a limited exclusion order, a cease and desist order, or both. The majority's view, however, renders the remedial language of section 337(g)(1) superfluous in view of the remedial relief provided in sections 337(d)(1) and (f)(1).⁴ There would have been no need for Congress to amend the statute in 1988 to add section 337(g)(1)'s remedial language for defaulting respondents if Congress intended the Commission to exercise remedial discretion over all respondents. Sections 337(d)(1) and (f)(1), which pre-date section 337(g)(1), would have been sufficient by themselves to achieve the effect of the majority's statutory interpretation.⁵ See *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("The rule against superfluities complements the principle that courts are to interpret the words of a statute in context. . . . A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .") (citation omitted); *Stone v. INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.")⁶

In light of the statutory language and its legislative history, I disagree with the majority's adoption of a commercially significant inventory/business operations test for statutory defaulters as a threshold for issuing cease and desist orders. That approach presumes the exercise of discretion. Further, the majority's approach may have the perverse effect of making it harder for a complainant to obtain a cease and desist order against a foreign defaulting respondent than against a foreign participating respondent. This is because without discovery a complainant may have no basis to ascertain the existence and levels of inventories. In fact, the legislative history makes clear that this potential difficulty was the motivation for adding section 337(g)(1) in the first place. See H.R. Rep. 100-40, at 160-61 ("This amendment is motivated by the fact that discovery is usually difficult or impossible to obtain from respondents who have chosen not to

⁴ Sections 337(d)(1) and (f)(1) require the Commission to provide some form of relief against a party in violation (unless such relief is contrary to the public interest factors), but grants the Commission discretion to decide whether to issue a limited exclusion order, a cease and desist order, or both.

⁵ The majority argues that the remedial language is not superfluous because the presumption the Commission is allowed to apply under section 337(g)(1) pertains to both issues of violation and remedy. In my view, it is this interpretation that renders the remedial language of section 337(g)(1) superfluous. Once you require the complainant to establish a factual threshold for issuing a cease and desist order, whereby the Commission then has discretion to decide whether to issue the order, you have converted the analysis under section 337(g)(1) to one similar to section 337(f)(1). Contrary to the majority, in my view, the presumption in section 337(g)(1) applies only to determining whether there is a violation, not remedy. Once a violation is established for a statutory defaulter based on the allegations in the complaint, section 337(g)(1), unlike section 337(f)(1), requires the Commission to issue a cease and desist order if requested (unless such relief is contrary to the public interest).

⁶ The majority notes that section 337(c) states that Commission findings with respect to public interest and "the amount and nature of bond, or the appropriate remedy" under subsections (d), (e), (f), and (g) are subject to judicial review under section 706 of Title 5. I do not find persuasive the majority's argument that this reference to "appropriate remedy" suggests that section 337(g) bestows discretion on the Commission as to cease and desist orders for defaulting respondents. Rather, section 337(c) simply subjects "Commission determinations on the public interest, the nature of the domestic market, bonding, and remedy, to a less stringent standard of judicial review than determinations of substantive violations of section 337." *Hyundai Elec. Indus. Co., Ltd. v. U.S. Int'l Trade Comm'n*, 899 F.2d 1204, 1208 (Fed. Cir. 1990). The "appropriateness" of the remedy in the context of subsection (g)(1) depends upon the relief requested by the complainant, not the discretion of the Commission. As explained above, to conclude otherwise would be to render the remedial language of section 337(g)(1) superfluous.

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participate in a section 337 investigation.”). There is no sound reason to provide less relief in the case of a defaulter compared to the case of a participating respondent.⁷

Thus, for the reasons explained above, while I agree with the decision to issue cease and desist orders in this case, I do not join the majority’s reasoning. Because the conditions in section 337(g)(1)(A)-(E) are met and complainant has requested the orders, in my view, the Commission is required to issue them against the defaulting respondents.⁸

Finally, even if one assumed that the Commission has discretion to decide whether to issue the cease and desist orders in statutory default cases, the record in this case shows that the complainant alleges and offers evidence related to domestic sales activities – not inventories. *See, e.g.*, Complaint at ¶¶ 22, 34, 45, 56, 61, 71, 81, 87, 96, 98, 104, 115, 206; SUMF at ¶¶ 143, 147, 151, 155, 160, 164, 168, 172, 177, 186; Mot. Ex. 7 (“Muller Decl.”) at ¶¶ 4-7, 11-14, 19-22, 31-34, 35-38, 43-46, 51-54, 55-58, 63-66; *see also* Mot. Exs. 7A1-2, 7C1-2, 7E1-2, 7H1-2, 7I1-2, 7K1-2, 7M1-2, 7N1-2, 7P1-2. In my view, domestic sales activities as to infringing goods are a basis to issue cease and desist orders when the Commission is operating under discretionary authority.

Accordingly, for the reasons provided herein, I do not join the Commission’s opinion with regard to the basis for issuing the cease and desist orders.

⁷ Speculative concerns about “potential” enforcement “challenges” against a foreign company are not sufficient grounds for denying a cease and desist order mandated by our governing statute. To the extent the majority is concerned about personal jurisdiction, the record in this case shows that the complainant alleges and offers evidence related to domestic sales activities as to infringing articles, offering an adequate record to support the conclusion that the foreign defaulting respondents have sufficient minimum contacts with the United States. Further, there is no reason to think that the Commission typically does not have personal jurisdiction over foreign defaulters given the pleading requirement to describe “specific instances” of unlawful importations or sales, which may establish minimum contacts with the United States. *See* 19 C.F.R. § 210.12(a)(3).

⁸ I am aware that in *Agricultural Tractors*, which involved a statutory default, the Commission declined to issue a cease and desist order to a foreign defaulting respondent when it was requested by the complainant. *See Certain Agricultural Tractors, Lawn Tractors, Riding Lawnmowers, and Components Thereof*, Inv. No. 337-TA-486, Comm’n Op. at 19-20 (July 14, 2003). It does not appear that the full statutory language of section 337(g)(1) was considered by the Commission in *Agricultural Tractors* in the context of the cease and desist orders given that it was not raised by the complainant. To the extent one views *Agricultural Tractors*, or any other Commission decision, as deciding that the Commission has discretion to decide whether to issue a cease and desist order under section 337(g)(1), those decisions are contrary to the statute, in my view. In addition, the Federal Circuit decisions cited by the majority, *Viscofan, S.A. v. U.S. Int’l Trade Comm’n*, 787 F.2d 544 (Fed. Cir. 1986), *Hyundai Electronics Industries, Co. v. U.S. Int’l Trade Comm’n*, 899 F.2d 1204 (Fed. Cir. 1990), and *Fuji Photo Film Co., Ltd. v. U.S. Int’l Trade Comm’n*, 386 F.3d 1095 (Fed. Cir. 2004), do not address the imposition of remedies on statutory defaulters. Therefore, those decisions are inapposite to the issue presented.

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

In the Matter of

**CERTAIN ELECTRIC SKIN CARE
DEVICES, BRUSHES AND CHARGERS
THEREFOR, AND KITS CONTAINING
THE SAME**

Investigation No. 337-TA-959

**SEPARATE VIEWS OF COMMISSIONER F. SCOTT KIEFF CONCURRING AS TO
REMEDY FOR RESPONDENTS IN DEFAULT**

I join the Commission's determination to issue a Cease and Desist Order ("CDO") as to each of the defaulted respondents, both domestic and foreign.¹ I write separately, however, in recognition of the recurring and perhaps increasing diversity of opinion within the Commission concerning the Commission's authority to issue CDOs under Section 337. More particularly, for some time now, the Commission has explicitly flagged through published opinions that there exists a diversity of viewpoints about both procedural and substantive standards for issuing CDOs in general under 19 U.S.C. § 1337(f)(1).² Furthermore, the Commission Majority appears to be taking the opportunity here to elaborate a potentially precedent-setting line of reasoning in this case that may impact future cases involving the more particular context of CDOs issued

¹ These defaulted respondents are as follows: Flageoli Classic Ltd. of Las Vegas, Nevada ("Flageoli"); Serious Skin Care, Inc. of Carson City, Nevada ("Serious Skin Care"); Our Family Jewels, Inc. of Parker, Colorado ("Our Family Jewels"); Beauty Tech, Inc. of Coral Gables, Florida ("Beauty Tech"); Xnovi Electronic Co., Ltd. of Shenzhen, China ("Xnovi"); Shanghai Anzikang Electronic Co., Ltd. of Shanghai, China ("Anzikang"); ANEX Corp. of Seoul, Republic of Korea ("ANEX"); Korean Beauty Co., Ltd. of Seoul, Republic of Korea ("Korean Beauty"); Wenzhou Ai Er Electrical Technology Co., Ltd. d/b/a CNAIER of ZheJiang, China ("Wenzhou Ai Er"); and Coreana Cosmetics Co., Ltd. of Chungcheongnam-do, Republic of Korea ("Coreana").

² See, e.g., *Certain Dental Implants*, Inv. No. 337-TA-934, Comm'n Op. at 49-51 & nn.29-33, Additional Views of Chairman Broadbent Vice Chairman Pinkert and Commissioners Williamson and Johanson, Additional Views of Commissioner Kieff (May 11, 2016)(Pub. Vers.)(“The Commission is not issuing a cease and desist order in this investigation because the Commissioners are divided 3-3 on whether a cease and desist order is appropriate.”); *Certain Stainless Steel Products, Certain Processes for Manufacturing or Relating to Same, and Certain Products Containing Same*, Inv. No. 337-TA-933, Comm'n Op. at 40-45 & nn. 26, 27 (June 9, 2016) (Pub. Vers.) (Issuing CDO as to a respondent found in default for failure to make or cooperate in discovery); and *Certain Three-Dimensional Cinema Systems and Components Thereof*, Inv. No. 337-TA-939, Comm'n Op. at 61-64 & nn. 33, 34 (August 23, 2016) (Pub. Vers.) (Issuing respective CDOs as to one domestic and one foreign respondent).

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against defaulting parties under 19 U.S.C. § 1337(g)(1). Yet, in neither context – neither the general involving a typical participating respondent found in violation nor the specific involving a defaulting respondent that fails to appear or respond to a served complaint and notice of investigation – has the Commission Majority acted with the benefit of supporting explanation and guidance offered by Congress or reviewing courts, or explicit request by the parties to the particular case. While Commission majorities of course have the power to act without the benefit of input from other parts of the government, the impacted parties, or the Bar, I write separately here, in part, to call the attention of any such interested outsiders to some more background about how this reasoning has evolved and the ways in which it is not consistent with the statute.

The Commission Majority begins its discussion of CDOs against defaulting parties by linking subsection (f)(1), which contains the conditional language – “may” – and serves as the general enabling portion of the statute for CDOs,³ to the Majority’s assertion that the Commission retains discretion as to whether or not to issue a CDO.⁴ But the Commission Majority does not explain how a grant of authority to do an activity is a grant of discretion about when and how the activity should be done. Instead, the Majority seems to determine there exists by implication a grant of discretion in (f)(1) based upon the summary characterization in a different subsection of the statute – (c) – that the remedy issued under (f)(1) will be “appropriate.” Unlike the Majority, I determine these vague statutory statements of “may” and “appropriate” do not confer upon the Commission such broad discretion.

³ 19 U.S.C. § 1337(f)(1) provides, *inter alia*: “In addition to, or in lieu of, taking action under subsection (d) or (e) of this section, the Commission *may issue* and cause to be served on any person violating this section, or believed to be violating this section, as the case may be, an order directing such person to cease and desist from engaging in the unfair methods or acts involved, unless after considering the effect of such order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such order should not be issued. . . .” (emphasis added).

⁴ See Comm’n Majority Op. at 22 (discussing that the Commission may deny an exclusion order in lieu of other relief, including a CDO).

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Furthermore, while the Commission Majority does cite to the statutory provision in Section 337(c) to support the proposition that the remedy should be “appropriate”, the Majority does not provide any meaningful guidance about what things would be inappropriate.⁵ Put differently, the Majority offers little guidance about how the discretion it asserts for itself is applied in this case or will be applied in future cases. Instead, the Commission Majority seems to base its reasoning about subsection (f)(1) on citations to one example in the legislative history of a circumstance involving “stockpiled” inventory in which a CDO would be appropriate, and to some cases involving respondents that have “commercially significant inventories in the United States or have significant domestic operations,” and it then links these cases and that portion of the statute to the statement that CDOs “are generally issued.”⁶

As mentioned previously, the use of the conditional term “may” in subsection (f)(1) does not compel the determination that the Commission has unbounded discretion to issue a CDO. Even broad discretion is not unbounded and it is in close keeping with the Rule of Law Virtues⁷ to ensure some degree of predictable restraint, grounded in the purpose of the statute, surrounding even discretionary matters. I agree with the Majority that a crucial component of ordinary analysis when considering the grant of a CDO against a participating party is whether the addition of this remedy would reasonably avoid material risk that other remedies – typically a GEO or LEO – may be undercut. But, as I recently detailed in additional views accompanying the ‘934 investigation, the Commission can benefit greatly in receiving briefing from parties and the Bar about how it should evaluate such risk of undercutting before declaring whether there is or is not an established practice, exactly what its contours may be, what burdens and

⁵ See *Id.* at 22-23.

⁶ See *Id.* at 23-26.

⁷ See, e.g., Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. Cal. L. Rev. 277, 313-18, (1985).

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presumptions it may implicate, and whether it is properly grounded in the statute.⁸

With respect to the Commission Majority's apparent requirement that the record support the conclusion that the defaulted respondents possess or control commercially significant inventory in the United States before the issuance of CDOs is appropriate,⁹ I first note that there is no such requirement recited in the statute (under subsection (f)(1), (g)(1), or otherwise). Even where legislative history concerning the amendment of subsection (f)(1) is cited by the Majority opinion,¹⁰ the passages provide no more than a mention of stockpiling product as one example, among what that same legislative history explicitly refers to in the plural as "circumstances," rather than as the sole pathway:

There are *circumstances*, however, where it is in the public interest to issue both an exclusion order and cease and desist order for the same unfair act. ***For example, a cease and desist order prohibiting a domestic respondent from selling the imported infringing product in the United States may be appropriate when the product has been stockpiled during the pendency of an investigation*** and an exclusion order may be appropriate to prevent future shipments of the infringing product. When the Commission determines that both remedies are necessary, it should be without legal question that the Commission has authority to order such relief. This amendment provides that authority.

H. Rep. 100-40 at 159-60 (April 6, 1987) (emphases added).¹¹ And, the Commission has issued CDOs under subsection (f)(1) to enforce patent claims where, at least with respect to some of the infringed patent claims, a commercially significant domestic inventory was not established, in part because the proven presence of commercially significant domestic inventories is not a

⁸ See *Certain Dental Implants*, Inv. No. 337-TA-934, Comm'n Op., Additional Views of Commissioner Kieff (May 11, 2016).

⁹ See, e.g., Comm'n Majority Op. at 33 stating:

Although discovery concerning these foreign defaulting respondents' U.S. inventories and U.S. business operations was not available due to their default, the complaint allegations and other information that complainant was able to gather constitute an adequate record to support the conclusion that the foreign defaulting respondents possess or control commercially significant inventory in the United States and have significant domestic operations. Therefore, the issuance of CDOs directed to the foreign defaulting respondents is appropriate.

¹⁰ See Comm'n Majority Op. at 23-24.

¹¹ See also S. Rep. 100-71 at 131 (June 1987).

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statutory requirement.¹²

Indeed, in the context of subsection (g)(1), even where the Commission has previously looked for a sufficiency of evidence to support relief, CDOs were issued against foreign defaulting respondents as recently as 2013 based upon “sufficient commercial activities in the United States.” *See Certain Digital Photo Frames and Image Display Devices and Components Thereof*, Inv. No. 337-TA-807, Comm’n Op. at 10-11 (Mar. 27, 2013).¹³

In brief, it appears that much of the recent debate regarding issuance of CDOs under (f)(1) has focused on the risk that other remedies may be undercut; and factors such as – but not limited to – domestic inventory and commercial activity are merely indicia of that risk. But this would not rule out the relevance of other factors. In the final analysis, a question the statute appears to place before us is whether the party seeking the relief has offered a logically sound reasoning to support its claim there would be material risk the other remedies would be undercut absent the grant of a CDO, backed up by the weight of evidence in the record.

Put differently, as Congress made clear, the previous remedies available to the owner of a property right in some IP that has been adjudicated to be infringed and not invalid were

¹² See, e.g., *Certain Sleep-Disordered Breathing Treatment Systems and Components Thereof*, Inv. No. 337-TA-890, Comm’n Op. at 49 (Public Ver.) (January 16, 2015) (“The Commission declines to restrict issuance of cease and desist orders to only the patent claims for which it was established that commercially significant inventory of infringing products exists in the United States.”) (dissenting footnote by Commissioner Johanson omitted).

¹³ In *Digital Photo Frames*, the Commission provided:

Section 337(g)(1) expressly states that “the Commission *shall* presume the facts alleged in the complaint to be true and *shall*, upon request, issue an exclusion from entry or a cease and desist order, or both” unless such exclusion or order is found to be contrary to the public interest. See 19 U.S.C. § 1337(g)(1) (emphasis added). Therefore, the Commission must presume that the facts alleged in the TPL complaint, including TPL’s allegations that foreign defaulting respondents Aiptek and WinAccord Taiwan maintain commercially significant inventories in the United States and/or are engaging in violative activities in the United States, are true. Based on the factual allegations in the complaint cited by TPL, the Commission finds sufficient evidence that Aiptek and WinAccord Taiwan offer for sale, sell, and distribute in the United States digital photo frames, image display devices, and components thereof that infringe the asserted patents via online sales. The evidence in the complaint, cited above, includes screenshots showing offers for sale and receipts evidencing the sale of the infringing products in the United States. **We find that this evidence demonstrates sufficient commercial activities in the United States to warrant the imposition of a CDO** directed against Aiptek and WinAccord Taiwan. [citations omitted].

Id. (bold emphasis added) (italics in original).

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“cumbersome and costly and ha[ve] not provided United States owners of intellectual property rights with adequate protection against foreign companies violating such rights.” See Congressional Findings and Purposes Respecting Part 3 of Pub. L. 100-418 at Section 1341(a)(2) & (b). Although this is a factual claim – how burdensome, costly, or adequate a protection may be – it is at least informed by the perspective that the entire reason for the existence of Section 337 as a trade remedy is to enhance protections for holders of domestic IP rights. By the time the Commission has reached a question about whether to issue a CDO, especially in the context of a non-defaulting party, at least a few significant factors might be borne in mind. One is that there is an adjudicated infringement of a not invalid property right in IP. A second is that the particular respondent is the adjudicated infringer. A third is that a CDO generally has little risk of negative spill-over impact on non-parties precisely because it is *in personam* in nature. A fourth is that a CDO only stops that particular party from doing particular activities that have been adjudicated to be infringing, thereby mitigating risk of negative spill-over impact on that party’s other legitimate general liberty interests.

Because I do not understand any particular party in any particular matter pending before us to have squarely placed into decision before us – especially not in this case – the precise contours of the decisional framework we should follow when deciding whether to issue a CDO under subsection (f)(1) against a non-defaulting party, I do not suggest that the factors I have just mentioned are the same ones that should drive our analysis when the matter is squarely put before us. But then again, in as much as those factors help explain why public risks from potentially excessive CDO grants are well mitigated, I don’t understand the Majority’s ongoing efforts that have the effect of elaborating views about the grant of a CDO under subsection (f)(1), including what facts need to be proven to obtain a CDO under that subsection, what evidence

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counts as evidence of those facts, and what burdens and presumptions should apply.

For similar reasons, I am troubled by the possible extension of the Majority's views about CDO practice under subsection (f)(1) to the setting of a defaulting party that at least on my read of the statute is governed by subsection (g)(1), rather than (f)(1). Indeed, the Majority's approach to subsection (g)(1) is similar to its approach to (f)(1), but even more strained. While its approach to (f)(1) is to derive discretion from a mention of the word "appropriate" in a different subsection – subsection (c), the Majority's reach for discretion regarding (g)(1) is towards a mention of the word "appropriate" in the legislative history,¹⁴ bootstrapped by the same reasoning the Majority followed about the word "appropriate" is its analysis of subsection (f).¹⁵ The Majority then asserts that in accordance with Sections 337(d) and (f), it "select[s] the appropriate relief"¹⁶ and proceeds to describe some cases in which the Commission has made particular determinations as well as a single brief passage relating to subsection (f)(1) in a Federal Circuit decision that recognized a Commission view that "ordinarily exclusion orders ... should be sufficient ... whereas ... [they are] ineffective with regard to existing stockpiles of domestic inventory."¹⁷ But, again, a recognition about one example of undercutting does not stand for the proposition that domestic inventory is the only legally recognized type of undercutting designed to be remedied by a CDO. As a result, the Majority's ensuing focus on when or when not to infer domestic inventory is of little moment to the question of whether other factors may be appropriate to consider when determining whether GEO or LEO remedies may be

¹⁴ Comm'n Majority Op. at 25 (citing H. Conf. Rep. No. 100-576, at 636-37 ("... when a respondent fails to appear, the ITC shall presume the facts alleged in the complaint to be true and shall, upon request, issue appropriate relief solely against that person.")). In my view, the mention of "appropriate relief" in the legislative history simply refers to requested relief that meets the many other applicable legal rules, including, for example, that it is not precluded by considerations of public interest as provided in the text of subsection (g)(1).

¹⁵ *Id.* at 22-25.

¹⁶ *Id.* at 26.

¹⁷ *Id.* at 27-28 (quoting *Fuji Photo Film Co., Ltd. v. Int'l Trade Comm'n*, 386 F.3d 1095, 1107 (Fed. Cir. 2004)).

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undercut.¹⁸

My analysis of subsection (g)(1) comes from the statute's plain meaning. Subsection (g)(1) is explicitly about defaulting parties who fail to appear or otherwise respond to the complaint and notice of investigation, and it explicitly uses the unconditional language "shall." Subsection (g)(1) provides as follows:

- (g) Exclusion from entry or cease and desist order; conditions and procedures applicable
 - (1) If-
 - (A) a complaint is filed against a person under this section;
 - (B) the complaint and a notice of investigation are served on the person;
 - (C) *the person fails to respond to the complaint and notice or otherwise fails to appear to answer the complaint and notice;*
 - (D) the person fails to show good cause why the person should not be found in default; and
 - (E) the complainant seeks relief limited solely to that person;

The Commission ***shall presume the facts alleged in the complaint to be true and shall, upon request, issue an exclusion from entry or a cease and desist order, or both,*** limited to that person unless, after considering the effect of such exclusion or order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the Commission finds that such exclusion or order should not be issued.

19 U.S.C. § 1337(g)(1) (emphases added).

The Supreme Court continues to reaffirm that statutes are to be read and applied in their entirety, giving full effect to neighboring provisions in the same statutory framework. *See, e.g., King v. Burwell*, 135 S.Ct. 2480, 2492 (2015) ("we 'must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.' ") (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. —, —, 134 S.Ct. 2427, 2441 (2014)) (parenthetical omitted); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a

¹⁸ *Id.* at 28-33.

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‘fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’ ”) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). Our statute contains two distinct provisions relating to a key point in this case: CDOs against defaulting parties. Even if the first provision, subsection (f)(1), which enables the Commission to grant CDOs, uses the conditional language “may,” the mere existence of such conditionality does not confer upon the Commission the unbounded flexible discretion to determine what those conditions are or how they should operate. Perhaps, if Congress had been silent on the matter, an argument could be made that the Commission was implicitly delegated such authority to set those conditions. But the Commission has not been presented with such an argument. Furthermore, any argument about such implied delegation in general, would have to at least address the very specific and explicit Congressional mandate in the subsequent statutory provision – (g) – that at least on its face appears to compel the grant of a CDO in the specific case of a defaulting party,¹⁹ “upon request” of the petitioner,²⁰ where the Commission has not determined that any applicable public interest considerations weigh against such relief.²¹

Even if the text in subsection (g)(1) providing that the Commission “shall, upon request” grant a CDO is not ultimately interpreted to compel the issuance of a CDO against a defaulting party upon request, some force and effect must be given to the prior text in (g)(1) providing that

¹⁹ In this case, the Commission has determined each of respondents Flageoli; Serious Skin Care; Our Family Jewels; Beauty Tech; Xnovi; Anzikang; ANEX; Korean Beauty; Wenzhou Ai Er; and Coreana to be in default. See Comm’n Majority Op. at 3; see also Order No. 13, as modified by Order No. 15, *unreviewed* Oct. 20, 2015; Order No. 18, *unreviewed* Oct. 22, 2015; Order No. 24, *unreviewed* Nov. 13, 2015; and Order No. 32, *unreviewed* Dec. 23, 2015.

²⁰ Complainant Pacific Bioscience Laboratories, Inc. (“PBL”) requested CDOs directed to each of the respective defaulted Respondents. See, e.g., Comm’n Majority Op. at 3 (citing February 18, 2016, PBL motion for summary determination at 1-2, and memorandum in support at 1); Comm’n Majority Op. at 13 and 21 (citing ComplRemedyOpen at 1).

²¹ See Comm’n Majority Op. at 33-35 (determining the public interest factors do not weigh against imposition of relief in this investigation).

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the Commission “shall presume the facts alleged in the complaint to be true.” In this case, the petitioner made allegations²² that at least suggest the CDO remedy is appropriate to avoid potential for the remedial relief of the exclusion order to be undercut.²³ The Commission Majority cites to no countervailing evidence on this point about potential undercutting. Even a single small fact that is merely presumed to be true rather than proven through valiant adversarial challenge can’t be outweighed by a nullity on the other side.

This reading of the statutory language in subsection (g)(1) is consistent with legislative history related to its enactment. For example, prior to 1988, when subsection (g) concerning default remedies was added to the statute, Congress highlighted the importance of improving protection for U.S. intellectual property rights, and the need to amend Section 337 of the Tariff Act of 1930 to make it a more effective remedy.²⁴ Section 172 of House Report 100-40 also gave reasoning for certain of those proposed amendments – to provide authorization to the Commission to issue relief for default judgments. Specifically motivated by the usual difficulty in obtaining discovery from respondents who “have chosen not to participate in a [S]ection 337 investigation,” Congress explained that in such cases, and upon request, the new subsection *requires* the Commission to issue relief unless otherwise precluded by public interest considerations:

Default Judgments

Present law

²² See, e.g., Amended Complaint at ¶ 15 (“Complainant also seeks permanent cease and desist orders to halt the marketing, sales and distribution of infringing products in the United States by each and every one of the Proposed Respondents”); see also, e.g., Complainant Pacific Bioscience Laboratories, Inc.’s Reply to Written Submissions on Remedy, the Public Interest and Bonding Filed by the Office of Unfair Import Investigations and Michael Todd, at 2-4 (June 16, 2016).

²³ See, e.g., *Certain Sleep-Disordered Breathing Treatment Systems and Components Thereof*, Inv. No. 337-TA-890, Comm’n Op. at 48 (Public Ver.) (January 16, 2015) (“The Commission generally issues cease and desist orders ‘when there is a commercially significant amount of infringing imported product in the United States that could be sold so as to undercut the remedy provided by an exclusion order.’”) (citations omitted).

²⁴ See H. Rep. 100-40, Title I, Subtitle E, Section 171. Congressional Findings and Purposes, at 154 (April 6, 1987).

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No provision.

Explanation of provision

Section 172(a)(5)(c) adds a new subsection to the Act which ***requires the Commission, in cases involving defaulting respondents, to presume the facts alleged in the complaint to be true and, upon request, to issue relief against the defaulting respondents***, unless the enumerated public interest factors (the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers) preclude relief. However, a general exclusion order prohibiting the entry of unfairly traded articles regardless of their source may not be issued unless a violation of the Act has been established by substantial, reliable, and probative evidence.

Reasons for change

This amendment is motivated by the fact that discovery is usually difficult or impossible to obtain from respondents who have chosen not to participate in a section 337 investigation. For this reason, the bill authorizes the Commission to presume the facts alleged in the complaint to be true insofar as they involve a defaulting respondent, and to then issue relief limited to that respondent. The amendment will therefore not affect participating respondents. Relief in the form of a general exclusion order must be supported by a Commission finding of violations of the Act based on substantial, reliable, and probative evidence. Complainants would declare at the time the last remaining respondent is found to be in default whether they are pursuing a general exclusion order.

H. Rep. 100-40, Title I, Subtitle E, Section 172. Protection Under the Tariff Act of 1930, at 160-61 (April 6, 1987) (to accompany H.R. 3 and concerning the Trade and International Economic Policy Reform Act of 1987).²⁵ The following year, the committee of conference on the disagreeing votes of the two Houses pointed out in its conference report that under the prior state of the law without a default provision in Section 337, the Commission placed the burden on a complainant to establish a violation of the statute when a respondent failed to appear. It was then clarified that the House bill, and the identical Senate amendment, now provided that “when a respondent fails to appear, the ITC shall presume the facts alleged in the complaint to be true and shall, upon request, issue appropriate relief solely against that person.” See H. Conf. Rep. 100-

²⁵ Two months later, Congress provided almost identical reasoning and explanation on Default Judgments in S. Rep. 100-71, Part IV, Title IV, Subtitle A, Section 401. Remedies Under the Tariff Act of 1930, at 132 (June 12, 1987) (to accompany S.490 and concerning The Omnibus Trade Act of 1987).

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576, Title I, Subtitle C, Part 3, Paragraph 7. Default Provisions, at 636-37 (April 20, 1988) (to accompany H.R. 3 and concerning the Omnibus Trade and Competitiveness Act of 1988).²⁶

In sum, I separate myself from the Majority's departure from the plain meaning and legislative history of the statutory provision in 19 U.S.C. § 1337(g)(1). To me, subsection (g)(1) compels the issuance of a CDO against the defaulting parties in this case, both by the weight of the facts we are instructed by subsection (g)(1) to presume as true and by the remedy we are instructed in subsection (g)(1) to grant upon request and in the absence of countervailing public interest considerations.

²⁶ A full quotation of the language from this paragraph is as follows:

7. Default provisions (sec. 172(a) of House bill; sec. 401(a) of Senate amendment; sec. 1342(a) of conference agreement)

Present law

There is no default provision in section 337. The Commission requires a complainant to establish a *prima facie* case of violation of section 337 in order to prevail if a respondent fails to appear.

House bill

The House bill provides that, when a respondent fails to appear, the ITC shall presume the facts alleged in the complaint to be true and shall, upon request, issue appropriate relief solely against that person.

If no respondent contests the investigation, and a violation is established by substantial, reliable, and probative evidence, a general exclusion order may be issued.

Senate amendment

The Senate amendment is identical to the House bill.

Conference agreement

The conferees agreed to the House and Senate provisions.

H. Conf. Rep. 100-576, Title I, Subtitle C, Part 3, Paragraph 7. Default Provisions, at 636-37 (April 20, 1988) (to accompany H.R. 3 and concerning the Omnibus Trade and Competitiveness Act of 1988).

**CERTAIN ELECTRIC SKIN CARE DEVICES, BRUSHES
AND CHARGERS THEREFOR, AND KITS CONTAINING
SAME**

Inv. No. 337-TA-959

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, Sarah J. Sladic, Esq., and the following parties as indicated, on **February 13, 2017**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

**On Behalf of Complainants Pacific Bioscience Laboratories,
Inc.:**

Robert M. Masters, Esq.
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
801 17th St. NW
Washington, DC 20006

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Respondents:

Our Family Jewels, Inc. d/b/a Epipür Skincare
7770 E. Iliff Ave. Rm./Suite E
Denver, CO 80231

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Xnovi Electronic Co., Ltd.
Unit 6A, Block C1, Area G
Sha Jing Street, Min Zhu Industrial Estate,
Baoan District, Shenzhen City,
China

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Shanghai Anzikang Electric Co., Ltd.
168 Ji Xin Road, Building 3, Room 401
Minhang District, Shanghai,
China

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

**CERTAIN ELECTRIC SKIN CARE DEVICES, BRUSHES
AND CHARGERS THEREFOR, AND KITS CONTAINING
SAME**

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Certificate of Service – Page 2

Beauty Tech, Inc.
1430 S. Dixie Hwy., Ste. 321
Coral Gables, FL 33146-3175

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

ANEX Corporation
#304-705 Bucheon Techno Park
345 Seokcheon-ro, Ojeong-gu
Bucheon City, Gyeonggi-do
421-741, Korea

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Korean Beauty Co., Ltd.
10 F, Pluszone Bldg. 700
Deungchon-Dong, Gangseo-Gu
Seoul, Korea

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Serious Skin Care, Inc.
112 N. Curry St.
Carson City, NV 89703-4934

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Wenzhou Ai Er Electrical Technology Co., Ltd. d/b/a CNAIER
1#, XiaSong Road, WanQuan Town
PingYang, ZheJiang
China

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Coreana Cosmetics Co., Ltd.
204-1 Jeongchon-ri, eup, Seonggeo-eup
Seobuk-gu, Cheonan-si, Chungcheongnam-do
Korea

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Flageoli Classic Limited
7310 Smoke Ranch Road
Las Vegas, NV 89128

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN ELECTRIC SKIN CARE
DEVICES, BRUSHES AND CHARGERS
THEREFOR, AND KITS CONTAINING
THE SAME**

Investigation No. 337-TA-959

**NOTICE OF A COMMISSION DETERMINATION TO REVIEW IN PART AN INITIAL
DETERMINATION GRANTING COMPLAINANT'S MOTION FOR SUMMARY
DETERMINATION OF VIOLATION OF SECTION 337; REQUEST FOR WRITTEN
SUBMISSIONS 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 has determined to review in part an initial determination ("ID") (Order No. 42) of the presiding administrative law judge ("ALJ") granting complainant's motion for summary determination of violation of section 337.

FOR FURTHER INFORMATION CONTACT: Michael Liberman, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3115. 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 under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 ("section 337"), on June 25, 2015, based on a complaint filed by Pacific Bioscience Laboratories, Inc. of Redmond, Washington ("PBL"). 80 *Fed. Reg.* 36576-77 (Jun. 25, 2015). The amended complaint, as supplemented, alleges a violation of section 337 based upon the importation into the United States, the sale for importation, or the sale within the United States after importation of certain electric skin care devices, brushes and chargers therefor, and kits containing the same by reason of infringement of certain claims of U.S. Patent Nos. 7,320,691 and 7,386,906, and U.S. Design

Patent No. D523,809. The complaint further alleges violations of section 337 by reason of trade dress infringement, the threat or effect of which is to destroy or substantially injure an industry in the United States. *Id.* The complaint named numerous respondents. The Commission's Office of Unfair Import Investigations was named as a party.

During the course of the investigation, eight of the respondents were terminated by consent order: Nutra-Luxe M.D., LLC of Fort Myers, Florida (Order No. 10) (consent order issued Jan. 5, 2016); SkincarebyAlana of Dana Point, California (Order No. 11) (consent order issued Oct. 6, 2015); Unicos USA, Inc. of LaHabra, California (Order No. 15) (consent order issued Oct. 20, 2015); H2PRO Beautylife, Inc. of Placentia, California (Order No. 19) (consent order issued Oct. 22, 2015); Jewlzle of New York, New York (Order No. 20) (consent order issued Oct. 22, 2015); Home Skinovations Inc. of Richmond Hill, Ontario, Canada, and Home Skinovations Ltd. of Yokneam, Israel (Order No. 30) (consent order issued Dec. 23, 2015); and Accord Media, LLC of New York, New York (Order No. 31) (consent order issued Dec. 23, 2015). Respondent RN Ventures Ltd. of London, United Kingdom, was terminated based on a settlement agreement (Order No. 36) (*not reviewed* Feb. 4, 2016). Respondents Michael Todd LP and MTTO LLC, both of Port St. Lucie, Florida, were also terminated based on a settlement agreement (Order No. 37) (*not reviewed* Mar. 3, 2016).

The remaining ten respondents were found in default: Coreana Cosmetics Co., Ltd. of Chungcheongnam-do, Republic of Korea; Flageoli Classic Limited of Las Vegas, Nevada; Serious Skin Care, Inc. of Carson City, Nevada; Shanghai Anzikang Electric Co., Ltd. of Shanghai, China; and Wenzhou Ai Er Electrical Technology Co., Ltd. of ZheJiang, China (Order No. 13) (*not reviewed*, as modified by Order No. 15, Oct. 20, 2015); ANEX Corporation of Seoul, Republic of Korea; Korean Beauty Co., Ltd. of Seoul, Republic of Korea; and Our Family Jewels, Inc. of Parker, Colorado (Order No. 18) (*not reviewed* Oct. 22, 2015); Beauty Tech, Inc. of Coral Gables, Florida (Order No. 24) (*not reviewed* Nov. 13, 2015); and Xnovi Electronic Co., Ltd. of Shenzhen, China (Order No. 32) (*not reviewed* Dec. 23, 2015) (collectively, "the defaulting Respondents").

On February 18, 2016, complainant PBL filed a motion for summary determination of violation of Section 337 by the defaulting Respondents. The Commission investigative attorney ("IA") filed a response in support of the motion. No other responses were filed.

On April 11, 2016, the ALJ issued an ID (Order No. 42) granting complainant's motion and making recommendations regarding remedy and bonding. The IA filed a timely petition for review-in-part of the ID. No other party petitioned for review of the ID. Complainant PBL filed a response in support of the IA's petition. No other responses were filed.

The Commission has determined to review the ID in part. Specifically, the Commission has determined to review the ID's findings on the economic prong of the domestic industry requirement as to the patent-based allegations, all issues related to violation of the asserted trade dress, and to correct certain minor typographical errors. The Commission does not request any submissions on the issues under review.

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 one or more cease and desist orders 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 are likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (Dec. 1994) (Commission Opinion).

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 orders 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. 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: 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. Complainant and the IA are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is further requested to provide the expiration dates of each of the asserted patents, and state the HTSUS subheadings under which the accused articles are imported. Complainant is also requested to supply the names of known importers of the infringing articles. The written submissions and proposed remedial orders must be filed no later than the close of business on June 9, 2016. Reply submissions must be filed no later than the close of business on June 16, 2016. Such submissions should address the ALJ's recommended determinations on remedy and bonding which were made in Order No.

42. 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 C.F.R. 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-959") in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures*, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.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 C.F.R. § 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 non-confidential 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 C.F.R. 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: May 26, 2016

**CERTAIN ELECTRIC SKIN CARE DEVICES, BRUSHES
AND CHARGERS THEREFOR, AND KITS CONTAINING
SAME**

Inv. No. 337-TA-959

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, Sarah J. Sladic, Esq., and the following parties as indicated, on **May 26, 2016**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

**On Behalf of Complainants Pacific Bioscience Laboratories,
Inc.:**

Robert M. Masters, Esq.
PAUL HASTINGS, LLP
875 15th St. NW
Washington, DC 20005

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Respondents:

Our Family Jewels, Inc. d/b/a Epiptir Skincare
7770 E. Iliff Ave. Rm./Suite E
Denver, CO 80231

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Xnovi Electronic Co., Ltd.
Unit 6A, Block C1, Area G
Sha Jing Street, Min Zhu Industrial Estate,
Baoan District, Shenzhen City,
China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Shanghai Anzikang Electric Co., Ltd.
168 Ji Xin Road, Building 3, Room 401
Minhang District, Shanghai,
China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

**CERTAIN ELECTRIC SKIN CARE DEVICES, BRUSHES
AND CHARGERS THEREFOR, AND KITS CONTAINING
SAME**

Inv. No. 337-TA-959

Certificate of Service – Page 2

Beauty Tech, Inc.
1430 S. Dixie Hwy., Ste. 321
Coral Gables, FL 33146-3175

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Anex Corporation
#304-705 Bucheon Techno Park
345 Seokcheon-ro, Ojeong-gu
Bucheon City, Gyenggi-do
421-741, Korea

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Korean Beauty Co., Ltd.
10 F, Pluszone Bldg. 700
Deungchon-Dong, Gangseo-Gu
Seoul, Korea

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Serious Skin Care, Inc.
112 N. Curry St.
Carson City, NV 89703-4934

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Wenzhou Ai Er Electrical Technology Co., Ltd. d/b/a CNAIER
1#, XiaSong Road, WanQuan Town
PingYang, ZheJiang
China

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Coreana Cosmetics Co., Ltd.
204-1 Jeongchon-ri, eup, Seonggeo-eup
Seobuk-gu, Cheonan-si, Chungcheongnam-do
Korea

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

Flageoli Classic Limited
7310 Smoke Ranch Road
Las Vegas, NV 89128

- ☐ Via Hand Delivery
☐ Via Express Delivery
☒ Via First Class Mail
☐ Other: _____

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN ELECTRIC SKIN CARE
DEVICES, BRUSHES AND CHARGERS
THEREFOR, AND KITS CONTAINING
SAME**

Inv. No. 337-TA-959

**ORDER NO. 42: INITIAL DETERMINATION GRANTING SUMMARY
DETERMINATION ON VIOLATION OF SECTION 337 AND
RECOMMENDED DETERMINATION ON REMEDY AND
BONDING**

(April 11, 2016)

On February 18, 2016, Complainant Pacific Bioscience Laboratories, Inc. ("PBL") filed a motion for summary determination on the existence of a domestic industry and the violation of Section 337 of the Tariff Act of 1930 by Respondents ANEX Corporation, Beauty Tech, Inc., Coreana Cosmetics Co., Ltd., Flageoli Classic Limited, Korean Beauty Co., Ltd., Our Family Jewels, Inc., Serious Skin Care, Inc., Shanghai Anzikang Electric Co., Ltd., Wenzhou Ai Er Electrical Technology Co., Ltd., and Xnovi Electronic Co. Ltd. (Motion Docket No. 959-031). On March 11, 2016, PBL filed a motion for leave to submit supplemental declarations in support of the motion for summary determination, which was granted pursuant to Order No. 40 (Mar. 17, 2016). On March 14, 2016, the Commission Investigative Staff ("Staff") filed a response in support of the motion. No other responses were received.¹

For the reasons discussed below, it is my Final Initial Determination that there is a

¹ On March 14, 2016, former Respondents Michael Todd LP and MTTO LLC filed a motion for leave to file a response, which was denied pursuant to Order No. 41 (Mar. 30, 2016).

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violation 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, and/or the sale within the United States after importation of certain electric skin care devices, brushes and chargers therefor, and kits containing same. It is my Recommended Determination that a general exclusion order and cease and desist orders issue to remedy this violation, and I recommend a bond of 100% of entered value during the Presidential review period.

Because this determination addresses violation and remedy for all of the remaining respondents, it terminates the Investigation in its entirety. Accordingly, the hearing scheduled for April 18-22, 2016, is hereby canceled.

PUBLIC VERSION

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The following abbreviations may be used in this Initial Determination:

Mot.	Complainant's motion for summary determination
Mem.	Complainant's memorandum in support of their motion for summary determination
SUMF	Complainant's statement of undisputed material facts as to which there is no genuine issue
Ex.	Exhibit
Decl.	Declaration
Staff Resp.	Staff's response to Complainant's summary determination motion

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I. BACKGROUND

A. Procedural History

On Friday, June 19, 2015, the Commission issued a Notice of Investigation in this matter upon an amended complaint (the “Complaint”) filed by Complainant Pacific Bioscience Laboratories, Inc. (“PBL”) alleging violations of section 337 of the Tariff Act of 1930, as amended, by reason of infringement of certain claims of U.S. Patent No. 7,320,691 (the “’691 patent”), U.S. Patent No. 7,386,906 (the “’906 patent”), and U.S. Patent No. D523,809 (the “D’809 patent”) (collectively, the “Asserted Patents”) and infringement of trade dress. Notice of Investigation at 2; 80 Fed. Reg. 36576-77 (2015). The Notice of Investigation identified twenty-one respondents: Our Family Jewels, Inc., Accord Media, LLC, Xnovi Electronic Co., Ltd., Michael Todd True Organics LP, MTTO LLC, Shanghai Anzikang Electronic Co., Ltd., Nutra-Luxe M.D., LLC, Beauty Tech, Inc., ANEX Corp., RN Ventures Ltd., Korean Beauty Co., Ltd., H2Pro BeautyLife, Inc., Serious Skin Care, Inc., Home Skinovations, Inc., Home Skinovations Ltd., Wenzhou Ai Er Electrical Technology Co., Ltd., Coreana Cosmetics Co., Ltd., Flageoli Classic Ltd., Jewlzle, Unicos USA, Inc., and SkincarebyAlana. *Id.* at 2-4.

A *Markman* Hearing was held on October 21, 2015, and a *Markman* Order (Order No. 34) issued on December 17, 2015. The Investigation was stayed pursuant to Order No. 35 (Jan. 4, 2016), and pursuant to Order No. 38 (Feb. 26, 2016), the stay was extended pending resolution of the present motion for summary determination.

B. Motion for Summary Determination

On February 18, 2016, PBL filed a motion for summary determination of violation (Motion Docket No. 959-031) (“Mot.”). Pursuant to Ground Rules 3.1 and 3.3, PBL attached a memorandum (“Mem.”) in support of the motion and a statement of undisputed material facts

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(“SUMF”). PBL further attached declarations from Lilac Muller (Mot. Ex. 7, “Muller Decl.”), Robert Hennessy (Mot. Ex. 32, “Hennessy Decl.”), Zane Miller (Mot. Ex. 33, “Miller Decl.”), Dr. Zoe D. Draelos (Mot. Ex. 34, “Draelos Decl.”), Dr. Brian C. Fabien (Mot. Ex. 35, “Fabien Decl.”), and Dr. Robert Akridge (Mot. Ex. 82, “Akridge Decl.”). On March 11, 2016, PBL submitted supplemental declarations from Zane Miller (Supp. Ex. A., “Miller Supp. Decl.”) and Robert Hennessy (Supp. Ex. B, “Hennessy Supp. Decl.”). Staff filed a response in support of the motion on March 14, 2016 (“Staff Resp.”). On March 14, 2016, Respondents Michael Todd LP and MTTO LLC filed a motion for leave to file a response, which was denied pursuant to Order No. 41 (Mar. 30, 2016).

PBL’s motion seeks summary determination of importation, infringement, and domestic industry. Mot. at 1-2; Mem. at 1. In addition, PBL seeks entry of a general exclusion order (“GEO”), limited exclusion orders, cease and desist orders, and a bond equal in value to the value of the accused products. *Id.*

C. The Private Parties

1. Complainant

Complainant Pacific Bioscience Laboratories, Inc. (“PBL”) is a Washington corporation with its principal place of business at 17275 NE 67th Court. Complaint ¶ 16; Hennessy Decl. ¶ 4. PBL is the original developer and maker of the Clarisonic System, a line of sonic-frequency skin cleansing devices first introduced in 2004. *Id.* ¶ 17; Hennessy Decl. ¶ 3. In December 2011, PBL was acquired by L’Oréal USA, Inc. *Id.* ¶ 18; Hennessy Decl. ¶ 4.

2. Terminated Respondents

Eight of the respondents were terminated by consent order: Nutra-Luxe M.D., LLC (Order No. 10, Aug. 28, 2015), SkincarebyAlana (Order No. 11, Sept. 9, 2015), Unicos USA, Inc. (Order No. 15, Sept. 21, 2015), H2PRO Beautylife, Inc. (Order No. 19, Sept. 28, 2015),

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Jewlzle (Order No. 20, Sept. 28, 2015), Home Skinovations Inc. and Home Skinovations Ltd. (Order No. 30, Nov. 30, 2015), and Accord Media, LLC (Order No. 31, Nov. 30, 2015). Respondent RN Ventures Ltd. was terminated based on a settlement agreement (Order No. 36, Jan. 12, 2016). Respondents Michael Todd LP² and MTTO LLC were also terminated based on a settlement agreement (Order No. 37, Feb. 3, 2016).

3. Defaulting Respondents

The remaining ten respondents were found in default: Coreana Cosmetics Co., Ltd., Flageoli Classic Limited, Serious Skin Care, Inc., Shanghai Anzikang Electric Co., Ltd., and Wenzhou Ai Er Electrical Technology Co., Ltd. (Order No. 13, Sept. 9, 2015); ANEX Corporation, Korean Beauty Co., Ltd., and Our Family Jewels, Inc. (Order No. 18, Sept. 28, 2015); Beauty Tech, Inc. (Order No. 24, Oct. 14, 2015); and Xnovi Electronic Co., Ltd. (Order No. 32, Dec. 1, 2015) (collectively, the “defaulting Respondents”). The present motion for summary determination is directed at these defaulting Respondents.

a. ANEX Corporation

ANEX Corporation (“ANEX”) is a corporation organized and existing under the laws of Korea with its principal place of business at #304-705 Bucheon Techno Park, 345 Seokcheon-ro, Ojeong-gu, Bucheon City, Gyeonggi-do 421-741, Korea. Complaint ¶ 63; Mot. Ex. 36C. ANEX sells skin care devices known as the Mimian products. *Id.* ¶ 64; Mot. Exs. 36A, 36B, 36D.

b. Beauty Tech, Inc., Flageoli Classic Limited, and Serious Skin Care, Inc.

Beauty Tech, Inc. d/b/a 5th Avenue Buzz (“Beauty Tech”) is a corporation organized and existing under the laws of Florida with its principal place of business at 1430 S. Dixie Hwy., Ste.

² Pursuant to Order No. 22, the name of Respondent “Michael Todd True Organics LP” was changed to “Michael Todd LP.” Order No. 22 (Oct. 2, 2015).

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321, Coral Gables, FL 33146-3175. Complaint ¶ 58; Mot. Ex. 37C. Beauty Tech sells skin care devices known as the NuSonic products. *Id.* ¶ 59; Mot. Exs. 37A, 37B.

Respondent Flageoli Classic Limited (“Flageoli”) is a corporation organized and existing under the laws of Nevada with its principal place of business at 7310 Smoke Ranch Road, Las Vegas, NV 89128. Complaint ¶ 88; Mot. Ex. 39B. Respondent Serious Skin Care, Inc. (“Serious Skin Care”) is a corporation organized and existing under the laws of Nevada with its principal place of business at 112 N. Curry St., Carson City, NV 89703-4934. Complaint ¶ 83; Mot. Ex. 43E. Flageoli and Serious Skin Care sell skin care devices known as the Beauty Buzz products, which are functionally identical to Beauty Tech’s NuSonic products. *Id.* ¶¶ 84, 89; Mot. Exs. 7N2, 39A.

c. Coreana Cosmetics Co., Ltd.

Coreana Cosmetics Co., Ltd. (“Coreana”) is a corporation organized and existing under the laws of Korea with its principal place of business at 204-1 Jeongchon-ri, Seonggeo-eup, Seobuk-gu, Cheonan-si, Chungcheongnam-do, Korea. Complaint ¶ 106; Mot. Ex. 38B. Coreana sells skin care devices known as the Coreana 4D Motion products. *Id.* ¶ 107; Mot. Exs. 7M1, 7M2, 38A.

d. Korean Beauty Co., Ltd.

Respondent Korean Beauty Co., Ltd. (“Korean Beauty”) is a corporation organized and existing under the laws of Korea with its principal place of business at 10 F, Pluszone Bldg 700, Deungchon-Dong, Gangseo-Gu, Seoul, Korea. Complaint ¶ 73; Mot. Ex. 40B. Korean Beauty sells skin care devices known as the Korean Beauty products. *Id.* ¶ 74; Mot. Exs. 40A, 7K2.

e. Our Family Jewels, Inc.

Respondent Our Family Jewels, Inc., d/b/a Epipür Skincare (“Our Family Jewels”) is a corporation organized and existing under the laws of Colorado with its principal place of

PUBLIC VERSION

business at 7770 E. Iliff Ave., Rm./Suite E, Denver, CO 80231. Mot. Ex. 42E; *see* Motion for Leave to Effect Personal Service on Unserved Respondents, Motion Docket No. 959-003, Ex. A (July 22, 2015). Our Family Jewels sells skin care devices known as the Episonic products. Complaint ¶ 20; Mot. Exs. 7A2, 42A-42D.

f. Shanghai Anzikang Electric Co., Ltd.

Respondent Shanghai Anzikang Electric Co., Ltd. (“Anzikang”) is a corporation organized and existing under the laws of China with its principal place of business at 168 Ji Xin Road, Building 3, Room 401, Minhang District, Shanghai, China. Complaint ¶ 42; Mot. Ex. 7E2. Anzikang sells skin care devices known as the Dione products. *Id.* ¶ 43; Mot. Exs. 7E1, 7E2, Ex. 41.

g. Wenzhou Ai Er Electrical Technology Co., Ltd.

Respondent Wenzhou Ai Er Electrical Technology Co., Ltd. d/b/a CNAIER (“Wenzhou Ai Er”) is a corporation organized and existing under the laws of China with its principal place of business at 1#, XiaSong Road, WanQuan Town, PingYang, ZheJiang, China. Complaint ¶ 100; Mot. Exs. 44C, 44D. Wenzhou Ai Er sells skin care devices known as the CNAIER products. *Id.* ¶ 101; Mot. Exs. 44A-44C.

h. Xnovi Electronic Co., Ltd.

Respondent Xnovi Electronic Co., Ltd. (“Xnovi”) is a corporation organized and existing under the laws of China that was successfully served at the address Unit 6A, Block C1, Area G, Sha Jing Street, Min Zhu Industrial Estate, Baoan District, Shenzhen City, China. Order No. 27 (Nov. 16, 2015); Complaint ¶ 31. Xnovi sells skin care devices known as the Lemonsonic products. Complaint ¶ 32; Mot. Exs. 7C2, 45C-45D.

PUBLIC VERSION

D. Intellectual Property at Issue

PBL asserts infringement of two utility patents and one design patent in this Investigation, namely the '691 patent, the '906 patent, and the D'809 patent. Notice of Investigation at 1; Complaint ¶¶ 127, 137, 145. PBL further asserts infringement of the trade dress for its Clarisonic products. Notice of Investigation at 2; Complaint ¶¶ 152-167.

The inventors of each of the Asserted Patents assigned all of their right, title and interest in and to the inventions to PBL. *Id.* ¶ 123; Mot. Ex. 4A, 5A, 6. As part of the 2011 acquisition, all right, title, and interest in and to the Asserted Patents passed to L'Oréal. *Id.* ¶ 124; Mot. Ex. 4B, 5B. L'Oréal granted PBL an exclusive license in and to the Asserted Patents, including all substantial rights to those patents, with the right to enforce the Asserted Patents. *Id.* ¶ 125; Mot. Ex. 10.

1. '691 Patent

The '691 patent, entitled "Apparatus and Method for Acoustic/Mechanical Treatment of Early Stage Acne," issued January 22, 2008, naming inventors Kenneth A. Picher, David Giuliani, and Stephen M. Meginniss. Complaint Ex. 1; Mot. Ex. 1 (the '691 patent). A description of the specification and prosecution history of the '691 patent was set forth in the *Markman* Order. Order No. 34 at 4-9. PBL asserts independent claims 1, 31, and 42:

1. An apparatus for treatment of acne, comprising:

at least two contacting elements having end faces, all of the end faces being in substantially the same plane, wherein at least one contacting element is a moving contacting element, the end faces of the moving contacting element moving in a single plane;

a mounting assembly for holding the contacting elements substantially adjacent to each other; and

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an assembly for positively moving said at least one moving contacting element bi-directionally about a neutral position relative to at least one adjacent contacting element, to produce alternating tension and compression of the skin, wherein when the apparatus is positioned so that the end faces of the contacting elements contact the skin, an action on the skin in the plane of a skin area to be treated for acne is produced to remove sebum plugs from skin pores, permitting ready removal thereof from the skin.

'691 patent at 15:2-19.

31. An apparatus for treatment of acne, comprising:

at least one moving contacting element having an end face for contacting the skin of a user; and

an assembly for positively moving said contacting element bi-directionally about a neutral position to produce alternating tension and compression of the skin, such that when the apparatus is positioned so that the contacting element end face contacts the skin, an action on the skin in the plane of the skin area to be treated for acne is produced to remove sebum plugs from the skin pores, permitting ready removal thereof from the skin.

Id. at 16:65-17:8.

42. An apparatus for treatment/cleansing of skin, comprising:

at least two contacting elements having end faces, all of the end faces being in substantially the same plane, wherein at least one contacting element is a moving contacting element, the end faces of the moving contacting element moving in a single plane;

a mounting assembly for holding the contacting elements substantially adjacent to each other; and

an assembly for positively moving said at least one moving contacting element bi-directionally about a neutral position relative to at least one adjacent contacting element, to produce alternating tension and compression of the skin, wherein when the apparatus is positioned so that the end faces of the contacting elements contact the skin, an action on the skin in the plane of the skin area to be treated for acne produces a cleansing action on the skin, including removal of foreign material from skin pores.

Id. at 17:39-18:3. PBL also asserts dependent claims 4, 5, 16, 33, 39, 44, and 46, which claim specific movements of the contact elements. *Id.* at 15:25-18:14. PBL further asserts claims 6

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and 40, which specify that the contact elements are rows of bristle tufts, claim 41, which specifies that the rows of bristle tufts are circular, and claims 22 and 49, which specify that the contacting elements are removable and replaceable. *Id.* at 15:31-18:33.

The *Markman* Order construed certain terms of the '691 patent: The term “treatment of acne” is not limiting in the preambles of claims 1 and 31. Order No. 34 at 11-13. The term “skin area to be treated for acne” in claims 1, 31, and 42 refers to the area where the claimed treatment is applied, whether that treatment is an action to remove sebum plugs, as described in claims 1 and 31, or a cleansing action as described in claim 42. *Id.* at 13-15. The terms “an action on the skin . . . is produced” in claims 1 and 31, and “an action on the skin . . . produces” in claim 42 are used in accordance with their plain and ordinary meaning, and “action on the skin” merely refers to movement of the skin that is caused by the claimed apparatus. *Id.* at 15-18. The term “alternating tension and compression of the skin” in claims 1, 31, 42, and 46 is construed to mean alternating stretching apart and pushing together of the skin. *Id.* at 18-20. The term “places the skin in alternating shear” in claims 4, 33, and 44 is construed to mean that the movement of the contacting element(s) produces alternating forces or stresses in the skin parallel to said movement. *Id.* at 20-22. The term “positively moving” in claims 1, 31, and 42 is construed to mean affirmatively driving. *Id.* at 22-23. The term “bi-directionally about a neutral position” in claims 1, 31, and 42 is construed to mean in one direction and then the opposite direction along a linear or arcuate path about a position where the contact element and skin are relaxed. *Id.* at 23-28. The term “relative to at least one adjacent contacting element” in claims 1 and 42 is construed to mean movement with respect to a neighboring contacting element in any direction, amplitude, or velocity that differs from the neighboring contacting element. *Id.* at 28-31.

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In addition, the term “an assembly [for positively moving] . . .” in claims 1 and 31 is subject to the requirements of 35 U.S.C. § 112, ¶ 6. Order No. 34 at 31-39.³ The claimed function is defined by the claim language, subject to the constructions for “positively moving,” “bi-directionally about a neutral position,” “relative to at least one adjacent contacting element,” “alternating tension and compression of the skin,” “an action on the skin,” and “a skin area to be treated for acne.” *Id.* at 39-40. The corresponding structure includes driver mechanism 50, described in the ’691 patent at column 6, lines 20-35 and shown in Figure 6, the drive assembly described at column 8, lines 37-49, the specific implementations of these driver assemblies described at columns 7:6-18, 9:10-23, 10:22-37, 11:15-49, 12:57-61, 13:57-59, and 14:28-30, and equivalents thereof. *Id.* at 40-44. No construction is necessary for the term “a mounting assembly for holding the contacting elements substantially adjacent to each other” in claims 1 and 42. *Id.* at 44-46.

2. ’906 Patent

The ’906 patent, entitled “Oscillating Brushhead Attachment System for a Personal Care Appliance,” issued on June 17, 2008, naming inventors Dane M. Roth, Stephen M. Meginniss, III, Kenneth A. Pilcher, Richard A. Reishus, and David Giuliani. Complaint Ex. 2; Mot. Ex. 2 (the ’906 patent). The ’906 patent describes a set of brushheads that are moveably interconnected and designed to be used with an oscillating electric skin care device. ’906 patent at Abstract.

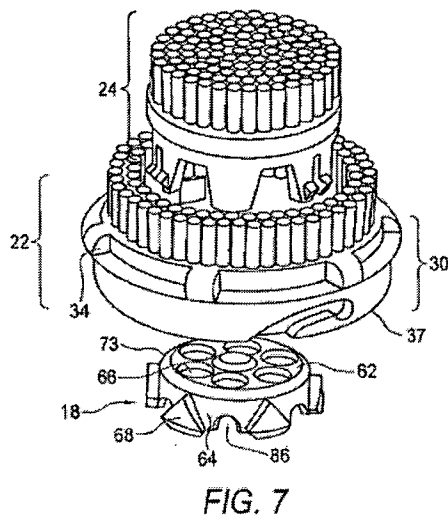
As seen below in Figure 7 from the patent, the ’906 patent is directed to a brushhead attachment system having three portions: a drive hub (18) and a brushhead assembly with two

³ PBL’s request for reconsideration of this claim construction is hereby denied. *See* Mem. at 13-18. PBL does not identify any new law or evidence that could not have been offered at the *Markman* Hearing, and as recognized by PBL and the Staff, this construction does not affect the outcome of any issue to be decided on summary determination. *Id.* at 13; Staff Resp. at 26 n.7.

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separate portions. '906 patent at 2:62-67. The two brushhead assembly portions are: (1) an inner brushhead portion (24) that engages the drive hub and oscillates, and (2) an annular outer portion (22) that remains stationary and does not move with the drive hub. *Id.* at 1:34-41; 2:62-67.

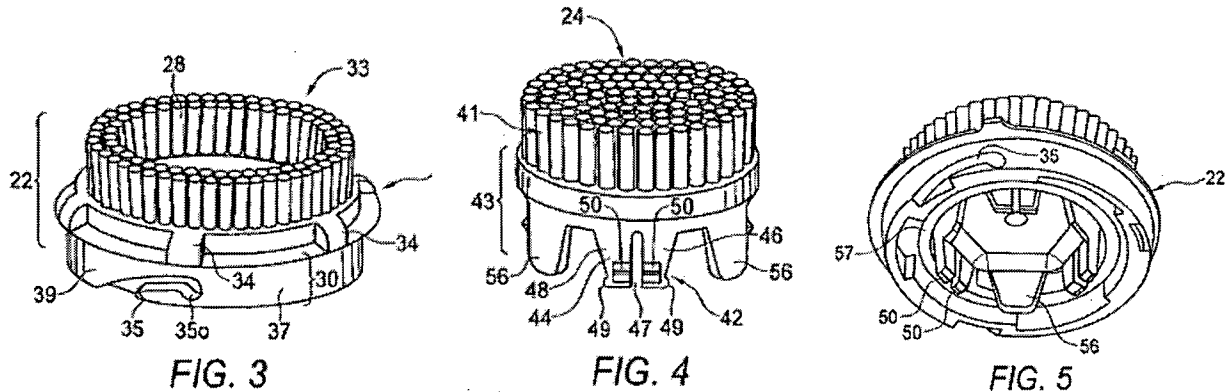
Moreover, the two distinct brushhead portions must be removable from and installable on the personal care appliance as a single unit. *Id.* The drive hub (18) is secured to a drive shaft of a personal care appliance and, as mentioned above, has an operative relationship with the inner brushhead portion (24), such that when they are connected both portions oscillate. *Id.* at Abstract, 2:67-3:3.



The '906 patent discloses that hub member (18) includes a plurality of spaced locking elements in the form of protrusions (68) around its periphery. '906 patent at Abstract. The annular outer brushhead portion includes a plurality of spaced grooves (35) in the outer surface thereof that mate with the extending pins in the body of the appliance for insertion and removal of the outer brushhead portion from the personal care appliance. *Id.*; *see also id.* at 3:18-30. The inner brushhead portion is configured to fit within the annular opening of the outer brushhead portion and includes a plurality of depending drive legs (56) which mate with the protrusions on the drive member for resulting oscillating action of the inner brushhead portion when the drive

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member oscillates. *Id.* at 3:40-4:33. The inner brushhead portion additionally includes snap legs (42) having locking snap elements (50) which fit onto an interior circular lip (57) of the outer brushhead portion in such a manner that the inner and outer brushhead portions may be installed and removed as a unit, while permitting the inner brushhead portion to be freely rotatable relative to the outer brushhead portion. *Id.*



The '906 patent's sole independent claim, claim 1, reads:

1. A brushhead assembly attachment system for a personal care appliance which includes an appliance body, comprising:
 - a hub member adapted to be secured to a driven shaft of a personal care appliance, the hub member including a plurality of locking elements around the periphery thereof;
 - an outer brushhead portion having a first cleaning member extending therefrom, the outer brushhead portion having a connecting structure for removably joining the outer brushhead assembly to the personal care appliance; and
 - an inner brushhead portion having a second cleaning member extending therefrom, configured to fit within the outer brushhead portion, which is configured to encircle the inner brushhead portion, wherein the inner brushhead portion includes a plurality of depending legs, at least some of which mate with the locking elements on the hub member, such that oscillating movement of the hub member results in similar movement of the inner brushhead portion, wherein at least others of the depending legs are configured to removably latch onto a portion of the outer brushhead portion, providing a joining relationship therebetween, but permitting oscillation of the inner brushhead portion relative to the outer brushhead portion, wherein the inner brushhead

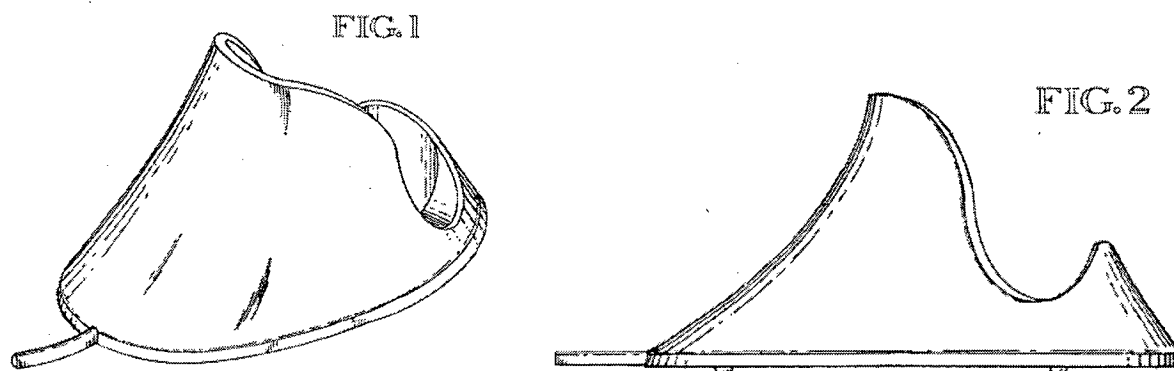
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portion and the outer brushhead portion are configured relative to each other and to the hub member such that attaching the outer brushhead portion to the appliance body by means of said connecting structure results in both connection of the outer brushhead portion to the appliance body and connection of the inner brushhead portion to the hub member.

'906 patent at 6:53-7:18. PBL further asserts dependent claim 2, specifying cleaning members that are bristles, and claims 4-5 and 7-15, describing specific limitations of the attachment system. *Id.* at 7:19-8:46. PBL does not seek a construction for any limitation of any asserted claim of the '906 patent, and Staff agrees that the asserted claim language can be given its plain and ordinary meaning from the perspective of one of ordinary skill in the art. Mem. at 21; Staff Resp. at 37-38.

3. D'809 Patent

The D'809 patent, entitled "Charger for an Electric Skin Brush," issued June 27, 2006, naming inventors are Dane M. Roth, Robert E. Akridge, and Kenneth A. Pilcher. Complaint Ex. 3; Mot. Ex. 3 (the D'809 patent). The D'809 patent claims an ornamental design for a charger for an electric skin brush, as shown and described in the patent's figures:



D'809 patent at Figs. 1-2; *see also* Figs. 3-7.

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4. Clarisonic Trade Dress

PBL's asserted trade dress is based on its Clarisonic products, including the Clarisonic Plus and the Clarisonic Pro. Complaint ¶ 152; Hennessy Decl. ¶ 3; Mot. Exs. 16, 17. PBL asserts that the Clarisonic products look substantially identical to each other in appearance, and are sold with a distinctive charging station. *Id.* PBL asserts that the elements of trade dress for the Clarisonic products include:

- hourglass shape of the product;
- shape of the head unit;
- identical molded arcs on each side of the head unit;
- a droplet (or “teardrop”) shaped pad of contrasting texture on the front of the device;
- one or more control buttons located towards the top of the droplet, inside its perimeter;
- two round lights (“dots”) located just above the droplet on the front of the device;
- four round lights (“dots”) centered on the narrowest part of the back of the device;
- location of the Clarisonic Pro or Plus name at the widest part of the back of the device;
- contrasting-color ring of bristles located within the bristles on the brush head;
- the shape and contour of the ring surrounding the brush head, with alternating protrusions and indentations; and
- the brush cap, with six large holes spaced evenly on the face, around the perimeter of the cap.

Complaint ¶ 156; Mem. at 23; Mot. Exs. 16, 17. PBL asserts that the key elements of the trade dress for the Clarisonic charging stations are:

- boot-last shape of the product;
- front plane of product extending forward in exaggerated proportion; and
- cradle for product dramatically higher in front than in back.

Complaint ¶ 157; Mem. at 24; Mot. Exs. 16, 17. These elements are collectively referenced as the “Clarisonic trade dress.”

II. LEGAL STANDARDS

A. Summary Determination

Commission Rule 210.18 governing summary determination states, in part:

The determination sought by the moving party shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.

19 C.F.R. § 210.18(b).

By analogy to Fed. R. Civ. P. 56 (a), in deciding whether to grant summary determination the evidence “must be viewed in the light most favorable to the party opposing the motion . . . with doubts resolved in favor of the nonmovant.” *Crown Operations Int’l, Ltd. v. Solutia, Inc.*, 289 F.3d 1367, 1375 (Fed. Cir. 2002) (citations omitted); *see also Xerox Corp. v. 3Com Corp.*, 267 F.3d 1361, 1364 (Fed. Cir. 2001) (“When ruling on a motion for summary judgment, all of the nonmovant’s evidence is to be credited, and all justifiable inferences are to be drawn in the nonmovant’s favor.”). The trier of fact should “assure itself that there is no reasonable version of the facts, on the summary judgment record, whereby the nonmovant could prevail, recognizing that the purpose of summary judgment is not to deprive a litigant of a fair hearing, but to avoid an unnecessary trial.” *EMI Group N. Am., Inc. v. Intel Corp.*, 157 F.3d 887, 891 (Fed. Cir. 1998) (citations omitted). “In other words, ‘[s]ummary judgment is authorized when it is quite clear what the truth is,’ [citations omitted], and the law requires judgment in favor of the movant based upon facts not in genuine dispute.” *Paragon Podiatry Lab., Inc. v. KLM Labs., Inc.*, 984 F.2d 1182, 1185 (Fed. Cir. 1993). “Issues of fact are genuine only ‘if the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party.’” *Crown Operations Int’l*, 289 F.3d at 1375 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

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B. Default

Commission Rule 210.16(b)(4) states: “A party found in default shall be deemed to have waived its right to appear, to be served with documents, and to contest the allegations at issue in the investigation.” 19 C.F.R. § 210.16(b)(4). Commission Rule 210.16(c) further provides that “[t]he facts alleged in the complaint will be presumed to be true with respect to the defaulting respondent.” 19 C.F.R. § 210.16(c). *See Certain Opaque Polymers*, Inv. No. 337-TA-883, Comm’n Op. at 18-19 (Apr. 30, 2015) (presuming allegations in a complaint to be true after default).

III. JURISDICTION

In order to have the power to decide a case, a court or agency must have both subject matter jurisdiction and jurisdiction over either the parties or the property involved. 19 U.S.C. § 1337; *Certain Steel Rod Treating Apparatus and Components Thereof*, Inv. No. 337-TA-97, Commission Memorandum Opinion, 215 U.S.P.Q. 229, 231 (1981).

A. Subject Matter Jurisdiction

Section 337 confers subject matter jurisdiction on the International Trade Commission to investigate, and if appropriate, to provide a remedy for, unfair acts and unfair methods of competition in the importation, the sale for importation, or the sale after importation of articles into the United States. *See* 19 U.S.C. §§ 1337(a)(1)(B) and (a)(2). The Complaint alleges that the defaulting Respondents have violated subsection 337(a)(1)(B) by the importation and sale of certain electric skin care devices. As indicated below, I find that the importation requirement has been satisfied with respect to certain products for each defaulting Respondent. No party has contested the Commission’s jurisdiction in this Investigation. Thus, I find that the Commission

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has subject matter jurisdiction over this Investigation under section 337 of the Tariff Act of 1930. *See Amgen, Inc. v. U.S. Int'l Trade Comm'n*, 902 F.2d 1532, 1536 (Fed. Cir. 1990).

B. Personal Jurisdiction

Respondents Beauty Tech, Flageoli, Serious Skin Care, and Our Family Jewels are located in the United States, and are thus subject to the personal jurisdiction of the Commission. Complaint ¶¶ 19, 58, 83, 88; Mot. Exs. 37C, 39B, 42E, 43E.

C. In Rem Jurisdiction

The Commission has *in rem* jurisdiction over the accused electric skin care devices by virtue of the below finding that the products have been imported into the United States. *See Sealed Air Corp. v. U.S. Int'l Trade Comm'n*, 645 F.2d 976, 985 (C.C.P.A. 1981).

IV. IMPORTATION

Section 337 prohibits “[t]he importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that (i) infringe a valid and enforceable United States patent” 19 U.S.C.

§ 1337(a)(1)(B). A complainant “need only prove importation of a single accused product to satisfy the importation element.” *Certain Purple Protective Gloves*, Inv. No. 337-TA-500, Order No. 17 at 5 (Sept. 23, 2004). I find that PBL has met the importation requirement by identifying specific instances of importation by each of the defaulting Respondents: (i) ANEX Mimian products that were “Made in Korea,” Complaint ¶ 222, Ex. 7 (Muller Decl.) ¶¶ 35-38, Exs. 7I1, 7I2; (ii) Beauty Tech NuSonic products that were “Made in China,” *Id.*, Complaint Ex. 7 (Muller Decl.) ¶¶ 31-34, Exs. 7H1, 7H2; (iii) A Serious Skin Care product distributed by Flageoli that was “Made in China,” *Id.*, Complaint Ex. 7 (Muller Decl.) ¶¶ 55-58, Exs. 7N1, 7N2; (iv) Coreana 4D Motion Cleanser products that were “Made in Korea,” *Id.*, Complaint Ex. 7 (Muller

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Decl.) ¶¶ 51-54, Exs. 7M1, 7M2; (v) Korean Beauty Facial Cleansing Brush & Foundation Head System products that were “Made in Korea,” *Id.*, Complaint Ex. 7 (Muller Decl.) ¶¶ 43-46, Exs. 7K1, 7K2; (vi) An Episonic product from Our Family Jewels that was “Made in China,” *Id.*, Complaint Ex. 7 (Muller Decl.) ¶¶ 4-7, Exs. 7A1, 7A2; (vii) An Anzikang Electric Facial & Body Brush Spa Cleaning System product labeled with a sales and production address in China, *Id.*, Complaint Ex. 7 (Muller Decl.) ¶¶ 19-22, Exs. 7E1, 7E2; (viii) CNAIER products from Wenzhou Ai Er that were “Made in China,” *Id.*, Complaint Ex. 7 (Muller Decl.) ¶¶ 63-66, Exs. 7P1, 7P2; and (ix) Lemon Sonic products from Xnovi that were “Made in China.” *Id.*, Complaint Ex. 7 (Muller Decl.) ¶¶ 11-14, Exs. 7C1, 7C2.

V. DOMESTIC INDUSTRY

A. Substantial Injury

Unfair practices in import trade are unlawful if the “threat or effect” is, *inter alia*, “(i) to destroy or substantially injure an industry in the United States.” 19 U.S.C. § 1337(a)(1)(A). PBL seeks a summary determination under this provision that the practices of certain defaulting Respondents infringe the Clarisonic trade dress. To satisfy the domestic injury requirement with respect to trade dress violations, PBL must show substantial injury. *See* 19 U.S.C. § 1337(a)(1)(A)(i).

Under section 337(a)(1)(A)(i), a complainant must establish a causal relationship between the unfair acts and the injury. *Certain Ink Markers and Packaging Thereof*, Inv. No. 337-TA-522, Order No. 30, 2005 WL 2866049, at *27 (July 25, 2005) (citations omitted). The required showing can be made in a variety of ways, and the injury requirement also can be met by a showing of probable future injury. *See id.* Circumstances from which probable future injury may be inferred include, for example, “(1) foreign cost advantages and production

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capacity, (2) the ability of the imported product to undersell the domestic product, or (3) substantial foreign manufacturing capacity combined with the respondent's intention to penetrate the United States market." *Id.* (citations omitted).

PBL alleged in the Complaint that the misappropriation of the Clarisonic trade dress by several Respondents, including Our Family Jewels and Anzikang, has threatened and caused, and will continue to threaten and cause, substantial injury to PBL's domestic injury. Complaint ¶¶ 267-273. As discussed above, PBL has established that Respondents Our Family Jewels and Anzikang have imported certain accused products. *See* SUMF ¶ 136; Mot. Ex. 7 (Muller Decl.) ¶¶ 4-7, 19-22, Ex. 7A2 (showing photographs of Our Family Jewels Episonic), 7E2 (showing photographs of Anzikang's Dione). These products are available for sale in the United States at a substantially lower price than PBL's products. Complaint ¶ 269; SUMF ¶ 137, Mot. Ex. 7A1 (receipt for purchase of Episonic), 7E1 (receipt for purchase of Dione). A large number of such products are available in the U.S. For example, during the pendency of this Investigation, PBL personnel discovered between one and four "knockoff" products each month, many of which could not be identified by manufacturer. Mot. Ex. 33 (Miller Decl.) at ¶¶ 17, 18.

PBL asserts that after such "knockoff" products began to enter the market, "there was a simultaneous and immediate decline in sales of the Clarisonic Pro and Plus." SUMF ¶ 138 (citing Mot. Ex. 32 (Hennessy Decl.) at ¶ 70); *see* Complaint ¶ 273. Mr. Hennessy presents a table showing a decline in sales since 2011, which "can be attributable to the infringing products." Mot. Ex. 32 (Hennessy Decl.) at ¶ 70.

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Based on PBL's evidence, however, it cannot be determined definitively that PBL has suffered injury caused by infringement of the Clarisonic trade dress. Mr. Hennessy's declaration states that sales declined after infringing products entered the market but does not provide data showing when that occurred, or any other details that would establish that the decline in sales more likely than not was due to unfair competition. PBL, as noted above, states that the decline may be "at least" partially the result of unfair competition. SUMF ¶ 139. No specific data back up the speculation on this point or quantify the amount of the purported injury. *See* Hennessy Decl. at ¶ 70 (stating that "The decrease in sales has been continuous since 2011, and can be attributable to the appearance of knock-off products in the marketplace.") Mr. Hennessy's speculation, even if undisputed, is not sufficient to carry PBL's burden of proof in this respect. More substantive data are required to show that the infringing products, not other factors, actually caused a decrease in PBL's sales. Similarly, PBL's statement that "the misappropriation of the Clarisonic Trade Dress has harmed PBL's reputation, goodwill and brand image and deprived PBL of the ability to control the quality of products that are attributed to it," Mem. at 48, is unsupported by hard evidence.

On the other hand, sufficient evidence of the extent and nature of the trade dress violations has been adduced to support a finding that there is a threat of substantial injury in the future. *See* 19 U.S.C. ¶ 1337 (a)(1)(A) (prohibiting unfair methods and acts "the threat *or* effect of which" is to substantially injure an industry in the United States) (emphasis added). This finding is based on the large numbers of infringing products being imported into the United States from a wide variety of sources, *see* SUMF at ¶¶ 140-186, and hard data showing that those

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products are being sold for substantially less than the price of PBL's products. *See* SUMF at ¶¶ 241-242. PBL thus has presented "reliable, probative, and substantial evidence," *see* 5 U.S.C. § 556(d), of the threat of future injury, and I find that PBL has satisfied the domestic injury requirement under Section 337(a)(1) as to the Clarisonic trade dress.

B. Economic Prong

In patent-based proceedings under Section 337, a complainant must establish that an industry "relating to the articles protected by the patent . . . exists or is in the process of being established" in the United States. 19 U.S.C. § 1337(a)(2). The domestic industry requirement of Section 337 consists of an "economic prong" and a "technical prong." *Certain Stringed Musical Instruments and Components Thereof* ("Stringed Musical Instruments"), Inv. No. 337-TA-586, Comm'n Op. at 12-14, 2009 WL 5134139, at *10 (April 24, 2008).

Subsection (2) of Section 337(a) states, in pertinent part, that the protection against unfair practices in import trade applies "only if an industry in the United States, relating to the articles protected by the patent . . . concerned, exists or is in the process of being established." 19 U.S.C. § 1337(a)(2). Subsection (3) of Section 337(a) provides:

For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned –

- (A) significant investment in plant and equipment;
- (B) significant employment of labor or capital; or
- (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. § 1337(a)(3). The Commission has adopted a flexible, market-oriented approach to domestic industry, favoring case-by-case determination in light of "the facts of each investigation, the article of commerce, and the realities of the marketplace." *Certain Printing &*

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Imaging Devices & Components Thereof (“*Printing and Imaging Devices*”), Inv. No. 337-TA-690, 2011 WL 1303160, at *15 (Feb. 17, 2011) (citing *Certain Male Prophylactic Devices* (“*Male Prophylactic Devices*”), Inv. No. 337-TA-546, Comm’n Op. at 39 (Aug. 1, 2007)).

PBL asserts that a domestic industry exists for the Asserted Patents in relation to the Clarisonic Mia 1, Mia 2, Mia 3, Pro, Plus, Smart Profile, Mia Fit, and Alpha Fit products (collectively, the “DI products”).

1. Significant Investment

A complainant’s investment must be shown to be significant “in relation to the articles protected by the intellectual property right concerned.” *Printing & Imaging Devices*, 2011 WL 1303160, at *15. Significance “is not measured in the abstract or in an absolute sense” or “according to any rigid mathematical formula.” *Id.* (citing *Male Prophylactic Devices*, Inv. No. 337-TA-546, Comm’n Op. at 42-43). Relevant activities may include production-related investments in the patented articles as well as, under appropriate circumstances, service, repair, testing and/or packaging activities relating to the protected article. *Id.* at *16. In general, the complainant must distinguish its activities and investments from those of a mere importer. *See Male Prophylactic Devices*, 2008 WL 2952724, at *27; *Certain Concealed Cabinet Hinges and Mounting Plates*, Inv. 337-TA-289, Comm’n Op., 1990 WL 10608981, at *10-11 (Jan. 8, 1990). “There is no minimum monetary expenditure that a complainant must demonstrate to qualify as a domestic industry,” nor is there a “need to define or quantify the industry itself in absolute mathematical terms.” *Stringed Musical Instruments*, Comm’n Op. at 25, 26. Likewise, “a precise accounting is not necessary, as most people do not document their daily affairs in contemplation of possible litigation.” *Id.*

To demonstrate that expenditures are significant, a complainant is required to place those expenditures in the context of its overall operations, so that investments are shown to be

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significant not in absolute terms but in relation to the business operation as a whole and to the relevant industry. *See Printing and Imaging Devices*, 2011 WL 1303160, at *17 (“[T]he magnitude of the investment cannot be assessed without consideration of the nature and importance of the complainant’s activities to the patented products in the context of the marketplace or industry in question”). Allocation of expenditures to domestic industry products as compared to non-domestic industry products often is necessary to show the significance of investments. Complainants commonly present sales data to show the importance of revenue from domestic industry products compared to revenue from other products.

In this case, PBL has provided evidence of the significance of its DI products by showing the overall sales revenue that is obtained from the DI products in the U.S. and overseas. *See Hennessy Decl.* at ¶¶ 9-11. Staff has prepared a table showing the various percentages of revenue from DI products as a proportion of PBL’s U.S. sales revenue, based on the data supplied by Mr. Hennessy. *See Staff Resp.* at 56. This evidence shows that PBL’s investment in the DI products is significant in the context of its operations in the United States and worldwide. The data presented by staff indicate that the DI products represented approximately 75% of PBL’s U.S. sales revenue in 2013-2015.

2. Plant and Equipment (19 U.S.C. § 1337(a)(3)(A))

In the Complaint, PBL asserts that it has made significant investment in plant and equipment related to the DI products. Complaint ¶¶ 249-254, 259. PBL further supports its asserted domestic industry through declarations from Mr. Hennessy. Complaint Ex. 37; Mot. Ex. 32 (Hennessy Decl.); Supp. Ex. B (Hennessy Supp. Decl.).

PBL’s headquarters, principal place of business and manufacturing facility in Redmond, WA, occupies approximately [REDACTED] Hennessy Supp. Decl. at ¶ 3. PBL carries out a variety of activities at the Redmond facility, including manufacture, administration, financial

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management, as well as engineering and research. *Id.* The square footage allocations are: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] both

domestically and internationally. *Id.* at ¶ 4. The annual rental for the Redmond facility is about

[REDACTED]. Hennessy Decl. at ¶ 12.

The Clarisonic products are manufactured [REDACTED] at the Redmond facility. *Id.* at ¶ 16. As stated by Mr. Hennessy, PBL has invested many millions of dollars on manufacturing equipment to produce components of the Clarisonic System, including the DI products.

Hennessy Supp. Decl. at ¶ 5. In 2013, PBL spent [REDACTED] in capital costs including tooling for creating molds for the various Clarisonic devices, dyes and assembly line equipment.

Id. PBL spent [REDACTED] on manufacturing and related support in 2014.

Hennessy Decl. at ¶ 23.

PBL also maintains a manufacturing warehouse facility occupying about [REDACTED]

[REDACTED] and a finished goods distribution and warehouse facility occupying about [REDACTED]

[REDACTED] both in Kent, WA. *Id.* at ¶¶ 13-14. The combined annual rent for these facilities is

[REDACTED]. *Id.*

While PBL does not allocate its expenditures on a product-by-product basis, Mr. Hennessy has estimated PBL's investments in plant and equipment related to the DI products using three different models: equal apportionment of the total investment amount of the current DI products, apportionment based on relative sales revenue, and apportionment based on relative unit sales volumes. *See* Hennessy Decl. at ¶¶ 24-27. The amounts under any of these

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models appear to be significant, but some of the expenditures included in Mr. Hennessy's calculations cannot be counted under subsection (A).

Section 337(a)(3) sets forth three types of expenses that may give rise to a domestic industry. The types of expenses are categorized in the statute as (A) plant and equipment; (B) labor or capital; and (C) "exploitation, including engineering, research and development, or licensing." 19 U.S.C. § 1337(a)(3)(A)-(C). While satisfaction of any of the three subsections numbered (A)-(C) will satisfy the economic prong, it does not follow that all expenditures of whatever nature may be counted under each of them. Instead, as the statute is written, only those expenditures that are indicated in each subsection may be counted toward satisfaction of the economic prong under that subsection. As a result, PBL's expenditures on facilities used for research and product development should not be counted under subsection (A); those expenditures count (if at all) under subsection (C).

The history of section 337(a)(3) confirms this plain meaning of the statute. Historically, until Congress amended section 337 in 1988, the Commission interpreted the statute "to require proof of the existence (or prospect) of a domestic industry that was manufacturing the articles protected by the intellectual property" *InterDigital Commc'n, LLC v. Int'l Trade Comm'n*, 707 F.3d 1295, 1300 (Fed. Cir. 2013); *see Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376, 1996 WL 1056330, at *14 (Nov. 1, 1996) ("[T]he domestic industry determination is . . . no longer confined to those portions of the domestic production facilities that manufacture under the patent in controversy.") Only after enactment of the 1988 amendments were expenses incurred as the result of activities enumerated in subsection (C) counted toward satisfaction of the economic prong. *See Printing & Imaging Devices*, 2011 WL 1303160, at *15 ("The legislative history of section 337(a)(3) evidences that

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Congress intended to codify the Commission's practice with respect to the first two factors and to expand the scope of the domestic industry by adding the third factor 'substantial investment in [the intellectual property's] exploitation,' as set forth in section 337(a)(3)(C). H.R. Rep. No. 40, 100th Cong., 1st Sess. Pt. 1, at 157 (1987)."

If expenditures on plant to accommodate activities such as product design, engineering and research and development could satisfy the economic prong under subsection (A), there would have been no need for Congress to enact subsection (C) explicitly to include those activities as ones giving rise to domestic industry expenditures. Under basic tenets of statutory construction, subsection (C) cannot be superfluous; therefore, expenses for design, engineering and research and development cannot be allocated to subsection (A). As discussed below, the same methodological flaw appears with respect to the amounts alleged in satisfaction of the economic prong under section 337(a)(3)(B).

As a result, non-manufacturing expenditures would need to be backed out of the calculation of qualifying investments under subsections (A) as well as (B). Notwithstanding the expenditures that should be counter under other subsections, however, it is apparent from Mr. Hennessy's testimony that a significant amount of the expenditures associated with PBL's Redmond headquarters properly are included under section 337(a)(3)(A). Mr. Hennessy reports that of the [REDACTED] occupied by the Redmond facility, most is devoted to manufacturing. Hennessy Decl. at ¶ 12, Hennessy Supp. Decl. at ¶ 4 [REDACTED]. The [REDACTED] rental for more than [REDACTED] in PBL's two manufacturing warehouses also should be counted. Thus, while expenditures devoted to activities properly counted under subsection (A) are less than asserted by Mr. Hennessey, they still are significant.

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PBL's expenditures related to manufacturing, moreover, cumulatively totaled [REDACTED] as of the end of 2013, and an additional [REDACTED] were added by the end of 2014. Hennessy Decl. ¶ 23. These costs are attributable to manufacturing for tool and die and assembly line equipment, for example. Hennessy Supp. Decl. at ¶ 5. According to Mr. Hennessy, all of these capital investments are attributable to "manufacturing and related support;" thus no deduction from these amounts is needed. Hennessy Decl. at ¶ 23.

3. Labor and Capital (19 U.S.C. § 1337(a)(3)(B))

In its Complaint, PBL asserts that it has made significant investments in labor and capital related to the DI products. Complaint ¶¶ 249-254, 259. PBL has approximately [REDACTED]

[REDACTED] Complaint Ex. 37 (Hennessy Complaint Decl.) ¶ 18; Supp. Ex. B (Hennessy Supp. Decl.) ¶ 6. As of December 31, 2013, PBL's total "United States-burdened payroll" exceeded [REDACTED]. Complaint Ex. 37 (Hennessy Complaint Decl.) ¶ 19; Mot. Ex. 32 (Hennessy Decl.) ¶ 30. As of December 31, 2014, PBL's total "United States-burdened" payroll exceeded [REDACTED]. *Id.* As of December 10, 2015, PBL's total "United States-burdened" payroll exceeded \$39.7 million annually. *Id.*

PBL separately reports labor costs for employees tasked with "designing products of, and processes for, the Clarisonic System, including the PBL Domestic Industry products." SUMF at ¶ 110; *see* Hennessy Decl. ¶ 31. PBL says research and development labor costs totaled [REDACTED]; in 2014, labor costs totaled [REDACTED]. Hennessy Supp. Decl. at ¶ 9. Although PBL is unable to apportion these costs specifically to individual products, Mr. Hennessy asserts that

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under any reasonable allocation method, the labor costs associated with research and development on the DI products is significant. *See* Hennessy Decl. at ¶¶ 31-35.

Mr. Hennessy states that costs for its [REDACTED] personnel totaled [REDACTED] in 2013. Hennessy Decl. ¶¶ 42, 48. Capital costs in 2013 were [REDACTED] and related manufacturing costs (excluding labor) totaled [REDACTED] Hennessy Decl. at ¶ 48. In 2014, labor costs were [REDACTED], capital costs were [REDACTED], and manufacturing costs were [REDACTED]. *Id.* In 2015 the amount for labor was [REDACTED], for capital [REDACTED], and for manufacturing, [REDACTED]. *Id.* Mr. Hennessy provides alternative models for allocating labor costs across the various Clarisonic product lines.

There is a problem with Mr. Hennessy's methodology in allocating costs under section (B) of section 337(a)(3). As he did in identifying expenditures under subsection (A), Mr. Hennessy has included under subsection (B) expenditures that were incurred as a result of PBL's research and product development activities. *See* Hennessy Decl. at ¶ 31; Hennessy Supp. Decl. at ¶ 9. For the same reasons discussed above, labor and capital expenditures for research and development must be counted under subsection (C) and cannot be counted under subsection (B).

However, because Mr. Hennessy provides a separate amount under subsection (B) for design, research and development costs, it is possible to determine that the amounts expended on labor and capital as a result of manufacturing activities are significant in themselves. Even if [REDACTED] associated with annual research and development expenditures is

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backed out of the investments recognized under subsection (B), labor and capital costs related to PBL's manufacturing operations still are significant.⁴

4. Patent Exploitation (19 U.S.C. § 1337(a)(3)(C))

PBL further asserts in the Complaint that it has made substantial investments in the Clarisonic system that exploits the Asserted Patents. Complaint ¶¶ 260-266. PBL states that under the category of research and development costs, labor totaled [REDACTED] in 2013, related capital costs that year were [REDACTED], and related research and development costs were [REDACTED]. Hennessy Decl. ¶ 36. For 2014, labor costs were about [REDACTED], related capital costs were [REDACTED], and related research and development amounted to [REDACTED]. *Id.* All those amounts were invested in the United States. Hennessy Supp. Decl. ¶ 9.

Mr. Hennessy states that each of the patents at issue in this Investigation “is directed to technology embodied in one or more of the current Clarisonic System” products. *Id.* ¶ 55. Staff maintains, however, that there is an insufficient showing of nexus between the research and development activities identified by Mr. Hennessy and the asserted patents. Staff asserts that “PBL fails to provide ‘a qualitative discussion of the relationship between the patented [invention] and the domestic investment,’ and consequently fails to establish a nexus between its investment and any of the asserted patents.” Staff Br. at 64 (quoting *Certain Integrated Circuit Chips and Products Containing The Same*, Inv. No. 337-TA-859, Comm’n Op. at 49-50 (Aug. 22, 2014)).

⁴ In theory, it would make no difference whether expenditures for plant, labor, and capital were counted under subsection (A), (B) or (C), if the substantive requirements for qualifying expenditures under (A) and (B) were not different than under (C). But the Commission has ruled on several occasions that the requirements to qualify expenditures under subsection (C) are different; under subsection (C) expenditures for labor and plant that arise from research activities must be linked to research on the patented technology; such costs cannot otherwise be counted at all. *See infra*.

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The Commission has held that qualifying expenditures under subparagraph (C) must be linked to the specific patent or technology asserted and not be “only product-related.” *Certain Television Sets, Television Receivers, Television Tuners, and Components Thereof*, Inv. No. 337-TA-910, Comm’n Op., 2015 WL 6755093, at *35 n.80 (Oct. 30, 2015). PBL’s statement that “the claimed technology is incorporated into” its DI product line, *see* Mem. at 44, is insufficient to establish a domestic industry under subsection (C).

As Staff points out, the same lack of nexus negates PBL’s reliance on private and clinical studies regarding new products and, in addition, PBL fails to quantify this investment. *See* Staff Resp. at 64 (citing *Lelo Inc. v. Int’l Trade Comm’n*, 786 F.3d 879, 883 (Fed. Cir. 2015)). PBL’s investments in advertising and marketing are not tied to the patented technology itself. PBL’s defense of its intellectual property rights also does not count toward establishing a domestic industry under subsection (C), because PBL has not demonstrated that its legal expenditures were related to efforts to license the technology as opposed to preventing others from exploiting it. *See Certain Multimedia Display and Navigation Devices and System, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-694, Comm’n Op. at 14, 22-23 (Aug. 8, 2011) (discounting litigation activities under subsection (C) as not being solely invested in licensing).

In sum, with respect to domestic industry, PBL has satisfied the economic prong with sufficient, undisputed, and reliable evidence under subsections (A) and (B), but has not satisfied the economic prong under subsection (C) of section 337(a)(3).

C. Technical Prong

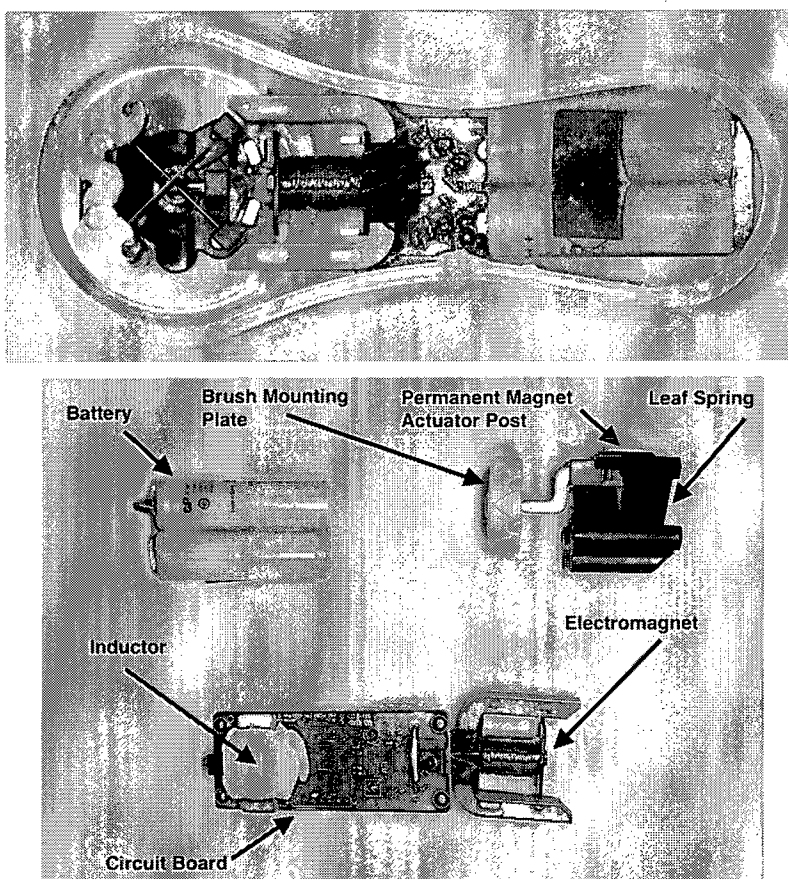
To meet the technical prong, the complainant must establish that it practices at least one claim of each asserted patent. *Certain Point of Sale Terminals and Components Thereof*, Inv. No. 337-TA-524, Order No. 40 (April 11, 2005). “The test for satisfying the ‘technical prong’ of

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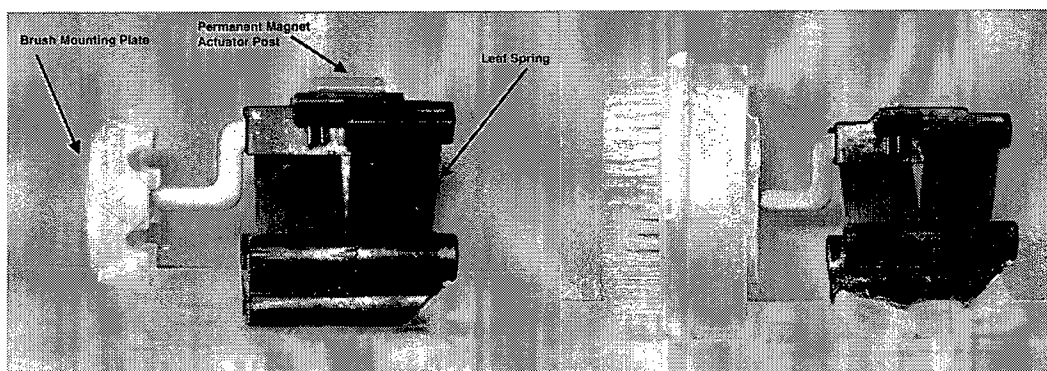
the industry requirement is essentially [the] same as that for infringement, *i.e.*, a comparison of domestic products to the asserted claims.” *Alloc v. U.S. Int’l Trade Comm’n*, 342 F.3d 1361, 1375 (Fed. Cir. 2003). The technical prong of the domestic industry requirement can be satisfied either literally or under the doctrine of equivalents. *Certain Excimer Laser Systems for Vision Correction Surgery and Components Thereof and Methods for Performing Such Surgery*, Inv. No. 337-TA-419, Order No. 43 (July 30, 1999).

PBL contends that each DI product practices at least claims 1 and 6 of the ’691 patent and claims 1 and 2 of the ’906 patent. Mem. at 37-38. Further, PBL alleges that the charging stations for the Clarisonic Pro and Clarisonic Plus domestic industry products practice the claim of the D’809 Patent. Mem. at 38.

PBL attached claim charts to the Complaint demonstrating how certain of the DI products practice the asserted claims of the ’691 patent, ’906 patent, and D’809 patent. Complaint ¶¶ 244-248, Exs. 27DD, 27EE, 27FF. In addition, PBL attached to its motion for summary determination a declaration from Dr. Zoe Draelos, M.D., who tested the Clarisonic Plus, Mia 1, and Mia 2 on subjects with acne to determine that these products satisfy the limitations of claim 1 of the ’691 patent requiring an “apparatus for treatment of acne” and “produce alternating tension and compression on the skin, wherein when the apparatus is positioned so that the end faces of the contacting elements contact the skin, an action on the skin in the plane of the skin area to be treated for acne is produced to remove sebum plugs from skin pores, permitting ready removal thereof from the skin.” Mot. Ex. 34 (Draelos Decl.) ¶¶ 3, 32-42, 54. PBL further submitted a declaration from Dr. Brian C. Fabien, Ph.D., who disassembled Clarisonic products and identified: (1) a battery, (2) a circuit board, (3) an inductor, (4) an electromagnetic actuator (a solenoid), and (5) the assembly to which the brush is mounted.



Id. ¶¶ 31, 35. He also inspected the brush assembly of the Clarisonic products to identify the mounting assembly composed of a central shaft that supports the brush mounting plate and the permanent magnet actuator post.



Id. ¶ 33. Dr. Fabien relied on Dr. Draelos's analysis, and prepared claim charts showing evidence that the Clarisonic Mia 1, Mia 2, and Smart Profile practice each limitation of claims 1

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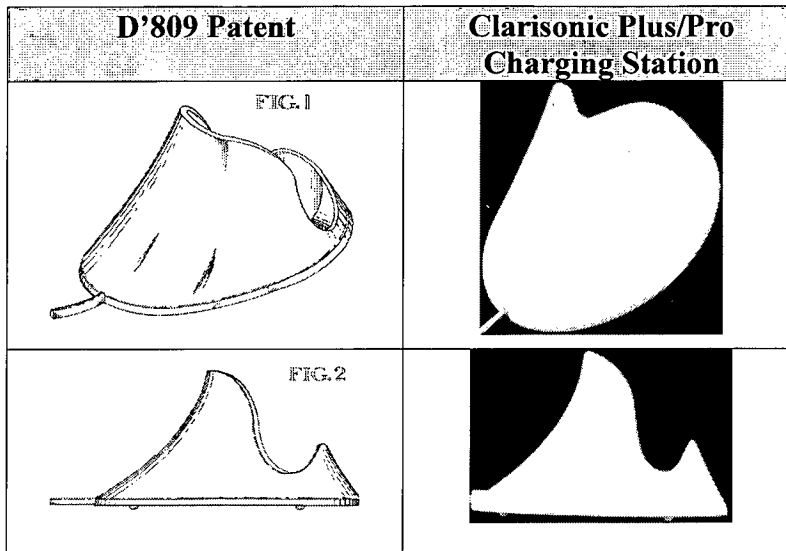
and 6 of the '691 patent. *Id.* ¶ 78, Exs. 35V, 35X, 35GG. Dr. Fabien identified bristle tufts arranged in a circular pattern comprising the claimed “contacting elements,” a mounting assembly holding the contacting elements substantially adjacent to each other, and a driver assembly meeting the limitations of the claims. *Id.* Dr. Fabien thus concluded that the Clarisonic Mia 1, Mia 2, and Smart Profile practice claims 1 and 6 of the '691 patent. *Id.* ¶¶ 2, 75a.

Dr. Fabien further prepared claim charts showing evidence that the Clarisonic Mia 1, Mia 2, and Smart Profile practice each limitation of claims 1 and 2 of the '906 patent. *Id.* ¶ 78, Exs. 35W, 35Y, 35HH. Dr. Fabien identified the bristle tufts as “cleaning members” and identified hub components meeting the limitations of the claims. *Id.* Dr. Fabien thus concluded that the Clarisonic Mia 1, Mia 2, and Smart Profile practice claims 1 and 2 of the '906 patent. *Id.* ¶¶ 2, 76a.

A PBL Senior Researcher, Zane Miller, also submitted a declaration stating that each of the DI products have similar inner assemblies and “operate in substantially the same manner and are similarly mechanically configured to move a brush head in an oscillatory back-and-forth arcuate motion at sonic frequencies.” Mot. Ex. 33 (Miller Decl.) ¶¶ 4-13. Relying on Mr. Miller’s representation, and based on visual inspection and operation of the other DI products, Dr. Draelos and Dr. Fabien extended their opinions to all of the DI products. Mot. Ex. 34 (Draelos Decl.) ¶¶ 55-58; Mot. Ex. 35 (Fabien Decl.) ¶¶ 66-69, 78.

In addition, Dr. Fabien also analyzed the charging station for the Clarisonic Pro and Clarisonic Plus, and found that these products practice the D’809 patent. *Id.* ¶¶ 3, 77b; Mot. Ex. 35FF. As part of his analysis, Dr. Fabien reviewed photographs of the charging stations to compare with the figures in the D’809 patent:

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Id. ¶¶ 62-64, Mot. Ex. 35FF.

There is no evidence in the record to contradict PBL's evidence that the DI products practice the identified claims of the Asserted Patents, and Staff supports a finding that the technical prong of the domestic industry requirement is satisfied. Staff Resp. at 51-54. I therefore find that PBL has satisfied the technical prong of the domestic industry requirement for each Asserted Patent, and accordingly, I find that a domestic industry exists as required by Section 337(a)(2).

VI. INFRINGEMENT

PBL accuses each of the defaulting Respondents of infringement of claims of the '691 patent and certain defaulting Respondents of infringement of claims of the '906 patent, the D'809 patent, and the Clarisonic trade dress:

- ANEX Mimian products: claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of the '691 patent; and claims 1-2, 4-5, and 7-15 of the '906 patent;
- Beauty Tech NuSonic products: claims 31, 33, and 39-41 of the '691 patent; and the D'809 patent;
- Flageoli and Serious Skin Care Beauty Buzz products: claims 31, 33, and 39-41 of the '691 patent; and the D'809 patent;
- Coreana 4D Motion products: claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and

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49 of the '691 patent; and claims 1-2, 4-5, and 7-14 of the '906 patent;

- Korean Beauty products: claims 31, 33, and 39-41 of the '691 patent;
- Our Family Jewels Episonic products: claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of the '691 patent; claims 1-2, 4-5, and 7-15 of the '906 patent; the D'809 patent, and the Clarisonic trade dress;
- Anzikang Dione products: claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of the '691 patent; claims 1-2, 4-5, and 7-15 of the '906 patent; the D'809 patent, and the Clarisonic trade dress;
- Wenzhou Ai Er CNAIER products: claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of the '691 patent; and claims 1-2, 4-5, and 7-15 of the '906 patent;
- Xnovi Lemonsonic products: claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of the '691 patent; and claims 1-2, 4-5, and 7-15 of the '906 patent.

Mem. at 6.

A. Applicable Law

Section 337(a)(1)(B)(i) prohibits “the importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that – (i) infringe a valid and enforceable United States patent or a valid and enforceable United States copyright registered under title 17.” 19 U.S.C. §1337(a)(1)(B)(i).

The Commission has held that the word “infringe” in Section 337(a)(1)(B)(i) “derives its legal meaning from 35 U.S.C. § 271, the section of the Patent Act that defines patent infringement.”

Certain Electronic Devices with Image Processing Systems, Components Thereof, and Associated Software, Inv. No. 337-TA-724, Comm’n Op. at 13-14 (December 21, 2011). Under 35 U.S.C. § 271(a), direct infringement of a patent consists of making, using, offering to sell, or selling the patented invention without consent of the patent owner.

1. Literal Infringement

“An infringement analysis entails two steps. The first step is determining the meaning and scope of the patent claims asserted to be infringed. The second step is comparing the

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properly construed claims to the device accused of infringing.” *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed. Cir. 1995) (*en banc*), *aff’d*, 517 U.S. 370 (1996) (citation omitted). Infringement must be proven by a preponderance of the evidence. *SmithKline Diagnostics, Inc. v. Helena Labs. Corp.*, 859 F.2d 878, 889 (Fed. Cir. 1988). A preponderance of the evidence standard “requires proving that infringement was more likely than not to have occurred.” *Warner-Lambert Co. v. Teva Pharm. USA, Inc.*, 418 F.3d 1326, 1341 n.15 (Fed. Cir. 2005).

A complainant must prove either literal infringement or infringement under the doctrine of equivalents. Literal infringement requires the patentee to prove that the accused device contains each and every limitation of the asserted claim(s). *Frank’s Casing Crew & Rental Tools, Inc. v. Weatherford Int’l, Inc.*, 389 F.3d 1370, 1378 (Fed. Cir. 2004). “If even one limitation is missing or not met as claimed, there is no literal infringement.” *Elkay Mfg. Co. v. EBCO Mfg. Co.*, 192 F.3d 973, 980 (Fed. Cir. 1999). Literal infringement is a question of fact. *Finisar Corp. v. DirecTV Group, Inc.*, 523 F.3d 1323, 1332 (Fed. Cir. 2008).

2. Design Patent Infringement

The test for determining infringement of a design patent is the “ordinary observer” test. *See, e.g., Certain Electronic Digital Media Devices and Components Thereof*, Inv. No. 337-TA-796, Comm’n Op. at 7-8 (Sept. 6, 2013) (citing *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 678 (Fed. Cir. 2008) (*en banc*)). In defining the “ordinary observer test,” the Supreme Court stated:

[I]f, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.

Id. (quoting *Gorham Co. v. White*, 81 U.S. 511, 528 (1871)). Thus, the “ultimate question [of

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whether a design patent is infringed] requires determining whether ‘the effect of the whole design [is] substantially the same’.” *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1125 (Fed. Cir. 1993) (quoting *Gorham*, 81 U.S. at 530). Design patent infringement is a question of fact, which a patentee must prove by a preponderance of the evidence. *Id.* at 1124.

3. Trade Dress Infringement

Trade dress infringement is analyzed under a two-pronged test: first, whether the mark is valid and, second, whether the respondent’s use of the accused mark is likely to cause confusion among an appreciable number of members of the public as to the source or sponsorship of the product. *Certain Footwear Products*, Inv. No. 337-TA-936, Initial Determination at 64 (Nov. 17, 2015). In order for a trademark to be valid, it must be nonfunctional and distinctive (*i.e.*, has acquired “secondary meaning”). *Id.* at 14. When the mark is unregistered, the party asserting the trade dress “bears the burden of establishing that the common law trademarks have secondary meaning and are not functional.” *Id.* at 14 (citing *Wal-Mart Stores Inc. v. Samara Brothers Inc.*, 529 U.S. 205, 216 (2000)).

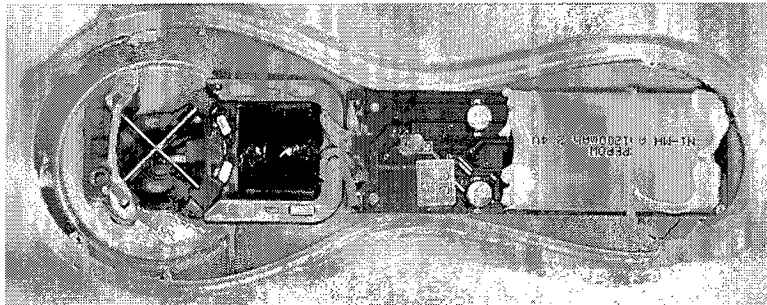
B. ’691 Patent

PBL accuses products from each defaulting Respondent of infringing certain claims of the ’691 patent. PBL attached claim charts to the Complaint demonstrating how the defaulting Respondents’ products infringe asserted claims of the ’691 patent. Complaint ¶¶ 174, 176, 178, 181, 182, 184, 186, 188, 189, Exs. 27A, 27C, 27E, 27H, 27I, 27K, 27M, 27O, 27P. In support of PBL’s motion for summary determination, Dr. Draelos tested the ANEX Mimian, Beauty Tech NuSonic, Coreana 4D Motion, Korean Beauty, Our Family Jewels Episonic, Anzikang Dione, Wenzhou Ai Er CNAIER, and Xnovi Lemonsonic products on subjects with acne to determine whether the products infringe certain limitations of claims 1, 4, 31, 33, and 42 of the ’691 patent:

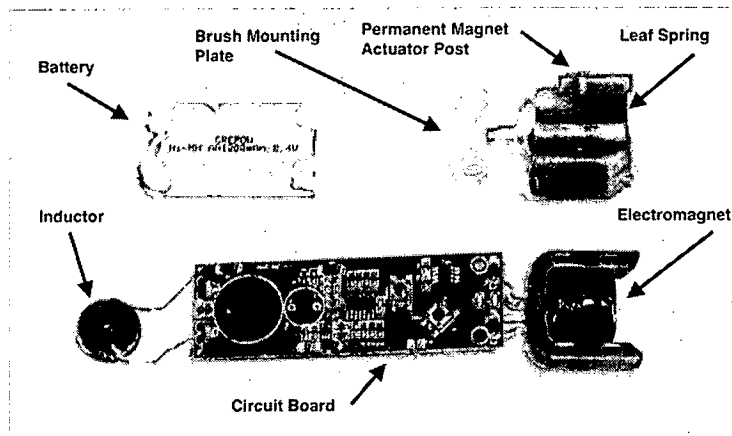
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- Claim 1: “An apparatus for treatment of acne” and “produce alternating tension and compression on the skin, wherein when the apparatus is positioned so that the end faces of the contacting elements contact the skin, an action on the skin in the plane of the skin area to be treated for acne is produced to remove sebum plugs from skin pores, permitting ready removal thereof from the skin.”
- Claim 4: “to remove sebum plugs from skin pores, permitting ready removal thereof from the skin.”
- Claim 31: “An apparatus for treatment of acne” and “produce alternating tension and compression on the skin, such that when the apparatus is positioned so that the contacting element end face contact the skin, an action on the skin in the plane of the skin area to be treated for acne is produced to remove sebum plugs from the skin pores, permitting ready removal thereof from the skin.”
- Claim 33: “to remove sebum plugs from skin pores, permitting ready removal thereof from the skin.”
- Claim 42: “An apparatus for treatment/cleansing of skin” and “produce alternating tension and compression on the skin, wherein when the apparatus is positioned so that the end faces of the contacting elements contact the skin, an action on the skin in the plane of the skin area to be treated for acne produces a cleansing action on the skin, including removal of foreign material from skin pores.”

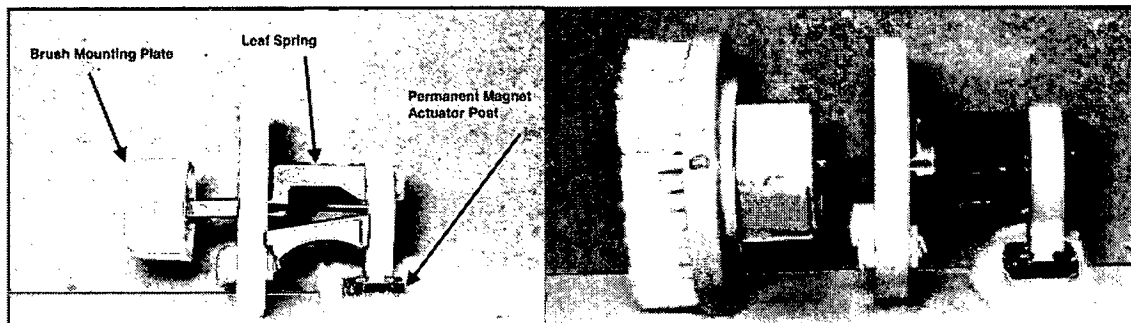
Mot. Ex. 34 (Draelos Decl.) ¶¶ 2, 4. Dr. Fabien analyzed these same products, and in the Wenzhou Ai Er CNAIER, Our Family Jewels Episonic, Coreana 4D Motion, Xnovi Lemonsonic, Anzikang Dione, and ANEX Mimian, he identified: (1) a battery, (2) a circuit board, (3) an inductor, (4) an electromagnetic actuator (a solenoid), and (5) the assembly to which the brush is mounted.



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Id. ¶¶ 31, 35. He also inspected the brush assembly of these products to identify the mounting assembly composed of a central shaft that supports the brush mounting plate and the permanent magnet actuator post.

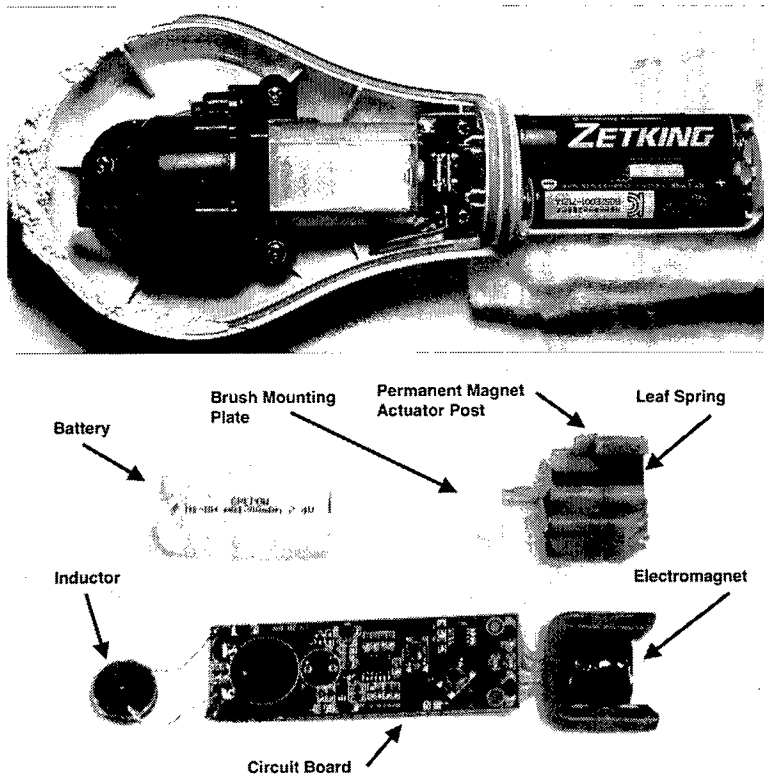


Id. ¶ 33. Dr. Fabien prepared claim charts showing evidence that the Wenzhou Ai Er CNAIER, Our Family Jewels Episonic, Coreana 4D Motion, Xnovi Lemonsonic, Anzikang Dione, and ANEX Mimian infringe each limitation of claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of the '691 patent. *Id.* ¶ 78, Exs. 35C, 35G, 35L, 35O, 35R, 35T. Dr. Fabien identified bristle tufts arranged in a circular pattern comprising the claimed “contacting elements,” a mounting assembly holding the contacting elements substantially adjacent to each other, and a driver assembly meeting the limitations of the asserted claims. *Id.* He further evaluated the movement of the contacting elements and relied on Dr. Draelos’s analysis to conclude that the Wenzhou Ai

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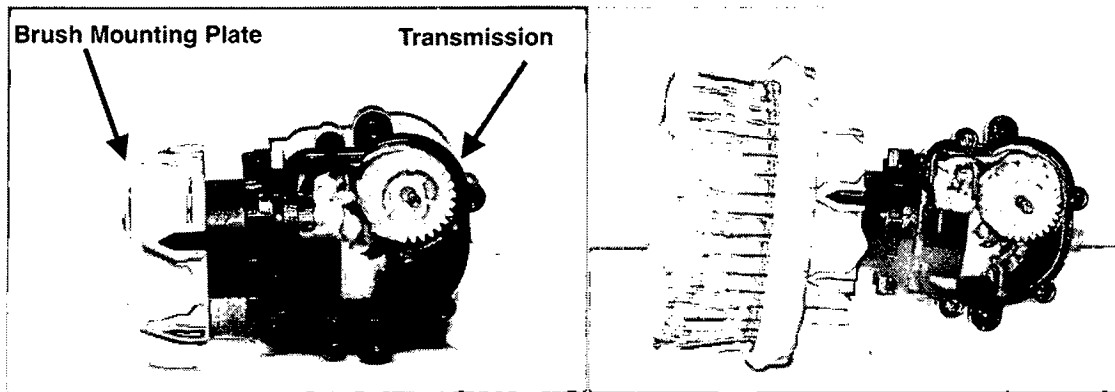
Er CNAIER, Our Family Jewels Episonic, Coreana 4D Motion, Xnovi Lemonsonic, Anzikang Dione, and ANEX Mimian products infringe claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of the '691 patent. *Id.* ¶ 4.

Dr. Fabien also analyzed the Beauty Tech NuSonic and the Korean Beauty products and identified: (1) a battery, (2) a circuit board, (3) an actuator (DC motor), and (4) a transmission (the assembly to which the brush is mounted).



Id. ¶¶ 32, 36. He also inspected the brush assembly of these products to identify the mounting assembly composed of a brush mounted onto a transmission that supports the brush mounting plate.

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Id. ¶ 33. Dr. Fabien prepared claim charts showing evidence that the Beauty Tech NuSonic and the Korean Beauty products infringe claims 31, 33, and 39-41 of the '691 patent. *Id.* ¶ 78, Exs. 35E, 35K. Dr. Fabien identified bristle tufts arranged in a circular pattern comprising the claimed “contacting elements” and a driver assembly meeting the limitations of the claims. *Id.* He further evaluated the movement of the contacting elements and relied on Dr. Draelos’s analysis to conclude that the Beauty Tech NuSonic and the Korean Beauty products infringe claims 31, 33, and 39-41 of the '691 patent. *Id.* ¶ 5. For the Beauty Buzz products from Serious Skin Care and Flageoli, Dr. Fabien inspected photographs and reviewed documents to conclude that the Beauty Buzz is a relabeled version of the Beauty Tech NuSonic. *Id.* ¶¶ 72-73. Dr. Fabien thus concluded that the Beauty Buzz products also infringe claims 31, 33, and 39-41 of the '691 patent. *Id.* ¶ 71, Ex. 35I.

There is no evidence in the record to contradict PBL’s evidence that the identified products infringe the asserted claims of the '691 patent, and Staff supports a finding of infringement. Staff Resp. at 25-37. I therefore find that the Wenzhou Ai Er CNAIER, Our Family Jewels Episonic, Coreana 4D Motion, Xnovi Lemonsonic, Anzikang Dione, and ANEX Mimian products infringe claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of the '691 patent, and the Beauty Tech NuSonic, the Beauty Buzz products from Serious Skin Care and

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Flageoli, and the Korean Beauty products infringe claims 31, 33, and 39-41 of the '691 patent.

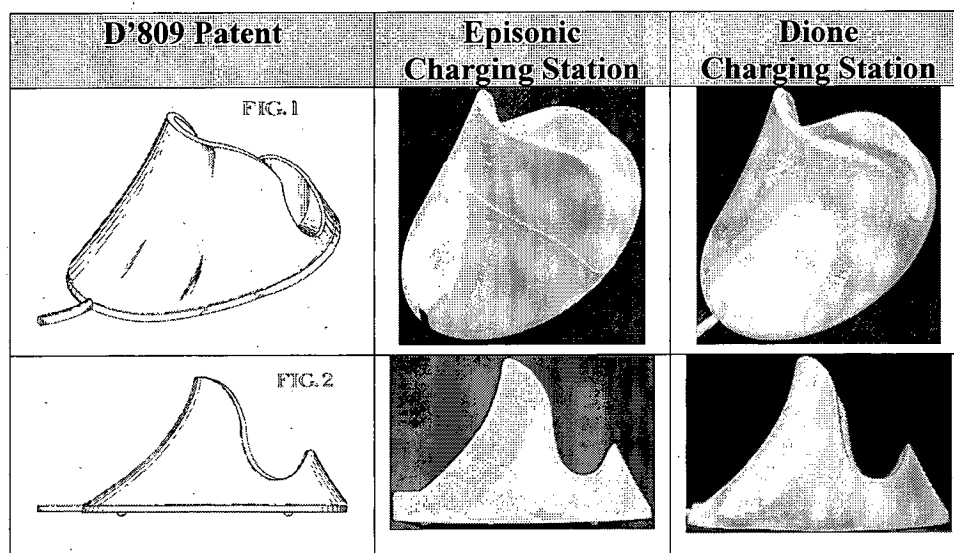
C. '906 Patent

PBL accuses certain products of infringing the '906 patent. PBL attached claim charts to the Complaint demonstrating how the Wenzhou Ai Er CNAIER, Our Family Jewels Episonic, Xnovi Lemonsonic, Anzikang Dione, ANEX Mimian, and Coreana 4D Motion products infringe asserted claims of the '906 patent. Complaint ¶¶ 192, 194, 195, 196, 197, 198, Exs. 27Q, 27S, 27T, 27U, 27GG, 27V. In support of PBL's motion for summary determination, Dr. Fabien analyzed these products and concluded that the Wenzhou Ai Er CNAIER, Our Family Jewels Episonic, Xnovi Lemonsonic, Anzikang Dione, and ANEX Mimian products infringe claims 1-2, 4-5, 7-15 of the '906 patent. Mot. Ex. 35 (Fabien Decl.) ¶ 6. Dr. Fabien further concluded that the Coreana 4D Motion products infringe claims 1-2, 4-5, and 7-14 of the '906 patent. *Id.* For each of these products, Dr. Fabien identified bristle tufts as "cleaning members" and identified hub components meeting the limitations of the claims, preparing claim charts identifying evidence of infringement for each limitation of the asserted claims of the '906 patent for each accused product. *Id.* ¶ 79; Mot. Exs. 35D, 35H, 35M, 35P, 35S, 35U.

There is no evidence in the record to contradict PBL's evidence that the identified products infringe the asserted claims of the '906 patent, and Staff supports a finding of infringement. Staff Resp. at 37-44. I therefore find that the Wenzhou Ai Er CNAIER, Our Family Jewels Episonic, Xnovi Lemonsonic, Anzikang Dione, and ANEX Mimian products infringe claim 1-2, 4-5, and 7-15 of the '906 patent, and the Coreana 4D Motion products infringe claims 1-2, 4-5, and 7-14 of the '906 patent.

D. D'809 Patent

PBL accuses certain products of infringing the '906 patent. PBL attached claim charts to the Complaint demonstrating how the Our Family Jewels Episonic, Anzikang Dione, Beauty Tech NuSonic, and Serious Skin Care/Flageoli Beauty Buzz products infringe the D'809 patent. Complaint ¶¶ 201, 203, 205, 207, Exs. 27W, 27Y, 27AA, 27CC. In support of PBL's motion for summary determination, Dr. Fabien analyzed these products and concluded that the charging stations for the Our Family Jewels Episonic, Anzikang Dione, and Beauty Tech NuSonic products infringe the D'809 patent from the perspective of an "ordinary observer." Mot. Ex. 35 (Fabien Decl.) ¶¶ 8, 26-27. As part of his analysis, Dr. Fabien reviewed photographs of the charging stations to compare with the figures in the D'809 patent:



Id. ¶¶ 62-64, Mot. Ex. 35N, 35Q.

For the Beauty Buzz products from Serious Skin Care and Flageoli, Dr. Fabien inspected photographs and reviewed documents to conclude that the Beauty Buzz is a relabeled version of the Beauty Tech NuSonic. *Id.* ¶¶ 72-73. Dr. Fabien thus concluded that the Beauty Buzz products also infringe the D'809 patent. *Id.* ¶ 71. Dr. Fabien prepared claim charts identifying

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evidence of infringement for each limitation of the asserted claims of the D'809 patent for each of these products. *Id.* ¶ 79; Mot. Exs. 35F, 35J, 35N, 35Q.

There is no evidence in the record to contradict PBL's evidence that the identified products infringe the D'809 patent, and Staff supports a finding of infringement. Staff Resp. at 44-48. I therefore find that the Our Family Jewels Episonic, Anzikang Dione, Beauty Tech NuSonic, and Serious Skin Care/Flageoli Beauty Buzz products infringe the D'809 patent.

E. Trade Dress

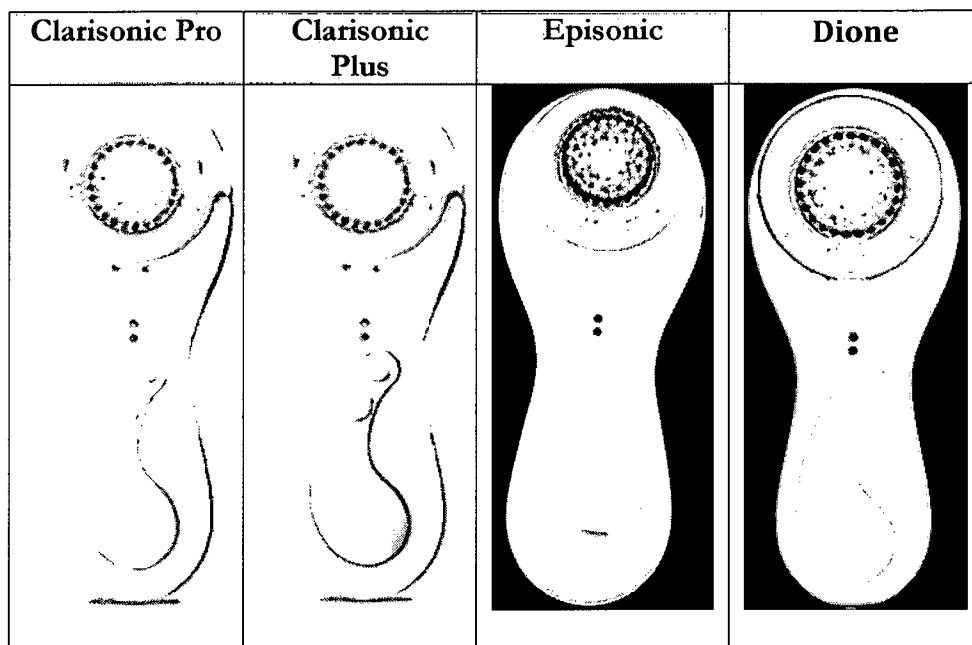
PBL accuses the Our Family Jewels Episonic and Anzikang Dione products of infringing the Clarisonic trade dress. In the Complaint, PBL alleged that the appearance of these products is essentially identical to and likely to cause confusion with the Clarisonic trade dress, attaching photographs of each product. Complaint ¶¶ 208-210, Exs. 7A2, 7E2.

The first step in a trademark infringement analysis is to determine whether the mark is valid. PBL argues that the Clarisonic trade dress is valid because it is not functional and it has acquired secondary meaning to consumers. Mem. at 24-30; *see* Complaint ¶¶ 153-161. Dr. Robert Akridge, one of the cofounders of PBL, submitted a declaration stating that the Clarisonic trade dress was adopted in order to have a distinctive, attention-getting and memorable product configuration for consumers. Mot. Ex. 82 (Akridge Decl.) at ¶ 7. Dr. Akridge further states that there is nothing comparatively simple or cheap about manufacturing the Clarisonic products or their charging stations with their distinctive shapes, and there is no functional reason for their design elements. *Id.* at 8-10. In addition, PBL submitted a declaration from Robert Hennessy stating that the advertising for the Clarisonic products promotes its features but not any utilitarian advantages to its design. Mot. Ex. 32 (Hennessy Decl.) at ¶ 72. Mr. Hennessy also identifies the substantial resources that PBL has invested in advertising and promoting Clarisonic products.

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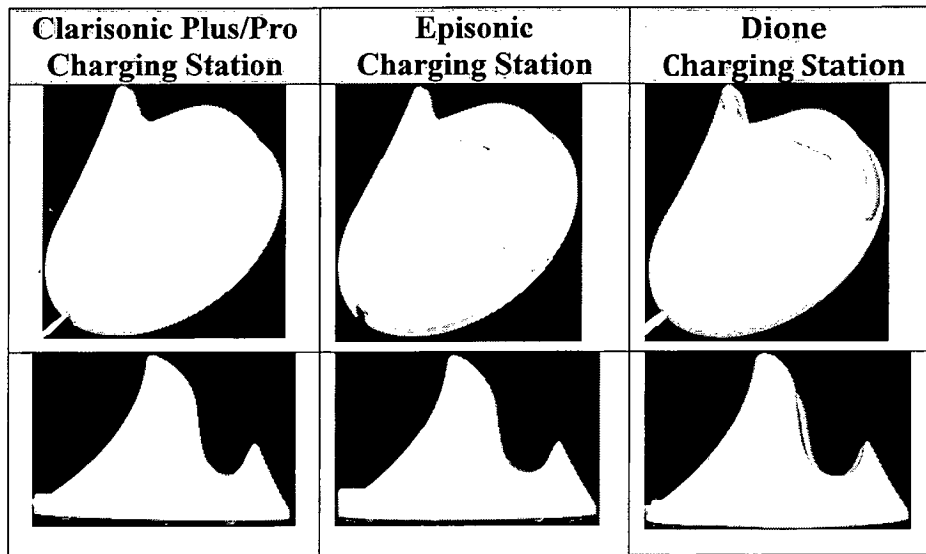
Id. at ¶ 71. PBL further attached an expert report to its motion that was prepared by Dr. Harvey H. Sundel for an earlier litigation involving the Clarisonic trade dress. Mot. Ex. 31.⁵ Dr. Sundel conducted a survey of facial skin cleansing product consumers and found that a significant number could identify the Clarisonic trade dress. *Id.* There is no evidence in the record to contradict PBL's evidence that the Clarisonic trade dress is not functional and it has acquired secondary meaning to consumers, and I thus find that the Clarisonic trade dress is valid.

Based on the images submitted with the Complaint and the motion for summary determination, the Our Family Jewels Episonic and Anzikang Dione devices and charging stations are nearly indistinguishable from the Clarisonic trade dress, and I therefore find that there is a likelihood of confusion by consumers.



⁵ The prior case was *Pacific Bioscience Laboratories, Inc. v. Nutra Luxe MD, LLC*, in which a jury found infringement of the '691 patent and the Clarisonic trade dress and awarded damages; and the parties subsequently stipulated to a permanent injunction. Case No. 2:10-cv-00230-JLR (W.D.Wash. June 27, 2013).

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See Complaint ¶¶ 156-157, 208-210, Exs. 7A2, 7E2, 24, 25; Mot. Exs. 35N, 35Q.

There is no evidence in the record to contradict PBL’s evidence of infringement, and I therefore find that the Our Family Jewels Episonic and Anzikang Dione devices and charging stations infringe the Clarisonic trade dress.

VII. INVALIDITY

The Asserted Patents are presumed valid as a matter of law. 35 U.S.C. § 282. This presumption of validity may be overcome only by “clear and convincing evidence.” *Pfizer, Inc. v. Apotex, Inc.*, 480 F.3d 1348, 1359 (Fed. Cir. 2007); see also *Microsoft Corp. v. i4i Ltd. P’ship*, 131 S. Ct. 2238, 2242-2253 (2011) (upholding the “clear and convincing” standard for invalidity). The burden of proof never shifts to the patentee to prove validity. *Scanner Techs. Corp. v. ICOS Vision Sys. Corp. N.V.*, 528 F.3d 1365, 1380 (Fed. Cir. 2008).

No party has challenged the validity of the Asserted Patents. See Staff Resp. at 23. The Commission is prohibited from making a determination on validity when no defense of invalidity has been raised. *Lannom Mfg. Co., Inc. v. International Trade Comm’n*, 799 F.2d 1572, 1580 (Fed. Cir. 1986). Accordingly, there is no genuine dispute as to invalidity.

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VIII. REMEDY & BONDING

PBL seeks a general exclusion order, limited exclusion orders, and cease and desist orders. PBL seeks a general exclusion order (“GEO”) that would prevent any product that infringes the asserted claims of the ’691, ’906, and D’809 patents from being imported into the United States. In the alternative, PBL seeks a limited exclusion order (“LEO”) as to each defaulting Respondent. PBL also seeks a cease and desist order (“CDO”) as to each defaulting respondent. PBL also seeks a LEO and CDO as to Our Family Jewels and Anzikang based on infringement of the Clarisonic trade dress. PBL requests a bond equal to 100% of the value of the accused products during the Presidential review period.

Staff supports PBL’s request for a GEO covering the ’691 and ’906 patents, but not the D’809 patent. Staff also supports PBL’s request for CDOs directed to the domestic defaulting respondents, but not the foreign defaulting respondents, and Staff supports PBL’s request for a 100% bond.

For the reasons discussed below, it is my recommended determination that a GEO be issued to remedy the violation of section 337, along with CDOs directed to all defaulting Respondents. I recommend that a bond in the amount of 100% of the value of imported infringing products be imposed against the defaulting Respondents during the Presidential review period.

A. Legal Standards

Under subsection 337(d), the Commission may issue either a GEO or a LEO. A LEO instructs the Bureau of Customs and Border Protection (“Customs”) to exclude from entry all articles that are covered by the intellectual property right at issue and that originate from an entity that was a party to the Commission investigation. *See Certain Condensers, Parts Thereof*

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and Products Containing Same, including Air Conditioners for Automobiles, Inv. No. 337-TA-334 (Remand), Comm'n Op. at 24, U.S.I.T.C. Pub 3063 (September 1997). A GEO, on the other hand, instructs Customs to exclude from entry all articles that are covered by the intellectual property right at issue, without regard to source. 19 U.S.C. § 1337(d)(2)(B).

19 U.S.C. § 1337(d)(2) provides:

A general exclusion order may be ordered if:

(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or

(B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19 U.S.C. § 1337(d)(2).⁶ A GEO may issue if either of these conditions is met. *See, e.g., Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-643, Comm'n Op., 2009 WL 6751505, at *12 (Oct. 1, 2009).

B. General Exclusion Order

I find that a GEO is proper with respect to products that infringe the '691 and '906 patents; a LEO is proper against Beauty Tech with respect to the D'809 patent.⁷

1. Preventing Circumvention of a LEO

The Commission has deemed it proper to issue GEOs under 19 U.S.C. § 1337(d)(2)(A) to prevent circumvention of an exclusion order limited to named parties in a variety of

⁶ The Commission has authority to issue a GEO under section 337(g)(2) in cases in which all of the respondents default. In cases such as this, however, where some respondents appear and are terminated from the investigation, while others default, the Commission's authority to issue a GEO stems from section 337(d)(2), not section 337(g)(2). *See Certain Handbags, Luggage, Accessories, and Packaging Thereof*, Inv. No. 337-TA-754, Comm'n Op. at 4-5 & n. 3 (May 30, 2012).

⁷ By agreement of the parties, infringing products are permitted to be imported during a certain period of time by Home Skinovations and MTTO. *See* Order No. 30, Ex. A (Nov. 30, 2015); Order No. 37, Ex. A (Feb. 3, 2016).

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circumstances. The Commission has issued GEOs in several recent investigations because it found that it would be difficult for Customs officials to identify the source of the infringing goods, and hence to enforce a LEO, and where the respondents had engaged in business practices that made circumvention likely, such as using multiple company names and affiliates and shipping the infringing products in packaging that disguised the source of the infringing goods. *See, e.g., Certain Toner Cartridges and Components Thereof* (“Toner Cartridges”), Inv. No. 337-TA-829, Comm’n. Op. at 6-7 (July 29, 2013) (GEO issued under 19 U.S.C. § 1337(d)(2)(A) to prevent likely circumvention because respondents “do business under multiple names and create an array of subsidiaries and changing corporate profiles” and because their accused cartridges “are often labeled under other brand names or packaged in unmarked, generic packaging”); *Certain Toner Cartridges and Components Thereof* (“Toner Cartridges”), Inv. No. 337-TA-740, Comm’n Op. at 5 (Oct. 5, 2011) (GEO issued under 19 U.S.C. § 1337(d)(2)(A) because “respondents do business under multiple names” and “an LEO could be circumvented because Lexmark-compatible laser toner cartridges are often labeled under other original equipment manufacturer brand names, making it easier . . . to evade enforcement.”); *Certain Inkjet Ink Cartridges with Printheads and Components Thereof*, Inv. No. 337-TA-723, Comm’n Op. at 23 (Dec. 1, 2011) (GEO issued under 19 U.S.C. § 1337(d)(2)(A) to prevent circumvention of LEO because it was difficult to identify source of infringing goods as “foreign manufacturers package products in unmarked generic or reseller branded packaging that lacks any markings to identify their origin” and “many manufacturers and distributors create multiple websites and corporate identities allowing them to sell infringing products without revealing their true identities.”).

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The Commission also has issued GEOs when market conditions exist that would incentivize circumvention or create a high likelihood of circumvention, such as large U.S. demand for the accused products, extensive sources of manufacture of the infringing goods, ease of entry into the market to manufacture infringing goods, and established distribution channels to facilitate circumvention by overseas manufacturers and distributors, including abundant distributors and/or internet retailers. *See, e.g., Certain Paper Towel Dispensing Devices and Components Thereof* (“*Paper Towel Dispensing*”), Inv. No. 337-TA-718, Comm’n Op. on Remedy, Public Interest and Bonding, at 15 (Jan. 20, 2012) (GEO issued under 19 U.S.C. § 1337(d)(2)(A)). The evidence shows that each of these factors is present in this Investigation.

a. Likelihood of Circumvention

PBL has demonstrated that Respondents change their corporate names to escape detection. A good example is defaulting Respondent Xnovi, which changed its name and location several times during the course of this Investigation. Mem. at 87; SUMF ¶¶ 179-182. When the Complaint was filed, Xnovi was believed to be at an address in Shenzhen, China, but it turned out that Xnovi actually was operating as a different company, Zherui Electronics Co., Ltd., with numerous possible addresses. Xnovi eventually was served at an address in Shenzhen City, China, *see* Order No. 37 (Nov. 16, 2015), but PBL has since been unable to serve the company at that address and suspects that Xnovi has again changed its address. SUMF at ¶ 182. PBL also has reason to suspect that Xnovi does business as “Waveclean.” SUMF at ¶ 183.

[REDACTED]

[REDACTED]

[REDACTED] SUMF at ¶¶ 55-56, 239. Respondent Our Family Jewels, Inc. also does business as Epipür Skincare; Respondent Beauty Tech, Inc. also does business as 5th Avenue

Buzz; and Respondent Wenzhou Ai Er Electrical Technology Co., Ltd., also does business as CNAIER. Mem. at 85; SUMF ¶ 236.

Similar circumstances in other investigations have led to the Commission's issuance of GEOs, as noted above. The undisputed evidence in this case supports issuance of a GEO with respect to the '691 and '906 patents.

b. Market Conditions Create a High Likelihood of Circumvention

The market conditions the Commission relies on to issue a GEO are present here. PBL asserts that demand for the pertinent products is strong and profits are high. Mem. at 88-89. A price comparison shows that infringing products range in price from \$19.99 to \$129, while PBL's products range from \$99 to \$265. *Id.*; see SUMF ¶¶ 241-242. Further, there are low barriers to entry into the market. The components of the pertinent devices are easy to assemble. See Mem. at 89-90; SUMF ¶ 244. The low cost of production makes it easy to enter into the market. Once the cheap devices are manufactured, they are immediately ready for shipment into the United States. Mem. at 90; see SUMF ¶¶ 247, 248. Again, the anonymous sale of infringing products on the Internet, including on popular websites such as Amazon.com, provides a ready market for retailers who source infringing goods from overseas suppliers. See SUMF ¶¶ 193, 195, 199, 203, 207, 214, 218, 221, 224, 229, 234-235.

c. Difficulty of Detecting the Source of Infringing Goods

Again, the types of business practices that warrant issuance of a GEO are prevalent in this case. As noted, manufacturers of the infringing products are unknown or difficult to identify. See SUMF ¶¶ 145-146. Xnovi, for example, appears to be marketing many infringing devices with the same packaging and instruction manuals under different names. SUMF at ¶¶ 196, 198, 200, 202; see Supp. Ex. A (Miller Supp. Decl.) at ¶¶ 12-23. Widespread availability of these

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products online compounds the problem. *See* Ex. 7 (Mueller Decl.); Ex. 33 (Miller Decl.); Supp. Ex. A (Miller Supp. Decl).

In addition, infringing devices may be relabeled or rebadged versions of other infringing products. For example, Beauty Tech, Inc., sells the NuSonic product, which is manufactured by an unknown foreign manufacturer. Mem. at 85; SUMF ¶¶ 145-146. Beauty Tech then repackages the NuSonic product as the Beauty Buzz, which was provided to Serious Skin Care. SUMF at ¶ 237. Serious Skin Care packaged the product as being distributed by Flageoli, the only identified seller of the product. SUMF ¶ 238. Infringing products have been purchased by PBL from Kmart.com and Amazon.com that were “the exact same device as the Lemonsonic, with the same accompanying manual and similar packaging,” but were sold under different names. Mem. at 86; SUMF ¶¶ 196, 198, 202.

2. Pattern of Violation and Difficulty in Identifying The Source of Infringing Products

A GEO is authorized by 19 U.S.C. § 1337(d)(2)(B), when it is shown that there is a widespread pattern of infringement by respondents and non-respondents, and that it is difficult to identify the source of infringing goods. *See, e.g., Toner Cartridges*, Inv. No. 337-TA-829, Comm’n. Op. at 7 (authorizing GEO based on a multitude of existing sources of infringing products and low barriers to entry for future participants, unmarked, generic packaging, including the use of private label services, and difficulty in identifying the source of infringing goods). To meet this requirement, a complainant must show that there is likelihood that non-respondents, in addition to the named respondents, also are infringing the asserted claims. *Id.* at 7 n.5.

Many of the facts discussed above satisfy this criterion for issuance of a GEO. As noted by PBL, it is relatively easy to register new companies in countries such as China, meaning that

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other companies in addition to those identified in the Complaint in this Investigation currently may be producing infringing goods for the U.S. market or will do so in the future, unless a GEO is imposed. *See* Mem. at 85. [REDACTED]

[REDACTED]. Mem. at 87; SUMF at ¶ 240.

PBL refers to “an unending stream of infringing products from foreign manufacturers – mainly from China and South Korea.” Mem. at 74; *see* SUMF ¶¶ 142, 146, 154, 159, 163, 167, 171, 176, 185. PBL has instituted litigation against infringing devices in U.S. district court in 2010 and 2015. Mem. at 74-75; SUMF ¶¶ 54, 56, 57, 61. PBL also has instituted enforcement actions against “at least” five Chinese manufacturers for infringement of a Chinese patent that is a counterpart to the ’906 patent, obtaining relief through judgment or settlement against all five. Mem. at 75; SUMF ¶¶ 188-190. PBL sought relief against another set of respondents in Great Britain. Mem. at 75; SUMF at ¶¶ 191-192. As of the date of its motion for summary determination, PBL had identified at least two devices that infringe one or more claims of the asserted patents. *See* Mem. at 76-83. “There are a myriad of other infringing brush heads that can be found on Amazon.com,” PBL asserts. Mem. at 83; SUMF ¶ 233.

Staff says that a LEO against Beauty Tech would be sufficient with respect to the D’809 patent. Staff notes that only five of the defaulting respondents are accused of infringing the D’809 patent, and three of the five accused charging devices covered by the D’809 patent come from the same source, Beauty Tech. Staff Resp. at 73 (citing SUMF ¶¶ 145-146, 237-238). Staff says that only one other charger, the Healthpro product, would infringe under the “ordinary observer” test, and that the other accused chargers have a distinctly different shape. On these grounds, Staff maintains that importation of products that infringe the D’809 patent is not sufficiently widespread to constitute a pattern of violation. Staff Resp. at 74 (citing *Certain*

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Ground Fault Circuit Interrupters and Products Containing Same, Inv. No. 337-TA-615, Comm'n Op. at 26-17). I agree that the requirements for obtaining a GEO have not been satisfied for products that infringe the D'809 patent.

For all the reasons discussed above, I recommend issuance of a GEO covering products that infringe the '691 and '906 patents and a LEO covering products that infringe the D'809 patent.

C. Limited Exclusion Order

In the event that the Commission determines not to issue a GEO, I recommend that a LEO be issued against each defaulting Respondent. 19 U.S.C. § 1337(d) states that the Commission shall exclude from importation articles that violate section 337. Any LEO should not be limited to the products identified in the Complaint, but should reach all infringing products that come from the defaulting Respondents.

PBL also seeks a certification provision requiring respondents to certify that imports are outside the scope of the LEO. Mem. at 96-97. I find that such a provision would assist Customs in monitoring the products that may be subject to a LEO.⁸

D. Cease and Desist Order

To obtain a CDO directed to a particular respondent, a complainant must demonstrate that a "commercially significant" inventory of imported, infringing products is in the possession of the respondent or related entities in the United States. *See, e.g., Certain Digital Photo Frames and Image Display Devices and Components Thereof*, Inv. No. 337-TA-807, Comm'n Op. at 7-8

⁸ As noted above, two terminated respondents, Home Skinovations and Michael Todd, have been permitted pursuant to the terms of a settlement agreement to wind down sales of their products for a period of time. *See* Order No. 30, Ex. A (Nov. 30, 2015); Order No. 37, Ex. A (Feb. 3, 2016). A certification provision would assist Customs in enforcing an exclusion order against these two entities.

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(Mar. 27, 2013) (issuing CDOs directed to three domestic respondents that had been found in default); *Toner Cartridges*, Inv. No. 337-TA-829, Comm. Op. at 8-11. The Commission “does not require a precise accounting of inventories.” *Certain Electronic Digital Media Devices and Components Thereof*, Inv. No. 337-TA-796, Comm’n Op., 2013 WL 10734395, at *74 (Sept. 6, 2013).

The Commission’s practice is to infer that a domestic defaulting respondent maintains a commercially significant inventory in the United States. *See Toner Cartridges*, Inv. No. 337-TA-829, Comm’n Op. at 9 (citing 19 C.F.R. § 210.16(c)(1)); *Digital Photo Frames*, Comm’n Op. at 8-9 (citing *Certain Agricultural Tractors, Lawn Tractors, Riding Lawnmowers, and Components Thereof*, Inv. No. 337-TA-486, Comm’n Op. at 18 (Aug. 19, 2003)). In this Investigation, it would be appropriate to infer that the domestic defaulting respondents maintain significant inventories of infringing products in the U.S. and to issue CDOs against each of them.

Staff notes that the Commission does not necessarily draw the inference concerning domestic inventories against foreign defaulting respondents. Staff Resp. at 75-76 (citing *Agricultural Tractors*). Where a complainant can show, however, that a “foreign respondent either maintains domestic inventories of subject products or engages in extensive domestic activities with respect to the subject products,” the Commission will issue CDOs against foreign defaulting respondents. *Digital Photo Frames*, Comm’n Op. at 8-9.

In this Investigation, as in *Digital Photo Frames*, there is evidence that the foreign defaulting respondents maintain commercially significant inventories of the accused products in the United States by reason of their use of online retailers. The evidence includes proof of many purchases of infringing products on the Internet. *See* Mot. Exs. 7A1-2, 7C1-2, 7E1-2, 7H1-2,

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7I1-2, 7J1-2, 7K1-27L1-2, 7M1-2, 7N1-2, 7P1-2. Accordingly, issuance of CDOs against foreign as well as domestic defaulting respondents is appropriate.

E. Bonding

Pursuant to 19 U.S.C. § 1337(j), accused products are permitted entry into the United States under bond during the Presidential review period of any exclusion order. The overriding concern is that the bond “be sufficient to protect the complainant from any injury.” 19 U.S.C. § 1337(j)(3). When reliable price information is available, the bond should be set such that it eliminates the differential in sales price between the domestic product and the lower price of the infringing imported product. *Certain Cigarettes*, Comm’n Opinion, 2009 WL 6751505, at *15.

Where prices vary or where reliable price information is not available, as is the case here with respect to defaulting Respondents, the Commission typically sets the bond at 100% of the value of the imported infringing products. *See, e.g., id.* at *16; *see also Certain Tadalafil or Any Salt or Solvate Thereof and Products Containing Same*, Inv. No. 337-TA-539, Comm’n Op., 2008 WL 2109706, at *9 (June 16, 2006) (accepting recommendation of 100% bond against defaulting respondents); *Certain Oscillating Sprinklers*, 2002 WL 342071 at *3 (imposing 100% bond against defaulting respondent); *Certain Microsphere Adhesives, Process for Making Same, & Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Notice of Termination of Investigation & Issuance of Ltd. Exclusion Order, 1996 WL 1056298, at *14 (Jan. 1996). Accordingly, in this instance the bonding requirement pending Presidential review should be set at 100% of the value of the imported infringing products.

IX. CONCLUSIONS OF LAW

1. The Commission has subject matter jurisdiction over this Investigation.
2. The Commission has *in personam* jurisdiction over domestic Respondents Beauty

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Tech, Flageoli, Serious Skin Care, and Our Family Jewels.

3. The Commission has *in rem* jurisdiction over the accused electric skin care devices, brushes and chargers therefor, and kits containing same.

4. There has been an importation into the United States, sale for importation, or sale within the United States after importation of the accused electric skin care devices, brushes and chargers therefor, and kits containing same.

5. A domestic industry exists in the United States pursuant to Section 337(a)(2) with respect to each of the Asserted Patents.

6. The importation and sale of certain accused electric skin care devices and chargers therefor threatens to substantially injure a domestic industry pursuant to Section 337(a)(1)(A) with respect to the Clarisonic trade dress.

7. Certain accused electric skin care devices infringe claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, and 49 of the '691 patent.

8. Certain accused electric skin care devices infringe claims 1-2, 4-5, and 7-15 of the '906 patent.

9. Certain accused electric skin care device chargers infringe the D'809 patent.

10. Certain accused electric skin care devices and chargers therefor infringe the asserted Clarisonic trade dress.

11. The Asserted Patents and the asserted Clarisonic trade dress have not been shown to be invalid.

12. There is a violation of section 337 by Respondents ANEX, Beauty Tech, Flageoli, Serious Skin Care, Coreana, Korean Beauty, Our Family Jewels, Anzikang, Wenzhou Ai Er, and Xnovi in the importation, sale for importation, and/or sale after importation of certain electric

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skin care devices, brushes and chargers therefor, and kits containing same with respect to the Asserted Patents and the Clarisonic trade dress.

X. INITIAL DETERMINATION AND RECOMMENDED DETERMINATION

Based on the foregoing, and the record as a whole, it is my Final Initial Determination that there is a violation 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, and/or the sale within the United States after importation of certain electric skin care devices, brushes and chargers therefor, and kits containing same. It is my Recommended Determination that a general exclusion order and cease and desist orders issue to remedy this violation, and I recommend a bond of 100% of entered value during the Presidential review period.

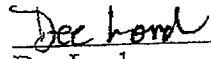
I hereby certify the record in this Investigation to the Commission with my Final Initial and Recommended Determinations. Pursuant to Commission Rule 210.38, the record further comprises the Complaint and exhibits thereto filed with the Secretary, the *Markman* order, and the exhibits attached to Complainants' summary determination motion and the Staff's response thereto. 19 C.F.R. § 210.38(a).

The initial determination portion of this Initial and Recommended Determination, issued pursuant to Commission Rule 210.42(c), shall become the determination of the Commission 45 days after the service thereof, unless the Commission, within that period, shall have ordered its review of certain issues therein, or by order, has changed the effective date of the initial determination portion. 19 C.F.R. § 210.42(h)(6). If the Commission determines that there is a violation of 19 U.S.C. § 1337(a)(1), the recommended determination portion, issued pursuant to Commission Rule 210.42(a)(1)(ii), will be considered by the Commission in reaching a determination on remedy and bonding. 19 C.F.R. § 210.50(a).

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Within seven (7) days of the date of this Initial Determination, each party shall submit to the Administrative Law Judge a statement as to whether or not it seeks to have any portion of this document deleted from the public version. *See* 19 C.F.R. § 210.5(f). A party seeking to have a portion of the order deleted from the public version thereof must attach to its submission a copy of the order with red brackets indicating the portion(s) asserted to contain confidential business information.⁹ The parties' submissions under this subsection need not be filed with the Commission Secretary but shall be submitted by paper copy to the Administrative Law Judge and by e-mail to the Administrative Law Judge's attorney advisor.

SO ORDERED.


Dee Lord
Administrative Law Judge

⁹ To avoid depriving the public of the basis for understanding the result and reasoning underlying the decision, redactions should be limited. Parties who submit excessive redactions may be required to provide an additional written statement, supported by declarations from individuals with personal knowledge, justifying each proposed redaction and specifically explaining why the information sought to be redacted meets the definition for confidential business information set forth in Commission Rule 201.6(a). 19 C.F.R. § 201.6(a).

**CERTAIN ELECTRIC SKIN CARE DEVICES, BRUSHES
AND CHARGERS THEREFOR, AND KITS CONTAINING
SAME**

Inv. No. 337-TA-959

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, Sarah J. Sladic, Esq., and the following parties as indicated, on **April 26, 2016**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112
Washington, DC 20436

**On Behalf of Complainants Pacific Bioscience Laboratories,
Inc.:**

Robert M. Masters, Esq.
PAUL HASTINGS, LLP
875 15th St. NW
Washington, DC 20005

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Respondents:

Our Family Jewels, Inc. d/b/a EpiPür Skincare
7770 E. Iliff Ave. Rm./Suite E
Denver, CO 80231

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Xnovi Electronic Co., Ltd.
Unit 6A, Block C1, Area G
Sha Jing Street, Min Zhu Industrial Estate,
Baoan District, Shenzhen City,
China

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Shanghai Anzikang Electric Co., Ltd.
168 Ji Xin Road, Building 3, Room 401
Minhang District, Shanghai,
China

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

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Certificate of Service – Page 2

Beauty Tech, Inc.
1430 S. Dixie Hwy., Ste. 321
Coral Gables, FL 33146-3175

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Anex Corporation
#304-705 Bucheon Techno Park
345 Seokcheon-ro, Ojeong-gu
Bucheon City, Gyeonggi-do
421-741, Korea

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Korean Beauty Co., Ltd.
10 F, Pluszone Bldg. 700
Deungchon-Dong, Gangseo-Gu
Seoul, Korea

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Serious Skin Care, Inc.
112 N. Curry St.
Carson City, NV 89703-4934

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Wenzhou Ai Er Electrical Technology Co., Ltd. d/b/a CNAIER
1#, XiaSong Road, WanQuan Town
PingYang, ZheJiang
China

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Coreana Cosmetics Co., Ltd.
204-1 Jeongchon-ri, eup, Seonggeo-eup
Seobuk-gu, Cheonan-si, Chungcheongnam-do
Korea

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____

Flageoli Classic Limited
7310 Smoke Ranch Road
Las Vegas, NV 89128

- ☐ Via Hand Delivery
☒ Via Express Delivery
☐ Via First Class Mail
☐ Other: _____