

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN DISPOSABLE VAPORIZER
DEVICES**

Investigation No. 337-TA-1410

**NOTICE OF A COMMISSION DETERMINATION NOT TO MODIFY, REVERSE, OR
SET ASIDE AN INITIAL DETERMINATION DENYING A MOTION FOR
TEMPORARY RELIEF**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to modify, reverse, or set aside the presiding administrative law judge's ("ALJ") initial determination ("ID") (Order No. 28) denying a motion for temporary relief.

FOR FURTHER INFORMATION CONTACT: Panyin A. Hughes, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3042. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal, telephone (202) 205-1810.

SUPPLEMENTARY INFORMATION: On July 22, 2024, the Commission instituted this investigation based on a complaint filed by RAI Strategic Holdings, Inc.; R.J. Reynolds Vapor Company; R.J. Reynolds Tobacco Company; and RAI Services Company, all of Winston-Salem, North Carolina (collectively, "RAI" or "Reynolds"). 89 Fed. Reg. 59158-60 (Jul. 22, 2024). The complaint alleged violations of section 337 based on the importation into the United States, the sale for importation, or the sale within the United States after importation of certain disposable vaporizer devices and components thereof by reason of infringement of certain claims of U.S. Patent No. 11,925,202 ("the '202 patent"). *Id.* The Commission's notice of investigation named the following thirty-five respondents: Breeze Smoke, LLC of Southfield, Michigan; Dongguan (Shenzhen) Shikai Technology Co., Ltd. of Guangdong Province, China; Vapeonly Technology Co. Ltd. of Hong Kong ("Vapeonly"); iMiracle (Shenzhen) Technology Co., Ltd. of Shenzhen, China ("iMiracle"); Guangdong Qisitech Co., Ltd. of Guangdong, China; Guangdong Fewo Intelligent Manufacturing Limited of Guangdong Province, China; Nevera (HK) Ltd. of Hong Kong ("Nevera"); Guangdong Cellular Workshop Electronics Technology Co., Ltd. of Guangdong Province, China; Wonder Ladies Ltd. of British Virgin Islands ("Wonder Ladies"); Sailing South Ltd. of British Virgin Islands ("Sailing South"); Marea Morada Ltd. of British

Virgin Islands (“Marea”); Social Brands, LLC of Dallas, Texas (“Social Brands”); Zhuhai Qisitech Co., Ltd. of Zhuhai, China; Shenzhen Han Technology Co., Ltd. of Guangdong Province, China; Palma Terra Ltd. of British Virgin Islands (“Palma”); Shenzhen IVPS Technology Co., Ltd. of Shenzhen, China; Heaven Gifts International Ltd. of Hong Kong (“Heavenly Gifts”); Maduro Distributors d/b/a The Loon of Fridley, Minnesota; Bidi Vapor, LLC of Orlando, Florida (“Bidi Vapor”); Kimsun Technology (HuiZhou) Co., Ltd. of Shenzhen, China (“Kimsun”); Shenzhen Yanyang Technology Co., Ltd. of Guangdong, China; Pastel Cartel, LLC of Austin, Texas; American Vape Company, LLC of Pflugerville, Texas; Affiliated Imports, LLC of Austin, Texas; Shenzhen LC Technology Co. Ltd. of Shenzhen, China (“Shenzhen LC”); LCF Labs, Inc. of Ontario, California (“LCF”); Shenzhen Kangvape Technology Co., Ltd. of Shenzhen, China; Flumgio Technology Ltd. of Hong Kong (“Flumgio”); Shenzhen Pingray Technology of Shenzhen City, China; SV3, LLC d/b/a Mi-One Brands of Phoenix, Arizona; Price Point Distributors Inc. d/b/a Price Point NY of Farmingdale, New York; Flawless Vape Shop Inc. of Anaheim, California (“Flawless Vape Shop”); Flawless Vape Wholesale & Distribution Inc. of Anaheim, California (“Flawless Vape”); TheSy, LLC d/b/a Element Vape of El Monte, California; and VICA Trading Inc. d/b/a Vapesourcing of Tustin, California (“VICA”). *Id.* at 59159-160. The Office of Unfair Import Investigations (“OUII”) was also named as a party in this investigation. *Id.* at 59160.

Concurrently with the complaint, RAI filed a motion for temporary relief requesting that the Commission issue a temporary exclusion order and temporary cease and desist orders prohibiting the importation into and the sale within the United States after importation of certain disposable vaporizer devices and components thereof during the course of the Commission’s investigation. The motion for temporary relief was provisionally accepted and referred to the presiding administrative law judge (“ALJ”) for investigation. *Id.* at 59159.

On July 29, 2024, the Commission issued a notice indicating that the ALJ, pursuant to Commission Rule 210.60, designated the temporary relief proceeding as “more complicated” because of the complexity of the issues raised. *See* Comm’n Notice (Jul. 29, 2024); Order No. 6 (Jul. 26, 2024).

On August 28, 2024, the Commission terminated the investigation as to Kimsun based on the entry of a consent order. Order No. 10 (Aug. 28, 2024), *unreviewed by* Comm’n Notice (Sept. 23, 2024).

On September 16, 2024, the Commission found the following respondents in default: Vapeonly, iMiracle, Nevera, Wonder Ladies, Sailing South, Marea, Social Brands, Palma, Heaven Gifts, Shenzhen LC, LCF, Flumgio, Flawless Vape Shop, Flawless Vape, and VICA. *See* Order No. 17 (Sept. 16, 2024), *unreviewed by* Comm’n Notice (Oct. 8, 2024).

On November 5, 2024, the Commission terminated the investigation as to Bidi Vapor based on the entry of a consent order. *See* Order No. 26 (Nov. 5, 2024), *unreviewed by* Comm’n Notice (Dec. 5, 2024).

The ALJ held an evidentiary hearing on September 26 and September 27, 2024, and received post-hearing briefs thereafter.

On November 19, 2024, the ALJ issued the temporary relief (“TEO”) ID denying the motion for TEO. The ID found (1) that Complainants have not shown likelihood of success on the merits with respect to infringement of the asserted claims of the ’202 patent (ID at 46-62); (2) that Respondents raised a substantial question of invalidity of the asserted claims (ID at 88-154); and (3) that Complainants have not persuasively shown irreparable harm in the event a temporary exclusion order is not issued. ID at 157-184.

On November 29, 2029, RAI filed comments pursuant to Commission Rule 210.66(c) disagreeing with some of the ALJ’s findings. 19 CFR 210.66(c). RAI, however, stated that it “is not seeking Commission review of any of these tentative determinations, and it will address the issues of infringement and validity in the permanent relief phase of the investigation.” RAI Comments at 1-2.

The Commission has determined not to modify, reverse, or set aside the subject ID.^{1, 2} Accordingly, the TEO ID becomes the determination of the Commission and RAI's motion for temporary relief is denied.

¹ Commissioner Kearns joins the Commission determination not to modify, reverse, or set aside the subject ID denying the motion for temporary relief (TEO). Given the preliminary nature of the ID's determinations, however, he notes that neither the Commission nor the ALJ should feel bound by those preliminary determinations in any final ID or review thereof. He would like to see the record further developed on at least some of the issues addressed therein. In particular, with regard to the economic prong of the domestic industry requirement, Commissioner Kearns would like to see the record supplemented on the following issues that he has considered in prior cases before making a final determination: (1) reliance on pre-issuance investments – *see, e.g., Certain Compact Wallets and Components Thereof*, Inv. No. 337-TA-1355 (“*Compact Wallets*”), Comm’n Op. at 15-16 n.7 (Aug. 13, 2024) (noting that regardless of the issuance date of the asserted patent, the existence of a domestic industry is assessed as of the filing of the complaint); (2) reliance on investments in e-liquid manufacturing, and in particular whether e-liquids are a claimed element – *see, e.g., Certain Beverage Dispensing Systems and Components Thereof*, Inv. No. 337-TA-1130, Comm’n Op. at 20 n.12 (Mar. 26, 2020) (considering the value of domestically sourced beer as part of the domestic industry analysis at least because a “carbonated drink” was an element of the asserted claims directed to a “drink dispenser”); (3) reliance on “regulatory” investments, and in particular whether those investments are distinguishable from the activities of a mere importer – *see, e.g., Certain Strontium-Rubidium Radioisotope Infusion Systems, Including Generators*, Inv. No. 337-TA-1110, Comm’n Op. at 42 n.27 (Dec. 11, 2019) (considering whether FDA-related activities are of a nature that can only be performed in the United States); and (4) whether the reference to “substantially all relevant foreign investments” identified as part of the cost of goods sold on page 84 of the ID includes foreign manufacturing costs – *see, e.g., Compact Wallets*, Comm’n Op. at 21-22 n.11 (noting preference to consider foreign manufacturing costs, where available, as part of the contextual assessment of whether complainant’s domestic investments are quantitatively significant).

² Chair Karpel notes that the ID's determinations are preliminary in nature and neither the Commission nor the ALJ are bound by the ID's preliminary determinations in any further proceedings in this investigation, including a final ID, and the Commission's review and final disposition on the merits. She notes that the Commission does not dictate the particulars of how a complainant must frame its domestic industry proofs and arguments, and that the Commission's determinations are based on the facts and evidence presented as to the claimed investments and the significance thereof as required by statute and as discussed in Commission and Federal Circuit case law. The Commissioners have different approaches to how the economic prong analyses may be shown based on the statutory domestic industry provisions under the facts and evidence presented in each case. For example, Chair Karpel and Commissioner Schmidlein have laid out their approach to the domestic industry analysis in *Certain Artificial Eyelash Extension Systems, Products, and Components Thereof*, Inv. No. 337-TA-1226, Separate Views of Commissioners Karpel and Schmidlein in Dissent on the Economic Prong of the Domestic Industry Requirement as to U.S. Design Patent Nos. D877,416 and D867,664 (Oct. 24, 2022).

The Commission vote for this determination took place on December 18, 2024.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR Part 210).

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', written in a cursive style.

Lisa R. Barton
Secretary to the Commission

Issued: December 18, 2024