

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 AN INITIAL
DETERMINATION TERMINATING THE INVESTIGATION AS TO RESPONDENT
NUTRA-LUXE M.D., LLC BASED ON A CONSENT ORDER STIPULATION AND
PROPOSED CONSENT ORDER**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review an initial determination (“ID”) (Order No. 10) of the presiding administrative law judge (“ALJ”), terminating the investigation as to respondent Nutra-Luxe M.D., LLC (“NutraLuxe”) based on a consent order stipulation and proposed consent order.

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 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 by numerous respondents. The amended complaint further alleges violations of section 337 based upon the importation into the United States, or in the sale of certain electric skin care devices, brushes and

chargers therefor, and kits containing the same, 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 Commission's Office of Unfair Import Investigations ("OUII") was also named as a party.

On August 17, 2015, complainant PBL and respondent NutraLuxe filed a joint motion to terminate this investigation as to NutraLuxe based on a consent order stipulation and proposed consent order. The Commission investigative attorney filed a response in support of the motion. No other responses were filed. On August 28, 2015, the ALJ issued an ID (Order No. 10). No party petitioned for review of the subject ID.

The Commission has determined to review the subject ID on its own motion. The parties' consent order stipulation and the proposed consent order contain ambiguous language at least concerning the identity of the articles subject to the consent order. Specifically, paragraph 1 of the proposed consent order states "(ii) any other product containing an oscillating brush head that has been previously adjudicated as infringing . . ." This language is inconsistent with consent orders that have been issued previously by the Commission, and arguably violates Commission Rule 210.21(c)(4), which provides that the "Commission will not issue consent orders with terms beyond those provided for in this section, and will not issue consent orders that are inconsistent with this section." In particular, Rule 210.21(c)(4)(i), 19 C.F.R. § 210.21(c)(4)(i), requires a "statement of the identity of . . . the respondent, and the subject articles." A parallel provision concerning the contents of the consent order stipulation is contained in Rule 210.21(c)(3)(i)(B), 19 C.F.R. § 210.21(c)(3)(i)(B). The proposed order does not clearly identify the articles subject to the consent order because it does not state what tribunal would do the referenced "adjudicat[ion]," or whether the adjudication must be final without right to further appeal. "[P]reviously" is also not defined in the proposed order, and could refer to a time before issuance of the consent order, institution of the investigation, or some other event. Further, paragraph 3 of the proposed consent order states "[t]his Consent Order shall be applicable to and binding upon . . . entities acting in concert or participation with NutraLuxe . . ." In sum, the subject language is ambiguous and does not appear to comply with the Commission's rules.

The moving parties are directed to file a joint submission by October 13, 2015, which either modifies the proposed consent order and consent order stipulation, withdraws the joint motion to terminate on consent order, or shows cause why the proposed consent order is in compliance with the Commission rules and should be issued without modification. OUII may also file a submission.

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: September 29, 2015