

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN IN VITRO FERTILIZATION
PRODUCTS, COMPONENTS THEREOF,
AND PRODUCTS CONTAINING THE SAME**

Inv. No. 337-TA-1196

**NOTICE OF COMMISSION DECISION TO VACATE IN PART AN INITIAL
DETERMINATION GRANTING IN PART COMPLAINANT’S MOTION FOR
SUMMARY DETERMINATION OF A VIOLATION OF SECTION 337;
REMAND OF THE INVESTIGATION; EXTENSION OF TARGET DATE**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to vacate in part an initial determination (“ID”) (Order No. 10) of the presiding Chief Administrative Law Judge (“Chief ALJ”) granting in part Complainant’s motion for summary determination of a violation of section 337 by respondents Fast IVF of Scottsdale, Arizona and Hermes Ezcanesi of Istanbul, Turkey (collectively, the “Defaulting Respondents”). The Commission has also determined to remand the investigation to the Chief ALJ for further proceedings consistent with the Commission Opinion issued concurrently herewith. The Commission has further determined to extend the target date for completion of the investigation until December 16, 2021.

FOR FURTHER INFORMATION CONTACT: Houda Morad, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708-4716. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission’s electronic docket (EDIS) at <https://edis.usitc.gov>. For help accessing EDIS, please email EDIS3Help@usitc.gov. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: On April 16, 2020, the Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (“section 337”), based on a complaint filed by complainant EMD Serono, Inc. of Rockland, Massachusetts (“Complainant”). See 85 FR 21267-68 (Apr. 16, 2020). The complaint, as amended and supplemented, alleges a violation of section 337 based on the importation into the United States, the sale for importation, and the sale within the United States after importation of certain *in vitro* fertilization products, components thereof, and products containing same (collectively, “Gray Market IVF Products”), by reason of: (1) infringement of U.S. Trademark Registration Nos.

4,689,651; 1,772,761; 3,777,170; 3,389,332; 3,816,320; 1,972,079; 3,604,207; and 3,185,427; (2) unfair methods of competition and unfair acts in the importation and sale of Gray Market IVF Products by reason of false designation of source; and (3) unfair methods of competition and unfair acts in the importation and sale of the Gray Market IVF Products by reason of false advertising. *See id.* In addition to the Defaulting Respondents, the notice of investigation also names General Plastik Drug Stores of Istanbul Suadiye, Turkey (“Unserved Respondent”) as a respondent in this investigation. *See id.* The Office of Unfair Import Investigations (“OUII”) is also a party to the investigation. *See id.*

On September 24, the Commission found each of the Defaulting Respondents in default. *See* Order No. 6 (Sept. 1, 2020), *unreviewed by* Comm’n Notice (Sept. 24, 2020). On October 26, 2020, the Commission terminated the Unserved Respondent from the investigation based on the withdrawal of the complaint allegations as to that respondent. *See* Order No. 8 (Oct. 13, 2020), *unreviewed by* Comm’n Notice (Oct. 26, 2020).

On December 2, 2020, Complainant filed a motion for summary determination of a violation of section 337 by the Defaulting Respondents. On December 22, 2020, OUII filed a response to Complainant’s motion. No other responses were filed.

On April 16, 2021, the Chief ALJ issued the subject ID (Order No. 10) granting in part pursuant to Commission Rule 210.18 (19 CFR 210.18) Complainant’s motion for summary determination of violation of section 337 by the Defaulting Respondents. Specifically, the Chief ALJ granted the motion with respect to Complainant’s trademark infringement claim under section 337(a)(1)(C) but denied the motion with respect to Complainant’s unfair competition claims under section 337(a)(1)(A). Order No. 10, insofar as it denies summary determination, is not an ID and is not subject to Commission review at this time. In addition, the Chief ALJ recommended that the Commission issue a general exclusion order and set a bond at 100 percent during the period of Presidential review. No petition for review of the subject ID was filed.

On May 18, 2021, the Commission determined to review the ID in part. Specifically, the Commission determined to review the ID’s findings with respect to the economic prong of the domestic industry requirement. The Commission requested briefing on the issue under review.

On June 1, 2021, Complainant and OUII filed submissions in response to the Commission’s May 18, 2021 notice. On June 8, 2021, OUII filed a response to Complainant’s submission. No other responses were filed.

Having reviewed the record of this investigation, including the subject ID and the parties’ submissions in response to the Commission’s May 18, 2021 notice and reply thereto, and for the reasons discussed in the Commission Opinion issued concurrently herewith, the Commission has determined to vacate in part the subject ID. Specifically, the Commission vacates the ID’s findings as to the issue under review, *i.e.*, the economic prong of the domestic industry requirement. Consequently, the Commission also vacates the ID’s finding of a violation of section 337. The Commission has also determined to remand the investigation to the Chief ALJ for further proceedings consistent with the Commission Opinion.

Commissioners Schmidlein and Karpel dissent from the Commission's decision and have filed a separate opinion explaining their views.

The Commission has further determined to extend the target date for completion of the investigation until December 16, 2021.

The Commission's vote for these determinations took place on October 6, 2021.

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

By order of the Commission.

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

Lisa R. Barton
Secretary to the Commission

Issued: October 6, 2021