

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN VACUUM INSULATED
FLASKS AND COMPONENTS
THEREOF**

Investigation No. 337-TA-1216

**NOTICE OF COMMISSION DECISION TO REVIEW IN PART AN INITIAL
DETERMINATION GRANTING IN PART COMPLAINANTS' MOTION FOR
SUMMARY DETERMINATION OF A VIOLATION OF SECTION 337; REQUEST
FOR SUBMISSIONS**

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. 24) of the presiding Chief Administrative Law Judge ("CALJ") granting-in-part complainants' motion for summary determination of a violation of section 337. The Commission also requests written submissions from the parties, interested government agencies, and other interested persons regarding remedy, bonding, and the public interest, under the schedule set forth below.

FOR FURTHER INFORMATION CONTACT: Michael Liberman, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW, Washington, D.C. 20436, telephone (202) 205-2392. 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 September 3, 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 Steel Technology LLC d/b/a Hydro Flask and Helen of Troy Limited (collectively, "Complainants," or "Hydro Flask"). 85 FR 55030-31 (Sept. 3, 2020). The complaint alleges a violation of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain vacuum insulated flasks and components thereof by reason of infringement of: (1) the sole claims of U.S. Design Patent Nos. D806,468 ("the D'468 patent"); D786,012 ("the D'012

patent”) and D799,320 (“the D’320 patent”), respectively; and (2) U.S. Trademark Registration Nos. 4,055,784 (“the ’784 trademark”); 5,295,365 (“the ’365 trademark”); 5,176,888 (“the ’888 trademark”); and 4,806,282 (“the ’282 trademark”). The complaint also alleges the existence of a domestic industry. The notice of investigation names numerous respondents: Cangnan Kaiyisi E-Commerce Technology Co., Ltd.; Shenzhen Huichengyuan Technology Co., Ltd.; Sinbada Impex Co., Ltd.; Yongkang Huiyun Commodity Co., Ltd.; Wuyi Loncin Bottle Co., Ltd.; Zhejiang Yuchuan Industry & Trade Co., Ltd.; Zhejiang Yongkang Unique Industry & Trade Co., Ltd.; Suzhou Prime Gifts Co., Ltd.; Hangzhou Yuehua Technology Co., Ltd.; Guangzhou Yawen Technology Co., Ltd.; Jinhua City Ruizhi E-Commerce Co., Ltd.; Wo Ma Te (Tianjin) International Trade Co., Ltd.; and Shenzhen City Yaxin General Machinery Co., Ltd. (collectively, the “Defaulting Respondents”); Eddie Bauer, LLC; PSEB Holdings, LLC; Dunhuang Group a.k.a. DHgate; Everich and Tomic Houseware Co., Ltd.; HydroFlaskPup; Yiwu Honglu Daily Necessities Co., Ltd.; and Yiwu Houju E-commerce Firm. The Commission’s Office of Unfair Import Investigations (“OUII”) is also named as a party in this investigation. *Id.*

Subsequently, the Commission permitted Hydro Flask to amend the complaint and notice of investigation to: (1) assert the ’012 patent against additional infringing products; (2) incorporate into the complaint the information and additional paragraphs included in Complainants’ Supplemental Letter to the Commission of August 18, 2020; and (3) correct the corporate names of four non-appearing respondents – Yiwu Houju E-Commerce Firm; Jinhua City Ruizhi E-Commerce Co., Ltd.; Wo Ma Te (Tianjin) International Trade Co., Ltd.; and Shenzhen City Yaxin General Machinery Co., Ltd. Mot. at 1. Order No. 12 (Nov. 6, 2020), *unreviewed by* Notice (Nov. 24, 2020); *see* 85 FR 77239-40 (Dec. 1, 2020). The Commission also terminated the investigation as to certain other respondents based on a consent order and settlement agreement, or a settlement agreement, or a consent order stipulation and consent order: Eddie Bauer LLC and PSEB Holdings, LLC; DHgate; Everich and Tomic Houseware Co., Ltd. Order No. 13 (Nov. 30, 2020), *unreviewed by* Notice (Dec. 21, 2020); Order No. 17 (Jan. 27, 2021), *unreviewed by* Notice (Feb. 16, 2021); Order No. 19 (Feb. 19, 2021), *unreviewed by* Notice (Mar. 12, 2021). The Commission likewise terminated the investigation with respect to the ’282 trademark. Order No. 16 (Jan. 11, 2021), *unreviewed by* Notice (Feb. 8, 2021).

On April 14, 2021, the Commission further found the Defaulting Respondents in default Order No. 21 (Mar. 22, 2021), *unreviewed by* Notice (Apr. 14, 2021). The Commission also permitted Hydro Flask to withdraw the amended complaint as to HydroFlaskPup, Yiwu Honglu Daily Necessities Co., Ltd., and Yiwu Houju E-commerce Firm. Order No. 22 (Apr. 7, 2021), *unreviewed by* Notice (Apr. 22, 2021).

On April 8, 2021, Hydro Flask filed a motion for summary determination of a violation of section 337 pursuant to Commission Rule 210.16(c)(2) (19 CFR 210.16(c)(2)) to support its request for entry of a GEO with respect to all asserted patents and trademarks. OUII filed a response in support of the motion on August 9, 2021.

On September 3, 2021, the CALJ issued the subject ID granting in part Hydro Flask’s motion for summary determination. The ID finds that Hydro Flask has shown by reliable, probative, and substantial evidence that a violation of section 337 has occurred with respect to the ’784, ’365, and ’888 trademarks, and the D’468, D’012, and D’320 patents, and that the domestic industry requirement is satisfied for the Asserted Trademarks and Patents. The ID finds that a violation has been established with respect to ten out of thirteen defaulting respondents: Cangnan Kaiyisi E-Commerce Technology Co., Ltd.; Yongkang Huiyun Commodity Co., Ltd.; Wuyi Loncin Bottle Co., Ltd.; Zhejiang Yongkang Unique Industry & Trade Co., Ltd.; Suzhou Prime Gifts Co., Ltd.; Hangzhou Yuehua Technology Co., Ltd.; Guangzhou Yawen Technology Co., Ltd.; Jinhua City Ruizhi E-Commerce Co., Ltd.; Wo Ma Te (Tianjin) International Trade Co., Ltd.; and Shenzhen City Yaxin General Machinery Co., Ltd.

The ID also finds that no violation has been established as to respondents Shenzhen Huichengyuan Technology Co., Ltd.; Sinbada Impex Co., Ltd.; and Zhejiang Yuchuan Industry & Trade Co., Ltd.

The ID contains the CALJ’s recommended determination on remedy and bonding (“RD”). The RD recommends issuance of a general exclusion order (“GEO”) with respect to the asserted patents and trademarks. The RD does not recommend issuance of any cease and desist orders (“CDOs”). No petitions for review were filed.

Having examined the record of this investigation, the Commission has determined to review in part the subject ID. Specifically, the Commission has determined to review the ID’s finding that Hydro Flask has satisfied the economic prong of the domestic industry requirement under Section 337(a)(3)(A). *See* ID at 89-92. On review, the Commission affirms the ID’s findings that Hydro Flask has established a domestic industry under Section 337(a)(3)(A). Given the nature and extent of Hydro Flask’s investments in plant and equipment as a whole, Hydro Flask is not a mere importer. As the ID correctly found, Hydro Flask conducts engineering, product development and design, quality assurance, customer support, research and development, product assembly and customization, and distribution in the United States and Hydro Flask’s plant and equipment investments in these activities directed to the DI products are quantitatively and qualitatively significant. *See* ID at 89-92. The Commission notes that the nature and extent of Hydro Flask’s investments distinguish this case from those in which complainants sought to establish a domestic industry almost entirely based on investments in sales, marketing, and/or distribution. As the Commission has previously stated, “[w]hile marketing and sales activity, alone, may not be sufficient to meet the domestic industry test, those activities may be considered as part of the overall evaluation of whether or not a Complainant meets the economic prong.” *Certain Solid State Storage Drives, Stacked Electronics Components, and Products Containing the Same*, Inv. No. 337-TA-1097, Commission Op. at 22 (June 29, 2018) (quoting *Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Order No. 24 at 34 (Apr. 21, 2010) (denying summary determination on the economic prong of the domestic industry requirement). Chair

Kearns notes that some of the claimed investments in plant and equipment appear to be for activities that would be carried out by a mere importer, such as distribution and customer support, and that the record does not allow a breakout of investments for such activities. In affirming the ALJ's grant of summary determination here, he finds that given the apparent amount of domestic investments for activities such as engineering, product development, research and development, and manufacturing, and the qualitative importance of these activities to this industry, it is unlikely that discounting the investments that are those of a mere importer would cause him to question the existence of a domestic industry.

In connection with the final disposition of this investigation, the Commission may issue an order that could result in the exclusion of the subject articles from entry into the United States. 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 likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843, Comm'n Op. at 7-10 (December 1994).

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, disapprove, or take no action on the Commission's action. See Presidential Memorandum of July 21, 2005, 70 *Fed. Reg.* 43251 (July 26, 2005). 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. Such submissions should address the recommended determination by the ALJ on remedy and bonding.

In their initial submissions, Complainants are requested to identify the remedy sought and Complainants Hydro Flask and OUII are requested to submit proposed remedial orders for the Commission's consideration. Hydro Flask is also requested to state the dates on which the

asserted patents expire, to provide the HTSUS subheadings under which the accused products are imported, and to supply the names of all known importers of the products at issue in this investigation. The initial written submissions and proposed remedial orders must be filed no later than close of business on November 4, 2021. Reply submissions must be filed no later than the close of business on November 11, 2021. 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. The Commission's paper filing requirements in 19 CFR 210.4(f) are currently waived. 85 FR 15798 (March 19, 2020). Submissions should refer to the investigation number ("Inv. No. 337-TA-1216") in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures*, [https://www.usitc.gov/secretary/documents/handbook on filing procedures.pdf](https://www.usitc.gov/secretary/documents/handbook%20on%20filing%20procedures.pdf)). Persons with questions regarding filing should contact the Secretary at (202) 205-2000.

Any person desiring to submit a document to the Commission in confidence must request confidential treatment by marking each document with a header indicating that the document contains confidential information. This marking will be deemed to satisfy the request procedure set forth in Rules 201.6(b) and 210.5(e)(2) (19 CFR 201.6(b) & 210.5(e)(2)). Documents for which confidential treatment by the Commission is sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the-Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. 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 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: October 21, 2021