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7020-02

INTERNATIONAL TRADE COMMISSION

Investigation No. 337-TA-971

Certain Air Mattress Systems, Components Thereof, and Methods of Using the Same

Commission Determination to Review in Part a Final Initial Determination; Schedule for Filing Written Submissions on the Issues Under Review and 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 ("the Commission") has determined to review in part the final initial determination ("ID") issued by the presiding administrative law judge ("ALJ") finding no violation of section 337 of the Tariff Act of 1930, as amended ("section 337"), in the above-referenced investigation on November 18, 2016.

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) 205-3115. 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, SW, 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 on November 20, 2015, based on a complaint filed by Select Comfort Corporation of Minneapolis, Minnesota and Select Comfort SC Corporation of Greenville, South Carolina (collectively, "Select Comfort," or "Complainants"). 80 FR 72738 (Nov. 20, 2015). The complaint alleges violations 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 the sale within the United States after importation of certain air mattress systems, components thereof, and methods of using the same by reason of infringement of certain claims of U.S. Patent Nos. 5,904,172 ("the '172 patent") and 7,389,554 ("the '554 patent"). *Id*. The notice of investigation names as respondents Sizewise Rentals LLC of Kansas City, Missouri; American National Manufacturing Inc. of Corona, California; and Dires LLC and Dires LLC d/b/a Personal Comfort Beds of Orlando, Florida (collectively, "Respondents"). *Id.* The Office of Unfair Import Investigations ("OUII") was also named as a party to the investigation. *Id.*

Pursuant to Commission Rule 210.50(b)(1), 19 CFR 210.50(b)(1), the Commission ordered that the presiding ALJ:

> [S]hall take evidence or other information and hear arguments from the parties and other interested persons with respect to the public interest in this investigation, as appropriate, and provide the Commission with findings of fact and a recommended determination on this issue, which shall be limited to the statutory public interest factors set forth in 19 U.S.C. 1337(d)(1), (f)(1), (g)(1).

80 FR 72738 (Nov. 20, 2015).

The evidentiary hearing on the question of violation of section 337 was held August 8-12, 2016. The final ID on violation was issued on November 18, 2016. The ALJ issued his recommended determination on remedy, the public interest and bonding on the same day. The ALJ found no violation of section 337 in this investigation. The ALJ recommended that if the Commission finds a violation of section 337 in the present investigation, the Commission issue a limited exclusion order ("LEO") prohibiting the importation of Respondents' air controllers and air mattress systems found to infringe the asserted patents. The ALJ also recommended the inclusion of a provision for the '554 patent, whereby Respondents certify that certain imports are not covered by the LEO because they contain components for use in non-infringing products. The ALJ did not recommend that the Commission issue a cease and desist order in this investigation. The ALJ further recommended a zero bond during the period of Presidential review.

All parties to this investigation filed timely petitions for review of various portions of the final ID, as well as timely responses to the petitions.

On December 19, 2016, both Complainants and Respondents filed their respective Public Interest Statement pursuant to 19 CFR 210.50(a)(4). Responses from public were likewise received by the Commission pursuant to notice. *See* Notice of Request for Statements on the Public Interest (Nov. 29, 2016).

Having examined the record in this investigation, including the final ID, the petitions for review, and the responses thereto, the Commission has determined to review the final ID in part. In particular, the Commission has determined as follows:

(1) to review the ID's findings that the P5000, P6000, and Arco products do not meet "guides and stops" limitation in claim 2 of the '172 patent, and that these products do not meet the same claim limitation in claim 12 of the '172 patent and for that reason do not infringe that claim;

(2) to review the ID's finding that the '172 Accused Products do not meet claim limitation "pressure monitor means being operably coupled to the processor and being in fluid communications with the at least one bladder for continuously monitoring the pressure in the at least one bladder" in claims 2, 6, 20, 22, and 24 of the '172 patent;

(3) to review the ID's finding that the '172 Accused Products do not infringe claim 9 of the '172 patent;

(4) to review, in part, the ID's analysis regarding whether the '172 Accused Products infringe claim 2 of the '172 patent for the limited purpose of taking no position on the ALJ's discussion in the last paragraph of page 20 and in the first paragraph of page 21 of

the ID;

(5) to review the ID's finding that claim 16 of the '554 patent is not infringed because Complainants did not establish that the accused products practice the "air posturizing sleep surface" limitation;

(6) to review the ID's finding that the '554 Domestic Industry Products do not practice the '554 patent;

(7) to review the ID's finding that Complainants did not satisfy the economic prong of the domestic industry requirement with respect to both the '172 and '554 patents.

The Commission has determined not to review the remainder of the ID.

The parties are requested to brief their positions on only the following issues, with reference to the applicable law and the evidentiary record:

1. The ID finds that: "Because Select Comfort asserts that guides and stops of the P5000, P6000, and Arco products are screws and screw bores, the undersigned finds that Select Comfort has failed to establish that these products meet this limitation." ID at 27.

a. Does the record support a finding that "Select Comfort asserts that guides and stops of the P5000, P6000, and Arco products are screws and screw bores?"

b. Does the record show that P5000, P6000, and Arco products meet the guides and stops limitation in claims 2 and 12 of the '172 patent?

2. The ID finds that because Complainants did not establish that the '172 Accused Products continuously monitor pressure using a processor in conjunction with the transducer, the '172 Accused Products do not meet claim limitation "and pressure monitor means being operably coupled to the processor and being in fluid communications with the at least one bladder for

continuously monitoring the pressure in the at least one bladder." ID at 32; *see id*. at 29-32.

a. To the extent not already briefed to the Commission, please discuss whether the record supports the ID's finding (with supporting citations to the record evidence).

3. The ID finds that: "Claim 9, like claim 2, includes the term 'continuously monitoring.' For the reasons stated above in the discussion of claim 2, claim 9 is not infringed because Select Comfort did not establish that the '172 Accused Products 'continuously monitor' pressure." ID at 32.

a. Does the record show that claim 9 of the '172 patent is not infringed because Select Comfort did not establish that the '172 Accused Products "continuously monitor" pressure?

4. The ID finds that: "Claim 16, like claim 1, includes the term 'air posturizing sleep surface.' For the reasons stated above in the discussion of claim 1, claim 16 is not infringed because Select Comfort did not establish that the accused products practice the 'air posturizing sleep surface' limitation." ID at 70.

a. Does the record show that the accused products infringe the "air posturizing sleep surface" limitation of claim 16 of the '554 patent?

5. Does the record show that the '554 Domestic Industry Products practice the '554 patent?

6. The ID finds that: "Claim 16, like claim 1, includes the term 'air posturizing sleep surface.' For the reasons stated above in the discussion of claim 1, the '554 DI products do not practice claim 16 because they do not meet the 'air posturizing sleep surface' limitation." ID at 75.

a. Does the record show that the '554 DI products practice the "air posturizing sleep surface" limitation of claim 16 of the '554 patent?

7. With respect to Complainants' investment in plant and equipment alleged under 19 U.S.C. § 1337(a)(3)(A) the ID finds that:

> While the Commission has stated that a precise allocation of expenses among various DI products is not necessary, that precedent cannot mean that Select Comfort's proposed allocation is acceptable; *i.e.* allocating 100 % of the rental expenses to the '172 patent, and then a portion of those same expenses to the '554 patent DI products. Accordingly, Select Comfort has not shown a domestic industry for either the '172 patent or the '554 patent based upon 19 U.S.C. 1337(a)(3)(A).

ID at 89-90.

a. Do Commission and judicial precedents and the record in the present investigation support the ID's finding?

b. Please explain with citation to the record what portion of the asserted domestic investment in plant and equipment, in terms of the dollar amount and percentage, can be allocated to the articles that practice the '172 patent.

c. Does the record show that Complainants' investment in plant and equipment under 19 U.S.C. § 1337(a)(3)(A) is significant with respect to the articles that practice the '172 patent?

d. Please explain with citation to the record what portion of the asserted domestic investment in plant and equipment, in terms of the dollar amount and percentage,

can be allocated to the articles that practice the ‘554 patent.

e. Does the record show that Complainants’ investment in plant and equipment under 19 U.S.C. § 1337(a)(3)(A) is significant with respect to the articles that practice the ‘554 patent?

8. With respect to Complainants’ employment of labor or capital alleged under 19 U.S.C. § 1337(a)(3)(B) the ID finds that:

> As with the plant and equipment issue in the previous section, Select Comfort has again allocated 100% of the relevant expense (in this section, employee compensation) to the ‘172 patent DI products and then allocated a portion of those same expenses to the ‘554 DI products. (CX-0445 at Q/A 59, 62; CX-0449C at Q/A 52; CIB at 92-93.) For the reasons set forth in the previous section, this argument is not persuasive. Accordingly, Select Comfort has not shown a domestic industry for either the ‘172 patent or the ‘554 patent based upon 19 U.S.C. 1337(a)(3)(B).

ID at 91.

a. Do Commission and judicial precedents and the record in the present investigation support the ID’s finding?

b. Please explain with citation to the record what portion of the asserted domestic employment of labor or capital, in terms of the dollar amount and percentage, can be allocated to the articles that practice the ‘172 patent.

c. Does the record show that Complainants' employment of labor or capital under 19 U.S.C. § 1337(a)(3)(B) is significant with respect to the articles that practice the '172 patent?

d. Please explain with citation to the record what portion of the asserted domestic employment of labor or capital, in terms of the dollar amount and percentage, can be allocated to the articles that practice the '554 patent.

e. Does the record show that Complainants' employment of labor or capital under 19 U.S.C. § 1337(a)(3)(B) is significant with respect to the articles that practice the '554 patent?

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, Comm'n Op. at 7-10 (Dec. 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 or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 FR 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.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues under review. The submissions should be concise and thoroughly referenced to the record in this investigation. 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 on remedy, the public interest and bonding issued on December 1, 2016, by the ALJ. Complainants and the Commission investigative attorney ("IA") are also requested to submit proposed remedial orders for the Commission's consideration.

Complainants are further requested to provide the expiration date of the '172 and '554 patents, the HTSUS numbers under which the accused articles are imported, and any known importers of the accused products. The written submissions and proposed remedial orders must be filed no later than the close of business on February 6, 2017. Reply submissions must be filed

no later than the close of business on February 13, 2017. 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 CFR 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-971") 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_electronicfiling.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 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. 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 contract personnel will sign appropriate nondisclosure agreements. 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.

Lisa R. Barton
Secretary to the Commission

Issued: January 23, 2017

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