



7020-02

## INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-959]

### **Certain Electric Skin Care Devices, Brushes and Chargers Therefor, and Kits Containing the Same**

#### **Modification of Initial Determination; Issuance of a General Exclusion Order, a Limited Exclusion Order, and Cease and Desist Orders; Termination of Investigation**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined that there is a violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337) in the above-captioned investigation. The Commission has determined to modify the ALJ's initial determination ("ID") (Order No. 42) in part and to issue a general exclusion order ("GEO"), a limited exclusion order ("LEO"); and cease and desist orders ("CDOs"). The investigation is terminated.

**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 <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 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 ("Complainant," or "PBL"). 80 *Fed. Reg.* 36576-77 (Jun. 25, 2015). The amended complaint, as supplemented, alleges a violation of section 337 based upon the importation into the United States, the sale for importation, or the sale within the United States after importation of certain electric skin care devices, brushes and chargers therefor, and kits containing the same by reason of infringement of certain claims of U.S. Patent Nos. 7,320,691 ("the '691 patent") and 7,386,906 ("the '906 patent"), and U.S. Design Patent No. D523,809 ("the D'809 patent"). The complaint further alleges violations of section 337 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 complaint named numerous respondents. The Commission's Office of Unfair Import Investigations was named as a party.

During the course of the investigation, eight of the respondents were terminated by consent order: Nutra-Luxe M.D., LLC of Fort Myers, Florida (Order No. 10) (consent order issued Jan. 5, 2016); SkincarebyAlana of Dana Point, California (Order No. 11) (consent order issued Oct. 6, 2015); Unicos USA, Inc. of LaHabra, California (Order No. 15) (consent order issued Oct. 20, 2015); H2PRO Beautylife, Inc. of Placentia, California (Order No. 19) (consent order issued Oct. 22, 2015); Jewlzie of New York, New York (Order No. 20) (consent order issued Oct. 22, 2015); Home Skinovations Inc. of Richmond Hill, Ontario, Canada, and Home Skinovations Ltd. of Yokneam, Israel (Order No. 30) (consent order issued Dec. 23, 2015); and

Accord Media, LLC of New York, New York (Order No. 31) (consent order issued Dec. 23, 2015). Respondent RN Ventures Ltd. of London, United Kingdom, was terminated based on a settlement agreement (Order No. 36) (*not reviewed* Feb. 4, 2016). Respondents Michael Todd LP and MTTO LLC, both of Port St. Lucie, Florida, were also terminated based on a settlement agreement (Order No. 37) (*not reviewed* Mar. 3, 2016).

The remaining ten respondents were found in default: Coreana Cosmetics Co., Ltd. of Chungcheongnam-do, Republic of Korea; Flageoli Classic Limited of Las Vegas, Nevada (“Flageoli”); Serious Skin Care, Inc. of Carson City, Nevada (“Serious Skin Care”); Shanghai Anzikang Electric Co., Ltd. of Shanghai, China (“Anzikang”); and Wenzhou Ai Er Electrical Technology Co., Ltd. of ZheJiang, China (Order No. 13) (*not reviewed*, as modified by Order No. 15, Oct. 20, 2015); ANEX Corporation of Seoul, Republic of Korea; Korean Beauty Co., Ltd. of Seoul, Republic of Korea; and Our Family Jewels, Inc. of Parker, Colorado (“Our Family Jewels”) (Order No. 18) (*not reviewed* Oct. 22, 2015); Beauty Tech, Inc. of Coral Gables, Florida (“Beauty Tech”) (Order No. 24) (*not reviewed* Nov. 13, 2015); and Xnovi Electronic Co., Ltd. of Shenzhen, China (Order No. 32) (*not reviewed* Dec. 23, 2015) (collectively, “the Defaulting Respondents”).

On February 18, 2016, complainant PBL filed a motion for summary determination of violation of Section 337 by the Defaulting Respondents. The Commission investigative attorney (“IA”) filed a response in support of the motion. No other responses were filed.

On April 11, 2016, the ALJ issued an ID (Order No. 42) granting complainant’s motion for summary determination of violation and making recommendations regarding remedy and bonding. The IA filed a timely petition for review-in-part of the ID. No other party petitioned for review of the ID. Complainant PBL filed a response in support of the IA’s petition. No

other responses were filed.

On May 26, 2016, the Commission determined to review the ID in part, and issued a “Notice Of A Commission Determination To Review In Part An Initial Determination Granting Complainant’s Motion For Summary Determination Of Violation Of Section 337; Request For Written Submissions On Remedy, The Public Interest, And Bonding” (“the Commission Notice”), in which the Commission specified the issues under review. *See* 81 *Fed. Reg.* 35377-79 (Jun. 2, 2016). In particular, the Commission determined “to review the ID’s findings on the economic prong of the domestic industry requirement as to the patent-based allegations, all issues related to violation of the asserted trade dress, and to correct certain minor typographical errors.” Commission Notice at 2. The Commission did not request any submissions on the issues under review.

The Commission requested written submissions on remedy, public interest, and bonding. *Id.* at 3. PBL and the IA timely filed their submissions pursuant to the Commission Notice. Settled respondents Michael Todd LP and MTTO LLC also filed a Written Submission on the Issue of Remedy and a Reply to PBL’s Written Submission. No other submissions were received in response to the Commission Notice.

Having examined the record in this investigation, the Commission has determined as follows:

(I) With respect to the ID’s findings on the economic prong of the domestic industry requirement as to the patent-based allegations:

(A) To vacate the subsection labeled “Significant Investment.” on pages 21-22 of the ID.

(B) To take no position on, and therefore vacate, the ID’s analysis and findings pertaining to the ID’s determination that the “non-manufacturing expenditures would need to be backed out of the calculation of qualifying investments under subsections (A) as well as (B).” ID/RD at 25.

(C) To affirm the ID’s finding that PBL satisfied the economic prong requirement under subsections 337(a)(3)(A) and (B).

(D) To take no position on, and therefore vacate, the ID’s analysis and findings regarding whether PBL satisfied the economic prong requirement under subsection (C) of section 337(a)(3). *See Beloit Corporation v. Valmet Oy*, 742 F.2d 1421, 1423 (Fed. Cir.1984) (“*Beloit*”).

(II) With respect to all of the ID’s findings pertaining to the alleged violation of PBL’s asserted trade dress, the Commission takes no position. *See Beloit*, 742 F.2d at 1423. The Commission finds that the respondents accused of infringing the trade dress are in default under section 337(g)(1).

(III) The Commission has corrected two typographical errors by substituting “Mot. Ex. 35 (Fabien Decl.) ¶¶ 31, 35” for “*Id.* ¶¶ 31,35” in the last paragraph on page 38 of the ID, and “Mot. Ex. 35 (Fabien Decl.) ¶¶ 31, 35” for “*Id.* ¶¶ 31, 35” in the last paragraph on page 31 of the ID.

Having reviewed the submissions on remedy, the public interest and bonding filed in response to the Commission’s Notice, and the evidentiary record, the Commission has determined that the appropriate form of relief in this investigation is: (a) a GEO prohibiting the unlicensed importation of certain electric skin care devices, brushes or chargers therefor, or kits containing same that infringe one or more of claims 1, 4-6, 16, 22, 31, 33, 39-41, 42, 44-46, 49 of

the '691 patent and claims 1-2, 4-5, and 7-15 of the '906 patent; (b) an LEO prohibiting the unlicensed entry of (i) infringing electric skin care devices, brushes or chargers therefor, or kits containing same that are covered by the claim of the D'809 patent and that are manufactured abroad by or on behalf of, or imported by or on behalf of respondents Beauty Tech; Flageoli; Our Family Jewels; Serious Skin Care; and Anzikang, and (ii) electric skin care devices, brushes or chargers therefor, or kits containing same that are covered by one or more of the Clarisonic Device Trade Dress or Clarisonic Charging Station Trade Dress and that are manufactured abroad by or on behalf of, or imported by or on behalf of respondents Our Family Jewels or Anzikang; and (c) cease and desist orders directed against each domestic and foreign Defaulting Respondent.

Chairman Schmidlein and Commissioner Kieff each write separately to explain their views as to the basis for issuing the cease and desist orders.

The Commission has further determined that the public interest factors enumerated in subsections (d)(1), (f)(1), and (g)(1) (19 U.S.C. §§ 1337(d)(1), (f)(1), (g)(1)) do not preclude issuance of the above-referenced remedial orders. Additionally, the Commission has determined that a bond in the amount of one hundred (100) percent of the entered value is required to permit temporary importation of the articles in question during the period of Presidential review (19 U.S.C. § 1337(j)). The investigation is terminated.

The Commission's orders, opinion, and the record upon which it based its determination were delivered to the President and to the United States Trade Representative on the day of their issuance. The Commission has also notified the Secretary of the Treasury of the orders.

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.

Issued: February 6, 2017

Lisa R. Barton

Secretary to the Commission

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