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INTERNATIONAL TRADE COMMISSION

Investigation No. 337-TA-1003

Certain Composite Aerogel Insulation Materials and Methods for Manufacturing the Same Commission Decision to Review in Part a Final Initial Determination Finding a Violation of Section 337; Request for Written 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 the presiding administrative law judge's ("ALJ") final initial determination ("ID") issued on September 29, 2017, finding a violation of section 337 of the Tariff Act of 1930, as amended, in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Cathy Chen, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205-2392. 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, DC 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 June 8, 2016, based on a complaint filed by Aspen Aerogels, Inc. of Northborough, Massachusetts (“Aspen”). 81 *Fed. Reg.* 36955-956 (Jun. 8, 2016). 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 composite aerogel insulation materials and methods for manufacturing the same by reason of infringement of certain claims of U.S. Patent No. 7,399,439 (“the ’439 patent”); U.S. Patent No. 9,181,486 (“the ’486 patent”); U.S. Patent No. 7,078,359 (“the ’359 patent”); U.S. Patent No. 6,989,123 (“the ’123 patent”); and U.S. Patent No. 7,780,890 (“the ’890 patent”). The complaint further alleges that an industry in the United States exists as required by 19 U.S.C. 1337(a)(2). The notice of investigation named Nano Tech Co., Ltd. of Zhejiang, China (“Nano”), and Guangdong Alison Hi-Tech Co., Ltd. of Guangzhou, China (“Alison”), as respondents. The Office of Unfair Import Investigations (“OUII”) is also a party in this investigation.

All asserted claims of the ’439 patent and the ’486 patent and certain asserted claims of the ’359 have been terminated from the investigation. *See* Comm’n Notice (Nov. 2, 2016); Comm’n Notice (Feb. 9, 2017). Only claims 15-17, and 19 of the ’123 patent; claims 1, 5, 7, 9, 12, 15, and 16 of the ’359 patent; and claims 11-13, 15, 17-19, and 21 of the ’890 patent (“the Asserted Claims”) remain in the investigation.

On November 15, 2016, the ALJ issued Order No. 19, granting Aspen’s motion for summary determination that the economic prong of the domestic industry requirement has been satisfied under section 337(a)(3)(A) and (B). The Commission determined to review in part

Order No. 19. *See* Comm'n Notice (Dec. 7, 2016). On review, the Commission affirmed with modification the summary determination that Aspen satisfies the economic prong of the domestic industry requirement. *See id.* at 1-2.

On September 29, 2017, the ALJ issued the final ID in this investigation, finding a violation of section 337 by Respondents Alison and Nano in connection with claims 1, 5, 7, and 9 of the '359 patent; claims 15-17, and 19 of the '123 patent; and claims 11-13, 15, 17-19, and 21 of the '890 patent. The ID also finds a violation of section 337 by Respondent Nano in connection with claims 12, 15, and 16 of the '359 patent. In addition, the ID finds that Aspen has shown that its domestic industry products satisfy the technical prong of the domestic industry requirement for the Asserted Patents. The ID further finds that Respondents have not shown that the Asserted Claims are invalid.

The ID also contains the ALJ's recommended determination on remedy and bonding. The ALJ recommended that the appropriate remedy is a limited exclusion order with a certification provision prohibiting the entry of certain composite aerogel insulation materials manufactured abroad by or on behalf of Respondents Alison and Nano that infringe certain claims of the '359 patent, and/or that are manufactured using certain claimed methods of the '123 patent and the '890 patent.

On October 16, 2017, Respondents and OUII each filed a timely petition for review of the final ID. Respondents and OUII challenge certain of the ID's findings with respect to the validity of the Asserted Claims and the ID's findings with respect to claim 5 of the '359 patent. Respondent Alison separately challenges the ID's finding of infringement with respect to claim 9 of the '359 patent. That same day, Aspen filed a contingent petition for review of the final ID,

challenging the ALJ's construction of two claim limitations in the '359 patent. On October 24, 2017, the parties filed timely responses to the petitions for review. On October 31, 2017, the parties filed their public interest comments pursuant to Commission Rule 210.50(a)(4).

Having examined the record of this investigation, including the ID, the petitions for review, and the responses thereto, the Commission has determined to review the ID in part. Specifically, with respect to the '359 patent, the Commission has determined to review the ALJ's construction of the "lofty fibrous batting" limitation in claim 1 of the '359 patent. The Commission's review of the "lofty fibrous batting" limitation does not include the ID's finding that Respondents have not proven that the term is invalid for indefiniteness. The Commission has also determined to review the ALJ's constructions of the additional limitations in claims 5 and 9, and the "total surface area of that cross section" limitation of claim 12 of the '359 patent, and the ID's associated findings on infringement and the technical prong of the domestic industry requirement with respect to those claims and claims 15 and 16 of the '359 patent. In addition, the Commission has determined to review the ID's findings that the asserted claims of the '359 patent are not invalid in view of Ramamurthi by itself or in combination with other prior art. With respect to the '123 and the '890 patents, the Commission has determined to review the ID's finding that claim 15 of the '123 patent and claims 11-13, 15, 17, and 21-23 of the '890 patent are not obvious in view of Ramamurthi and either Uchida or Yada. The Commission has determined not to review the remaining issues decided in the ID.

The parties are requested to brief their positions on the issues under review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission is particularly interested in responses to the following questions:

1. Please address the proper scope of claim 9 of the '359 patent and, in particular, the "about 1 to 20%" limitation. Your response should be limited to the evidence in the record, including a discussion of relevant statements, if any, made in the prosecution history.
2. With reference to question one, please address whether Respondent Alison's accused products infringe claim 9 of the '359 patent under the proper construction of the "about 1 to 20%" limitation.
3. With reference to question one, please discuss whether Ramamurthi anticipates the limitation "the dopant is present in an amount of about 1 to 20% by weight of the total weight of the composite" in claim 9 of the '359 patent.
4. Please address whether the Commission should adopt Dr. Gnade's interpretation or Dr. Leventis' interpretation of the "total surface area of that cross section" limitation in claim 12 of the '359 patent. Your response should be limited to the evidence in the record, including a discussion of relevant statements, if any, made in the prosecution history.
5. With reference to question four, please address whether Respondents' accused products and Aspen's domestic industry products meet the limitation "where the batting is sufficiently lofty that the cross-sectional area of the fibers of the batting visible in the cross-section of the composite is less than 10% of the total surface area of that cross section" under both Dr. Gnade's interpretation and Dr. Leventis' interpretation of the scope of claim 12 of the '359 patent.
6. With reference to question four, please discuss whether Ramamurthi anticipates

the limitation “the cross-sectional area of the fibers of the batting visible in the cross-section of the composite is less than 10% of the total surface area of that cross section” in claim 12 of the ’359 patent.

7. Please address Aspen’s contention in its combined response (at 82-84) that Respondents’ petitions for review presents new arguments and new evidence concerning Uchida and Yada that they failed to raise in their post-hearing briefs.

The parties have been invited to brief only these discrete issues, as enumerated above, with reference to the applicable law and evidentiary record. The parties are not to brief other issues on review, which are adequately presented in the parties’ existing filings.

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 (December 1994) (Commission Opinion).

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 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. 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: The parties to the investigation are requested to file written submissions on the issues identified in this notice. 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. Complainant and the Office of Unfair Import Investigations are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is further requested to state the dates that the patents expire, the HTSUS numbers under which the accused products are imported, and any known importers of the accused products. The written submissions and proposed remedial orders must be filed no later than close of business on **December 15, 2017**. Initial submissions are limited to 40 pages, not including any attachments or exhibits related to discussion of the public interest. Reply submissions must be filed no later than the close of business on **December 22, 2017**.

Reply submissions are limited to 20 pages, not including any attachments or exhibits related to discussion of remedy, the public interest, and bonding. 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 C.F.R. 210.4(f)). Submissions should refer to the investigation number (“Inv. No. 337-TA-1003”) in a prominent place on the cover page and/or the first page. *See Handbook on Filing Procedures*, (https://www.usitc.gov/secretary/documents/handbook_on_filing_procedures.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^[1], solely for cybersecurity purposes. All nonconfidential 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: November 30, 2017

[1] All contract personnel will sign appropriate nondisclosure agreements.

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