



7020-02

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-1139]

Certain Electronic Nicotine Delivery Systems and Components Thereof;

Commission Determination to Review the Final Initial Determination in Part and to

Affirm the Finding of a Violation of Section 337; Schedule for Filing Written

Submissions on Remedy, the Public Interest and Bonding; Extension of the 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 review the presiding administrative law judge's ("ALJ") final initial determination ("ID") in part. On review, the Commission affirms the ID's finding of a violation of section 337 in the above-captioned investigation. The Commission requests written submissions from the parties, interested government agencies, and interested persons on the issues of remedy, the public interest, and bonding concerning respondent Eonsmoke, LLC ("Eonsmoke") and defaulting respondent XFire, Inc. ("XFire"). The Commission has also determined to extend the target date for completion of the above-captioned investigation to Monday, April 20, 2020.

FOR FURTHER INFORMATION CONTACT: Cathy Chen, 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: On December 13, 2018, the Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based on a complaint filed on behalf of Juul Labs, Inc. ("JLI") of San Francisco, California. 83 FR 64156 (Dec. 13, 2018). The complaint, as amended and supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electronic nicotine delivery systems and components thereof by reason of infringement of certain claims of U.S. Patent Nos.: 10,070,669 ("the '669 patent"); 10,076,139 ("the '139 patent"); 10,045,568 ("the '568 patent"); 10,058,130 ("the '130 patent"); and 10,104,915 ("the '915 patent") (collectively, "the Asserted Patents"). *Id.* The Commission's notice of investigation named twenty-one respondents, including Eonsmoke of Clifton, New Jersey and XFire of Stafford, Texas. *Id.* at 64157. The Office of Unfair Import Investigations ("OUII") is also a party to the investigation.

On February 25, 2019, the ALJ granted JLI's motion to amend the complaint and notice of investigation to change the name of respondent Bo Vaping of Garden City, New York to ECVD/MMS Wholesale LLC of Garden City, New York and the name of respondent MMS Distribution LLC of Rock Hill, New York to MMS/ECVD LLC of Garden City, New York. *See* Order No. 8 (Feb. 25, 2019), *not rev'd* by Comm'n Notice (Mar. 25, 2019).

On February 28, 2019, the ALJ granted a motion to amend the complaint and notice of investigation to change the name of respondent Limitless Mod Co. of Simi Valley, California to

Limitless MOD, LLC of Simi Valley, California. *See* Order No. 10 (Feb. 28, 2019), *not rev'd* by Comm'n Notice (Mar. 27, 2019).

Before the evidentiary hearing, JLI settled with the following eight respondents: J Well France S.A.S. of Paris, France; ECVD/MMS Wholesale LLC; MMS/ECVD LLC; The Electric Tobacconist, LLC of Boulder, Colorado; ALD Group Limited of Guangdong Province, China; Flair Vapor LLC of South Plainfield, New Jersey; Shenzhen Joecig Techonology Co., Ltd. of Guangdong Province, China; and Myle Vape Inc. of Jamaica, New York. *See* Order No. 31 (July 30, 2019), *not rev'd* by Comm'n Notice (Aug. 23, 2019); Order No. 16 (Mar. 21, 2019), *not rev'd* by Comm'n Notice (Apr. 4, 2019); Order No. 33 (July 30, 2019), *not rev'd* by Comm'n Notice (Aug. 23, 2019); Order No. 13 (Mar. 12, 2019), *not rev'd* by Comm'n Notice (Apr. 5, 2019); Order No. 34 (July 30, 2019), *not rev'd* by Comm'n Notice (Aug. 23, 2019); Order No. 32 (July 30, 2019), *not rev'd* by Comm'n Notice (Aug. 23, 2019).

In addition, the investigation terminated as to the following six respondents based on a consent order stipulation and the issuance of a consent order: Vapor Hub International, Inc. of Simi Valley, California; Limitless MOD, LLC; Asher Dynamics, Inc. of Chino, California; Ply Rock of Chino, California; Infinite-N Technology Limited of Guangdong Province, China; and King Distribution LLC of Elmwood Park, New Jersey. *See* Order No. 9 (Feb. 27, 2019), *not rev'd* by Comm'n Notice (Mar. 27, 2019); Order No. 11 (Feb. 28, 2019), *not rev'd* by Comm'n Notice (Mar. 26, 2019); Order No. 18 (Mar. 28, 2019), *not rev'd* by Comm'n Notice (Apr. 11, 2019); Order No. 20 (Apr. 2, 2019), *not rev'd* by Comm'n Notice (Apr. 15, 2019).

On April 23, 2019, the ALJ found respondent XFire in default pursuant to Commission Rule 210.16(b), 19 CFR 210.16(b). *See* Order No. 22 (Apr. 23, 2019), *not rev'd* by Comm'n Notice (May 16, 2019).

Also, prior to the evidentiary hearing, the ALJ granted JLI's motion for partial termination of the investigation with respect to allegations of infringement as to all asserted claims of the '139 patent and certain asserted claims of the other asserted patents. *See* Order No. 36 (Aug. 8, 2019), *not rev'd* by Comm'n Notice (Sep. 5, 2019). As a result, the following claims remain at issue in the investigation: claims 1, 2, and 13 of the '669 patent; claims 12, 17, and 20 of the '568 patent; claims 1, 2, and 4 of the '130 patent; and claims 1, 6, and 21 of the '915 patent (collectively, "the Asserted Claims").

JLI and the Commission were unable to serve respondent Keep Vapor Electronic Tech. Co., Ltd. of Shenzhen, China despite multiple attempts at service. The final ID states that JLI does not request any relief against this respondent. *See* ID at 2 n.1.

On May 21, 2019, the ALJ granted a motion to amend the complaint and notice of investigation to change the name of respondent Ziip Lab Co., Ltd. of Guangdong Province, China to SS Group Holdings of Guangdong Province, China. *See* Order No. 26 (May 21, 2019), *not rev'd* by Comm'n Notice (June 14, 2019).

Only five respondents participated in the evidentiary hearing: SS Group Holdings; ZLab S.A. of Punta del Este – Maldonado, Uruguay; Shenzhen Yibo Technology Co. Ltd. Of Guangdong Province, China (collectively, "the Ziip Respondents"); Vapor 4 Life Holdings, Inc. of Northbrook, Illinois ("V4L"); and Eonsmoke.

On August 5, 2019, one day before the prehearing conference, the ALJ issued an ID (Order No. 35), granting JLI's motion for summary determination of importation, infringement, and domestic industry. The ALJ found that JLI was entitled to summary determination of importation with respect to the Ziip Respondents and their accused products; Eonsmoke and its accused products; and V4L and certain V4L accused products. *See* Order

No. 35 at 4-11 (Aug. 5, 2019). Citing to a stipulation between JLI and the Ziip Respondents, the ALJ stated in his infringement analysis with respect to the Ziip Respondents' accused products that "the question of whether Ziip accused products contain or perform each limitation of asserted claims is moot." *Id.* at 11. The ALJ did not specifically state whether summary determination of infringement as to the Ziip Respondents was denied or granted nor the reasoning supporting grant or denial of the motion as to this issue. *Id.*

An evidentiary hearing was held from August 6-7, 2019.

On September 4, 2019 the Commission reviewed Order No. 35 in part. Specifically, the Commission reviewed the ALJ's analysis as to infringement and a statement regarding mootness on page 11 of the ID. The Commission remanded to the ALJ for clarification on this issue and as to whether the ID grants or denies summary determination that the Ziip Respondents infringe the Asserted Patents. *See* Comm'n Notice (Sep. 4, 2019).

In response to the Commission's September 4, 2019 Notice, the ALJ clarified that Order No. 35 denied summary determination of infringement as to the Ziip Respondents because that issue was moot in light of the stipulation between JLI and the Ziip Respondents. *See* Remand of Order No. 35 (Oct. 10, 2019).

On November 19, 2019, the ALJ granted motions to terminate the investigation as to the Ziip Respondents and V4L based on settlement agreements. *See* Order Nos. 38 and 39 (Nov. 19, 2019), *not rev'd* by Comm'n Notice (Dec. 16, 2019). Accordingly, only respondent Eonsmoke remains active in this investigation.

On December 12, 2019, the ALJ granted JLI's motion to strike portions of the Ziip Respondents' and Eonsmoke's posthearing briefs. *See* Order No. 40 (Dec. 12, 2019).

Specifically, these portions relate to the issue of invalidity of asserted claim 4 of the '915 patent, which was not addressed by Respondents' expert or in their prehearing briefings. *Id.* at 3-5.

On December 13, 2019, the ALJ issued a combined final ID and recommended determination ("RD"), finding a violation of section 337 by respondent Eonsmoke. Specifically, the final ID finds, *inter alia*, that JLI satisfied the importation requirement as to Eonsmoke's accused products; that JLI has shown Eonsmoke's accused products infringe the Asserted Claims; that JLI has satisfied the domestic industry requirement with respect to the Asserted Patents; and that the Asserted Claims have not been shown to be invalid. In addition, in the event the Commission finds a violation of section 337, the RD recommends that the Commission issue a limited exclusion order ("LEO") and cease and desist orders ("CDO") directed at Eonsmoke and defaulting respondent XFire, and impose a 100 percent bond during the period of Presidential review.

No petitions for review were filed, which means each party has abandoned all issues decided adversely to that party. *See* 19 CFR 210.43(b)(4).

Having reviewed the record of this investigation, including the final ID, the Commission has determined to *sua sponte* review the final ID in part. 19 CFR 210.44. Specifically, the Commission has determined to review and, on review, decline to adopt the discussion of the validity of element [c] of claim 12 of the '669 patent on pages 50 and 55 of the final ID. The Commission has also determined to review the discussion of Warranty and Customer Support and Regulatory Compliance on pages 265-266 of the final ID and the discussion of the quantitative significance of JLI's contract manufacturers' investments in the last paragraph on page 272 of the final ID. The Commission has determined not to review the remainder of the final ID, including the other portions of the ID's domestic industry analysis, which are sufficient

to support the ID's finding that JLI has satisfied the domestic industry requirement under subparagraphs 337(a)(3)(A) and (B) with respect to the Asserted Patents. Accordingly, the Commission finds a violation of section 337 by reason of Eonsmoke's importation of electronic nicotine delivery systems and components thereof that infringe one or more of claims 1, 2, and 13 of the '669 patent; claims 12, 17, and 20 of the '568 patent; claims 1, 2, and 4 of the '130 patent; and claims 1, 6, and 21 of the '915 patent. The Commission also finds that JLI is entitled to relief against defaulting respondent XFire pursuant to 19 U.S.C. 1337(g)(1).

The Commission has determined to extend the target date for completion of the investigation to Monday, April 20, 2020.

In connection with the final disposition of this investigation, the statute authorizes issuance of (1) an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) cease and desist order(s) that could result in the respondent(s) 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 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). In addition, if a party seeks issuance of any cease and desist orders, the written submissions should address that request in the context of recent Commission opinions, including those in *Certain Arrowheads with Deploying Blades and Components Thereof and Packaging Therefor*, Inv. No. 337-TA-977, Comm'n Op. (Apr. 28, 2017) and *Certain Electric Skin Care*

Devices, Brushes and Chargers Therefor, and Kits Containing the Same, Inv. No. 337-TA-959, Comm'n Op. (Feb. 13, 2017). Specifically, if Complainant seeks a cease and desist order against a respondent, the written submissions should respond to the following requests:

1. Please identify with citations to the record any information regarding commercially significant inventory in the United States as to each respondent against whom a cease and desist order is sought. If Complainant also relies on other significant domestic operations that could undercut the remedy provided by an exclusion order, please identify with citations to the record such information as to each respondent against whom a cease and desist order is sought.
2. In relation to the infringing products, please identify any information in the record, including allegations in the pleadings, that addresses the existence of any domestic inventory, any domestic operations, or any sales-related activity directed at the United States for each respondent against whom a cease and desist order is sought.
3. Please discuss any other basis upon which the Commission could enter a cease and desist order.

The statute requires the Commission to consider the effects of any remedy upon the public interest. The public interest 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, disapprove, or take no action on the Commission's determination. *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: 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 initial submissions should include views on the recommended determination by the ALJ on remedy and bonding.

Complainant and the Commission Investigative Attorney are also requested to identify the form of remedy sought and to submit proposed remedial orders for the Commission's consideration in their initial written submissions. Complainant is further requested to state the dates that the Asserted Patents expire, the HTSUS numbers under which the accused products are imported, and to supply the identification information for all known importers of the products at issue in this investigation. The written submissions and proposed remedial orders must be filed no later than close of business on **February 27, 2020**. Reply submissions must be filed no later than the close of business on **March 5, 2020**. 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 Commission Rule 210.4(f), 19 C.F.R. 210.4(f). Submissions should refer to the investigation number (Inv. No. 337-TA-1139) in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, https://www.usitc.gov/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. 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 contract personnel will sign appropriate nondisclosure agreements. 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.

Issued: February 13, 2020.

Lisa Barton,

Secretary to the Commission.

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