

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN VACUUM INSULATED
FLASKS AND COMPONENTS
THEREOF**

Investigation No. 337-TA-1216

COMMISSION OPINION

On October 21, 2021, the Commission determined to review in part and, on review, to affirm an initial determination (“ID”) issued on September 3, 2021, by the presiding administrative law judge (“ALJ”) granting summary determination of a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (“section 337”), with respect to U.S. Trademark Registration Nos. 4,055,784 (“the ’784 trademark”); 5,295,365 (“the ’365 trademark”); and 5,176,888 (“the ’888 trademark”) (collectively, “the Asserted Trademarks”) and U.S. Design Patent Nos. D806,468 (“the D’468 patent”); D786,012 (“the D’012 patent”); and D799,320 (“the D’320 patent”) (collectively, “the Asserted Patents”). 86 Fed. Reg. 59424-26 (Oct. 27, 2021). This opinion sets forth the Commission’s determination regarding remedy, the public interest, and bonding during the period of Presidential review.

I. BACKGROUND AND PROCEDURAL HISTORY

The Commission instituted this investigation on September 3, 2020, based on a complaint, as amended, filed by Hydro Flask Steel Technology, LLC d/b/a Hydro Flask and Helen of Troy Limited (collectively, “Hydro Flask,” or “Complainants”). 85 Fed. Reg. 55030-031 (Sept. 3, 2020). The complaint alleges a violation of section 337 in the importation into the United States,

PUBLIC VERSION

the sale for importation, and the sale within the United States after importation of certain vacuum insulated flasks and components thereof by reason of infringement of the Asserted Patents, the Asserted Trademarks, and U.S. Trademark Registration No. 4,806,282 (“the ‘282 trademark”).
Id.

The notice of investigation named twenty 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. *Id.* The Office of Unfair Import Investigations (“OUII”) was also named as a party to the investigation. *Id.*

On November 6, 2020, the CALJ granted Hydro Flask’s motion for leave to amend the Complaint to: (1) assert the D’012 patent against additional infringing products sold by respondent Everich and Tomic Houseware Co., Ltd.; (2) incorporate into the Complaint the information and additional paragraphs included in Hydro Flask’s 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

PUBLIC VERSION

Co., Ltd. Order No. 12 (Nov. 6, 2020), *unreviewed by Comm'n Notice (Nov. 24, 2020); see also* 85 Fed. Reg. 77239-40 (Dec. 1, 2020).

On January 11, 2021, the Commission terminated the '282 trademark from the investigation. *See Order No. 16 (Jan. 11, 2021), unreviewed by Comm'n Notice (Feb. 8, 2021).*

On March 22, 2021, the Commission found the thirteen Defaulting Respondents to be in default. *Order No. 21 (Mar. 22, 2021), unreviewed by Comm'n Notice (Apr. 14, 2021).*

The Commission terminated the investigation as to three respondents based on settlement agreements or consent orders during the course of this investigation. *See Order No. 13, Initial Determination Terminating Respondents Eddie Bauer, LLC and PSEB Holdings, LLC (Nov. 30, 2020), unreviewed by Comm'n Notice (Dec. 21, 2020); Order No. 17, Initial Determination Terminating Respondent Dunhuang Group a/k/a DHgate (Jan. 27, 2021), unreviewed by Comm'n Notice (Feb. 16, 2021); Order No. 19, Initial Determination Terminating Respondent Everich and Tomic Houseware Co., Ltd. (Feb. 22, 2021), unreviewed by Comm'n Notice (Mar. 12, 2021).*

On April 7, 2021, the CALJ issued an initial determination granting Hydro Flask's motion to terminate the investigation as to the remaining respondents, HydroFlaskPup, Yiwu Honglu Daily Necessities Co., Ltd., and Yiwu Houju E-commerce Firm, based on withdrawal of the amended Complaint. *Order No. 22 (Apr. 7, 2021), unreviewed by Comm'n 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 Rules 210.16(c)(2) and 210.18 (19 C.F.R. §§ 210.16(c)(2), 210.18) and a request for entry of a general exclusion order ("GEO") with respect

PUBLIC VERSION

to the Asserted Patents and the Asserted Trademarks.¹ On August 9, 2021, OUII filed a response in support of the motion.²

On September 3, 2021, the CALJ issued the ID granting in part Hydro Flask’s motion for summary determination of a Section 337 violation. Order No. 24 (Sept. 3, 2021). 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 Asserted Patents and the Asserted Trademarks as to a subset of the Defaulting Respondents, and that Hydro Flask has satisfied the domestic industry requirement for the Asserted Patents and the Asserted Trademarks. ID at 99. Specifically, the ID finds that a violation has been established with respect to ten out of the 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. *Id.* at 1, 99.

The ID finds that no violation has been established as to respondents Shenzhen

¹ See Complainants’ Motion for Summary Determination of Violation and for Recommended Determination on Remedy and Bonding (Apr. 8, 2021) (“Mot.”); see also Memorandum of Points and Authorities in Support of Complainants’ Motion for Summary Determination of Violation and for Recommended Determination on Remedy and Bonding (Apr. 8, 2021) (“Compl. Mem.”).

² See Corrected Version – Commission Investigative Staff’s Response to Complainants’ Motion for Summary Determination of Violation and for Recommended Determination on Remedy and Bonding (Aug. 9, 2021) (“OUIIResp”).

PUBLIC VERSION

Huichengyuan Technology Co., Ltd., Sinbada Impex Co., Ltd., and Zhejiang Yuchuan Industry & Trade Co., Ltd. *Id.* at 99. No petitions for review of the ID were filed.

The ID also contains the CALJ’s recommended determination on remedy and bonding (“RD”). The RD recommends issuance of a GEO with respect to the asserted patents and trademarks. RD at 96. The RD does not recommend issuance of the CDOs requested by Hydro Flask. *Id.* at 98.

On October 21, 2021, the Commission determined to review the final ID’s finding that Hydro Flask has satisfied the economic prong of the domestic industry requirement under Section 337(a)(3)(A), and on review, to affirm the ID’s finding of a violation of section 337 with respect to the ten Defaulting Respondents identified in the ID. *See* 86 Fed. Reg. 59424-26 (Oct. 27, 2021). On review, the Commission determined to affirm the ID’s findings that Hydro Flask had 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.” *Id.* at 59425. The Commission found that the ID correctly found that “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.” *Id.* (citing ID at 89-92). The Commission noted 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

PUBLIC VERSION

based on investments in sales, marketing, and/or distribution.” *Id.*³ The Commission also requested written submissions from the parties, interested government agencies, and interested persons on remedy, the public interest, and bonding. *See id.*

On November 4, 2021, Hydro Flask and OUII filed their opening written submissions on remedy, the public interest, and bonding.⁴ On November 12, 2021, OUII filed a reply remedy submission.⁵ No other submissions were received by the Commission.

II. COMMISSION DETERMINATIONS AS TO REMEDY, THE PUBLIC INTEREST, AND BONDING

Upon finding a violation of Section 337, and after considering the statutory public interest factors, the Commission has “broad discretion in selecting the form, scope, and extent of the remedy.” *Viscofan, S.A. v. U.S. Int’l Trade Comm’n*, 787 F.2d 544, 548 (Fed. Cir. 1986). Having found a violation of Section 337 in this investigation, the Commission provides its determinations as to the appropriate remedy to address the violation found, the public interest, and the amount of bond imposed on infringing imports during the period of Presidential review.

A. Remedy

1. General Exclusion Order

³ Chair Kearns clarifies, with respect to the economic prong analysis, that, in his view, it is generally not appropriate to credit investments that are those of a mere importer regardless of what other activities the firm in question engages in.

⁴ *See* Complainants’ Submission on Remedy, the Public Interest, and Bonding (Nov. 4, 2021) (“ComplRem”); Response of the Office of Unfair Import Investigations to the Commission’s Request for Written Submissions Regarding Remedy, the Public Interest, and Bonding (Nov. 4, 2021) (“OUIIRem”).

⁵ *See* Reply of the Office of Unfair Import Investigations on the Issues of Remedy, the Public Interest, and Bonding (Nov. 12, 2021) (“OUIIRem”).

PUBLIC VERSION

Section 337(d)(1) provides that if the Commission determines that there is a violation of section 337, “it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry” unless after consideration of certain public interest factors, it finds such articles should not be excluded. 19 U.S.C. § 1337(d)(1). Section 337(d)(2) provides that “[t]he authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that— (A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.” 19 U.S.C. § 1337(d)(2);⁶ *see also* 19 C.F.R. § 210.50(c).

a. The RD’s Recommendation

The RD recommends that the appropriate remedy is a GEO that encompasses infringing vacuum insulated flasks and components thereof. RD at 96.

1) Circumvention of a Limited Exclusion Order

The RD finds that the evidence shows a GEO is necessary to prevent circumvention of a limited exclusion order (“LEO”). *Id.* at 94. The RD finds that Hydro Flask identified “tens of thousands” of sales on the Internet, including through online marketplaces such as Bonanza.com, Alibaba.com, and AliExpress.com. *Id.* (citing Am. Compl. at ¶¶ 134-68, 174-75, 202, 204; Compl. Exs. 1.3-1.7). The RD finds that many of these storefronts are anonymous and provide no identifying information about the sellers or buyers of the allegedly infringing or

⁶ A GEO issued under section 337(g)(2) is not appropriate as there were participating respondents that were later terminated from the investigation. *See* 19 U.S.C. § 1337(g)(2) (providing for issuance of a GEO where “no person appears to contest an investigation ”).

PUBLIC VERSION

counterfeit products. *Id.* (citing Am. Compl. at ¶¶ 175-175; SOMF at ¶¶ 95- 97; Mot. Exs. B-E; Compl. Ex. 3.35). The RD notes that, under Commission precedent, “a large number of anonymous infringing sales on the Internet [] supports a likelihood of circumvention under subparagraph (A) and also supports a determination that it is difficult to identify the source of infringing products under subparagraph (B).” *Id.* (citing *Certain Loom Kits for Creating Linked Articles (“Loom Kits”)*, Inv. No. 337-TA-923, Comm’n Op. at 13 (June 26, 2015)).

The RD finds that the evidence also shows that the Defaulting Respondents can easily circumvent an LEO by engaging in deceptive business practices, such as changing their storefront names, providing a false address, or masking their identity. *Id.* at 94-95 (citing SOMF at ¶ 100; EDIS Doc. No. 737556 (detailing how many of the defaulting and withdrawn respondents engage in deceitful business practices, which makes enforcement of an LEO nearly impossible); *Certain Cases for Portable Electronic Devices*, Inv. No. 337-TA-867/861, Comm’n Op. at 9 (July 10, 2014) (“[T]he respondents can easily circumvent an LEO by selling infringing goods online . . . and foreign manufacturing operations can change their names and distribution patterns to avoid detection.”)). The RD further finds that the barrier for entering the market is low due to the rampant manufacturing of these goods in China. *Id.* at 95 (citing Geyer Ex. 29).

2) Widespread Pattern of Unauthorized Use

The RD finds that there is a widespread pattern of violation of section 337. *Id.* The RD finds that Hydro Flask has identified many instances of unlawful conduct on online marketplaces where manufacturers and sellers often maintain multiple storefronts on the same platform, and use identical product listings to conceal the source of the goods. *Id.* (citing

PUBLIC VERSION

Kemnitzer Decl. at ¶ 81-104; Am. Compl. at ¶ 213; SOMF at ¶¶ 104-105). The RD finds that identifying the seller and importer of the accused products has proven to be difficult; for example, physical samples of the accused products were purchased from the Defaulting Respondents from websites like Alibaba.com, but the accused products were often sent from a third party in plain packaging, labeled as “cups.” *Id.* (citing SOMF at ¶ 99; Compl. Exs. 3.34-3.38). The RD notes that notices from the U.S. Customs and Border Protection (“CBP”) further illustrate the difficulties in trying to identify the source of the infringing and counterfeit Hydro Flask goods as these notices often identify only the name of the importer, not the name or address of the manufacturer. *Id.* at 95-96 (citing Am. Compl. at ¶ 202; Compl. Ex. 12.1; Judge Exs. 13-17; SOMF at ¶ 110).⁷

The RD finds that despite Hydro Flask’s extensive enforcement activities, infringement continues. *Id.* at 96. The RD notes that [[
]] *Id.*
(citing Judge Decl. at ¶ 23). The RD further finds that [[

⁷ For example, Hydro Flask received fourteen CBP detention notices for importations in a four-month period from September 25, 2019 to January 22, 2020 totaling more than 800 products seized. Compl. at ¶ 202 (citing Compl. Ex. 12.1 (CBP Detention Notices to Hydro Flask)). While each of these notices contained the name of the exporter, the name and address of the manufacturer was unknown. Without such identifying information of the manufacturer, there is a clear risk of circumvention for the LEO because the manufacturer can change carriers or use intermediaries to continue to mask their identities. *Id.* (citing *Certain Water Filters & Components Thereof*, Inv. No. 337-TA-1126, Recommended Determination, 2019 WL 4072337, at *41 (July 11, 2019) (“The evidence showing . . . generic, unmarked product shipments illustrates a clear risk of circumvention of any [limited exclusion order] in the absence of a GEO.”)).

]] *Id.* (citing Judge Decl. at ¶¶ 24; 16-21; Judge Ex. 15).

The RD recommends that, for the above reasons, the appropriate remedy is a GEO that encompasses the infringing vacuum insulated flasks and components thereof. *Id.*

b. Determination

In affirming the ID’s finding of violation, the Commission has found that Complainants have established a violation of section 337 based on substantial, reliable, and probative evidence and therefore that the articles at issue shall be excluded from entry. For the reasons that follow, we determine to issue a GEO pursuant to Section 337(d)(2), consistent with the recommendations of the RD.

1) Circumvention of a Limited Exclusion Order

The record supports the RD’s finding that a GEO is necessary to prevent circumvention of an LEO. RD at 93-95. The record shows that “Hydro Flask identified ‘tens of thousands’ of sales on the Internet, including through online marketplaces such as Bonanza.com, Alibaba.com, and AliExpress.com.” RD at 94; OUIIRem at 7. Many of these storefronts are anonymous and provide no identifying information about the sellers or buyers of the allegedly infringing or counterfeit products. *See* RD at 94; OUIIRem at 7. Furthermore, “[t]he evidence also shows that the Defaulting Respondents can easily circumvent an LEO by engaging in deceptive business practices, such as changing their storefront name, providing a false address, or masking their identity.” RD at 94; OUIIRem at 7.

Commission precedent provides that “a large number of anonymous infringing sales on the Internet . . . supports a likelihood of circumvention under subparagraph (A).” *Loom Kits*, Comm’n Op. at 13. Also, circumvention of an LEO is likely where “the respondents can easily

circumvent an LEO by selling infringing goods online” and “foreign manufacturing operations can change their names and distribution patterns to avoid detection.” *Certain Cases for Portable Electronic Devices*, Inv. No. 337-TA-867/861, USITC Pub. 4857, Comm’n Op. at 9 (Nov. 2018). “The Commission has previously found the practices of ‘facilitating circumvention through Internet operations; masking of identities and product sources; and use of unmarked, generic, and/or reseller-branded packaging’ would all indicate a likelihood of circumvention.” *Certain Water Filters & Components Thereof*, Inv. No. 337-TA-1126, Comm’n Op. at 7-8 (Nov. 15, 2019) (quoting *Toner Cartridges and Components Thereof*, Inv. No. 337-TA-918, Comm’n Op. at 6 (Oct. 1, 2015)). Likewise, “the small size and portability of the products covered by the asserted patent makes circumvention of specific types of enforcement, such as a limited exclusion order, easy and inexpensive.” *Certain Foldable Reusable Drinking Straws and Components and Accessories Thereof*, Inv. No. 337-TA-1183, Comm’n Op. at 9 (Feb. 10, 2021). Commission precedent therefore supports the RD’s finding that a GEO is necessary on this record due to potential circumvention of an LEO.

2) Widespread Pattern of Unauthorized Use

The record shows that there has been widespread violation of the asserted IP and that it is difficult to identify the source of the infringing products. RD at 95. Specifically, Hydro Flask identified “‘tens of thousands’ of sales on the Internet, including through online marketplaces.” *Id.* at 94; OUIIRem at 8. As OUII notes, the Commission has found that the importation of infringing products and/or sale of infringing products within the United States after importation by defaulting respondents may be sufficient to demonstrate a pattern of violation. OUIIRem at 8; RD at 21-28, 33-77; *see Loom Kits*, Comm’n Op. at 13-14 (“We previously determined that at

least ten different respondents imported infringing products from China into the United States or sold such products inside the United States in violation of section 337..... The record therefore shows a pattern of violation of section 337.”); *Certain Shaker Screens for Drilling Fluids, Components Thereof, and Related Marketing Materials*, Inv. No. 337-TA-1184, Comm’n Op. at 5 (March 31,2021) (“*Shaker Screens*”) (“[T]here was a widespread pattern of violation based on infringement of the ’649 and ’735 patents by the Defaulting Respondents and the four other respondents previously terminated by consent order”). In addition, the record indicates that there are numerous other “clear counterfeit Hydro Flask goods” and there are “hundreds of storefronts selling for importation and/or importing counterfeit Hydro Flask goods.” Compl. Mem. at 47 (citing Kemnitzer Decl. ¶¶ 81-104 (performing a patent infringement analysis on various non-party products)); *see Shaker Screens*, Comm’n Op. at 5-6 (finding a GEO also warranted where “the evidence shows that thirteen nonparties are selling in the United States shaker screens that appear to infringe the ’649 and/or the ’735 patents”); OUIIRem at 9. Thus, the record of a widespread pattern of unauthorized use and Commission precedent on this issue support issuance of a GEO in this case.

3) Difficulty in Identifying Source of Infringing Products

The record also shows that it is difficult to identify the source of the infringing products. *See* RD at 95. The RD finds that “identifying the seller and importer of the [a]ccused [p]roducts has proven to be difficult. For example, physical samples of the [a]ccused [p]roducts were purchased from the Defaulting Respondents from websites like Alibaba.com; however, the [a]ccused [p]roducts were often sent from a third party (not the Defaulting Respondent from which the product was purchased), in plain packaging, and labeled as ‘cups.’” RD at 95.

“Manufacturers and sellers often maintain multiple storefronts on the same platform and use identical product listings – all to conceal the source of the goods.” *Id.*; OUIIRem at 8. Further, as the RD notes, “[n]otices from the U.S. Customs and Border Protection . . . further illustrate the difficulties in trying to identify the source of the infringing and counterfeit Hydro Flask goods. The CBP notices often only identify the name of the importer, not the name or address of the manufacturer.” RD at 95-96; OUIIRem at 9.

Commission precedent explains that use of generic packaging, intermediary importers, the ease of selling products under various brand names, and similar efforts to impede the identification of the source of goods support the need for a GEO. *See, e.g., Shaker Screens*, Comm’n Op. at 6 (finding a GEO appropriate when “the use of generic packaging and intermediary importers made it difficult to identify the source of the infringing products”); *Certain High-Density Fiber Optic Equipment and Components Thereof*, Inv. No. 337-TA-1194, Comm’n Op. at 75-76 (Aug. 23, 2021) (finding difficulty identifying source when products are sold without branding, products can be easily be produced and sold under any brand, and there are many rapidly appearing and disappearing manufacturers that sell similar products); OUIIRem at 10. Therefore, based on the record and relevant Commission precedent, we find that a GEO is necessary in this investigation to provide Hydro Flask with an effective remedy in the face of difficulties of identifying the source of infringing products.

2. Cease and Desist Orders

Section 337(f)(1) provides that in addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue a cease and desist order (“CDO”) as a remedy for violation of section 337. *See* 19 U.S.C. § 1337(f)(1). CDOs are generally issued when, with respect to the

imported infringing products, respondents maintain commercially significant inventories in the United States or have significant domestic operations that could undercut the remedy provided by an exclusion order.⁸ *See, e.g., Certain Table Saws Incorporating Active Injury Mitigation Technology & Components Thereof* (“Table Saws”), Inv. No. 337-TA-965, Comm’n Op. at 4-6 (Feb. 1, 2017); *Certain Protective Cases & Components Thereof*, Inv. No. 337-TA-780, USITC Pub. No. 4405, Comm’n Op. at 28 (Nov. 19, 2012) (citing *Certain Laser Bar Code Scanners & Scan Engines, Components Thereof & Prods. Containing Same*, Inv. No. 337-TA-551, Comm’n Op. at 22 (June 24, 2007)). Complainants bear the burden on this issue. “A complainant seeking a cease and desist order must demonstrate, based on the record, that this remedy is necessary to address the violation found in the investigation so as to not undercut the relief provided by the exclusion order.” *Table Saws*, Comm’n Op. at 5 (citing *Certain Integrated Repeaters, Switches, Transceivers, & Prods. Containing Same*, Inv. No. 337-TA-435, USITC Pub. No. 3547 (Oct. 2002), Comm’n Op. at 27 (Aug. 16, 2002); *see also* H.R. REP. No. 100-40, at 160 (1987)).

a. The RD’s Recommendation

The RD notes that before the ALJ, Hydro Flask requested the issuance of CDOs against each of the Defaulting Respondents. RD at 97 (citing Mem. at 49-50). The RD considers Hydro Flask’s assertion that Hydro Flask was unable to obtain discovery about the Defaulting Respondents’ U.S. inventory due to their lack of participation and that “great harm . . . would

⁸ When the presence of infringing domestic inventory or domestic operations is asserted as the basis for a CDO under section 337(f)(1), Commissioner Schmidlein does not adopt the view that the inventory or domestic operations needs to be “commercially significant” in order to issue the CDO. *See, e.g., Certain Magnetic Tape Cartridges and Components Thereof*, Inv. No. 337-TA-1058, Comm’n Op. at 65, n.24 (Apr. 9, 2019); *Table Saws*, Comm’n Op. at 6-7, n.2 (Feb. 1, 2017). In Commissioner Schmidlein’s view, the presence of some infringing domestic inventory or domestic operations, regardless of its commercial significance, provides a basis to issue a CDO. *Id.*

befall” Hydro Flask absent such an order. *Id.* OUII does not support Hydro Flask’s request. *Id.* (citations omitted).

The RD finds that in the present investigation, none of the Defaulting Respondents are located in the United States, and that there is no evidence in the record to suggest that the Defaulting Respondents have domestic operations or commercially significant inventory in the United States. *Id.* at 97-98. The RD finds that, for these reasons, CDOs are not warranted. *Id.* at 98.

b. Determination

The CALJ found no evidence that the Defaulting Respondents have domestic operations or commercially significant inventories, and for that reason he found that no CDOs are warranted and recommended that the Commission decline to issue any CDOs. RD at 97-98; *see also* OUIIRem at 11; OUIIRem at 2. Hydro Flask does not renew its request for CDOs in its remedy submission to the Commission, nor does it address the CALJ’s recommendation against issuing CDOs. Accordingly, based on the record before the Commission, we decline to issue any CDOs in this investigation.⁹

⁹ Commissioner Schmidlein and Commissioner Karpel concur with the determination not to issue any CDOs in this investigation. In prior investigations, Commissioner Schmidlein and Commissioner Karpel have explained their view that section 337(g)(1) governs a determination concerning CDO issuance with respect to defaulting respondents when the conditions of subsections 337(g)(1)(A) through (E) are satisfied. *See, e.g., Certain Foldable Reusable Drinking Straws and Components and Accessories Thereof*, Inv. No. 337-TA-1183, Comm’n Op. at 11 n.6 (Feb. 10, 2021); *Certain Rolled-Edge Rigid Plastic Food Trays*, Inv. No. 337-TA-1203, Notice of Comm’n Determ. To Issue a Limited Exclusion Order Against Defaulting Respondent, 86 Fed. Reg. 12495, 12495-96 (Mar. 3, 2021). Here, however, the record indicates Hydro Flask did not renew its request for CDOs in its remedy submission before the Commission, and thus the requirement of Section 337(g)(1)(E) is not met. For this reason, Commissioner Schmidlein and Commissioner Karpel agree that section 337(f)(1) governs the determination rather than Section 337(g)(1). Because, *inter alia*, CDOs are not a requested remedy, Commissioner Schmidlein and

B. The Public Interest

Section 337 requires the Commission, upon finding a violation of section 337, to issue an exclusion order “unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.” 19 U.S.C. § 1337(d)(1).

Under appropriate facts and circumstances, the Commission may determine that no remedy should issue because of the adverse impacts on the public interest. *See, e.g., Certain Fluidized Supporting Apparatus & Components Thereof*, Inv. Nos. 337-TA-182/188, USITC Pub. 1667, Comm'n Op. at 1-2, 23-25 (Oct. 1984) (finding that the public interest warranted denying complainant's requested relief). Moreover, when the circumstances of a particular investigation require, the Commission has tailored its relief in light of the statutory public interest factors. *See, e.g., Certain Microfluidic Devices*, Inv. No. 337-TA-1068, Comm'n Op. at 1, 22-48, 53-54 (Jan. 10, 2020); *Certain Road Milling Machines & Components Thereof*, Inv. No. 337-TA-1067, Comm'n Op. at 32-33 (July 18, 2019).

The statute requires the Commission to consider and make findings on the public interest in every case in which a violation is found regardless of the quality or quantity of public interest information supplied by the parties. 19 U.S.C. § 1337(d)(1). Thus, the Commission publishes a notice inviting the parties as well as interested members of the public and interested government agencies to gather and present evidence on the public interest at

Commissioner Karpel concur with not issuing CDOs against defaulting respondents in this case.

PUBLIC VERSION

multiple junctures in the proceeding. 19 U.S.C. § 1337(d)(l).¹⁰

The record shows that none of the four public interest factors indicate the proposed remedy would be against the public interest or require any tailoring of the remedy. With respect to the first factor, there is no evidence on the record, and no party has argued, that an exclusion order on infringing insulated vacuum flasks would raise public health and welfare concerns. ComplRem at 13; OUIIRem at 12.

With respect to the second factor, the record shows that competitive conditions in the United States economy are not contrary to the entry of relief. *See* OUIIRem at 12; ComplRem at 13. As OUII correctly points out, “[t]he intellectual property rights at issue are trademarks and design patents, and there is no bar to any competing manufacturer selling products under a different name or using a different cap design.” OUIIRem at 12. The record also shows that there are many competing products currently available – for example, a search for “vacuum flask” on amazon.com returns over 5000 results. *Id.* (citing www.amazon.com/s?k=vacuum+flask&ref=nb_sb_noss_1 (last accessed on October 28, 2021)).

Likewise, with respect to the third factor, the record lacks evidence indicating that the GEO would adversely affect the production of like or directly competitive articles in the United States. As the ID notes, Hydro Flask performs some assembly and packaging as well as customization of products in the United States. ID at 89-90. The remedial order in this investigation will not adversely affect these operations, and could cause Hydro Flask’s packaging, assembly, and customization operations to increase as the order prohibits entry of trademarked

¹⁰ The Commission did not request in the notice of institution that the CALJ take evidence or make findings concerning the public interest.

PUBLIC VERSION

infringing goods. *See Certain Ink Cartridges and Components Thereof*, Inv. No. 337-TA-946, Comm'n Op. at 16 (Jun. 29, 2016) (issuing an exclusion order when “there is no evidence that the [remedial] orders would adversely affect production of ink cartridges in the United States and, in all likelihood, the orders will cause Epson’s domestic production (and therefore, overall domestic production) to increase”). In addition, apart from Hydro Flask’s domestic assembly and packaging, the record does not show domestic production of any vacuum insulated flasks that are like or directly competitive with the flasks that are subject to the GEO and thus that any domestic production of such articles would be adversely affected by the order that includes vacuum insulated flasks and components thereof. In sum, there is no indication that the exclusion of infringing vacuum insulated flasks and components thereof would adversely affect the production of like or directly competitive articles in the United States.

With respect to the fourth factor, the record indicates that consumers have many different options for vacuum flasks and that they will benefit from reduced confusion in the marketplace. OUIIRem at 12-13 (citing RD at 21-28 (finding that Respondents’ use of similar trademarks is likely to cause consumer confusion)); ComplRem at 15. The record also shows that Hydro Flask designs and sells a significant volume of its domestic industry products and can continue to supply the marketplace, and that other sellers would also be able to supply any gap in domestic demand for vacuum insulated flasks and components thereof resulting from unavailability of the infringing products. ComplRem at 14; OUIIRem at 3; *see Certain Toner Cartridges and Components Thereof*, Inv. No. 337-TA-918, Comm'n Op. at 14-15 (Aug. 31, 2015). Thus, the record shows that Hydro Flask and third-party suppliers could replace the products subject to exclusion, and that there is no indication that excluding the

PUBLIC VERSION

infringing products will result in unmet consumer demand. ComplRem at 13-14.

Based on the foregoing, we find that the public interest factors do not weigh against entry of the GEO in this investigation.

C. Bond During Period of Presidential Review

If the Commission enters an exclusion order, a respondent may continue to import and sell its products during the 60-day period of Presidential review under a bond in an amount determined by the Commission to be “sufficient to protect the complainant from any injury.” 19 U.S.C. § 1337(j)(3); *see also* 19 C.F.R. § 210.50(a)(3). When reliable price information is available in the record, the Commission has often set the bond in an amount that would eliminate the price differential between the domestic product and the imported, infringing product. *See Certain Microsphere Adhesives, Processes for Making Same, & Prods. Containing Same, Including Self-stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. No. 2949, Comm’n Op. at 24 (Jan. 16, 1996). The Commission also has used a reasonable royalty rate to set the bond amount where a reasonable royalty rate could be ascertained from the evidence in the record. *See, e.g., Certain Audio Digital-to-Analog Converters & Prods. Containing Same*, Inv. No. 337-TA-499, Comm’n Op. at 25 (Mar. 3, 2005). Where the record establishes that the calculation of a price differential is impractical, or there is insufficient evidence in the record to determine a reasonable royalty, the Commission has imposed a 100 percent bond. *See, e.g., Certain Liquid Crystal Display Modules, Prods. Containing Same, & Methods Using the Same*, Inv. No. 337-TA-634, Comm’n Op. at 6-7 (Nov. 24, 2009). The complainant, however, bears the burden of establishing the need for a bond. *Certain Rubber Antidegradants, Components Thereof & Prods. Containing Same*, Inv. No. 337-TA-533, USITC Pub. No. 3975, Comm’n Op. at 40 (July 21,

2006).

1. The RD's Recommendation

The RD considers Hydro Flask's request that the bond be set at 100 percent during the Presidential review period "because the Defaulting Respondents failed to participate in this Investigation and prevented Hydro Flask from obtaining any discovery into pricing of the infringing goods." RD at 98-99 (citing Mem. at 50). The RD also considers OUII's similar position. *Id.* at 99 (citing Staff Resp. at 50-51). The RD notes that, in OUII's view, "the evidentiary record lacks sufficiently reliable information as to price levels for the Accused Products in the United States." *Id.* (citing Staff Resp. at 50).

The RD finds that none of the Defaulting Respondents have participated in this investigation or produced any discovery and, as a result, Hydro Flask was unable to obtain information on which to base a reasonable bond rate. RD at 99. The RD further finds that with little to no information on pricing or royalty information, it is impossible to calculate a bond rate based on the average price differential between Hydro Flask's products and the accused products. *Id.* Accordingly, the RD agrees with Hydro Flask and OUII that the Commission set the bond at 100 percent of the entered value of the accused products. *Id.* (citing *Certain Digital Photo Frames & Image Display Devices & Components Thereof* ("Digital Photo Frames"), Inv. No. 337-TA-807, Comm'n Op. at 17 (Mar. 27, 2013)).

2. Determination

In this investigation, the evidentiary record lacks sufficiently reliable information as to prices for the infringing products in the United States. RD at 99 ("With little to no information on pricing or royalty information, it is impossible to calculate a bond rate based on the average price

differential between Hydro Flask’s products and the Accused Products.”). Given that none of the Defaulting Respondents participated in the investigation or produced any discovery, the record supports setting the bond at 100 percent of the entered value of the infringing imported product. *See, e.g., Digital Photo Frames, Comm’n Op. at 17* (“The Commission finds that there is little or no evidence in the record of this investigation as to pricing of the defaulting respondents’ productsThe Commission has traditionally set a bond of 100 percent of the entered value of the products under these circumstances.”). Accordingly, consistent with the RD’s recommendation, we determine to impose a bond in the amount of 100 percent of the entered value of the products covered by the GEO during the Presidential review period.

III. CONCLUSION

The Commission determines that the appropriate remedy is a GEO prohibiting the unlicensed entry of certain vacuum insulated flasks and components thereof that infringe the sole claims of one or more of the D’468 patent, the D’012 patent, and the D’320 patent, and/or one or more of the ’784 trademark, the ’365 trademark, and the ’888 trademark. We find that consideration of the public interest factors does not warrant denying remedial relief. We also set the bond on articles entering the United States during the period of Presidential review in the amount of one hundred (100) percent of the entered value of the products covered by the GEO.

PUBLIC VERSION

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

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