

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

CERTAIN POOL AND SPA ENCLOSURES

Inv. No. 337-TA-1069

**ORDER NO. 9: INITIAL DETERMINATION GRANTING JOINT MOTION BY COMPLAINANT AQUA SHIELD, INC. AND RESPONDENTS INTER POOL COVER TEAM, ALUKOV HZ SPOL. S.R.O., ALUKOV, SPOL. S.R.O., POOL & SPA ENCLOSURES, LLC, AND POOLANDSPA.COM FOR TERMINATION OF THE INVESTIGATION BASED ON A SETTLEMENT AGREEMENT**

(January 23, 2018)

On January 5, 2018, Complainant Aqua Shield, Inc. (“Complainant”) and Respondents Inter Pool Cover Team, Alukov HZ Spol. S.R.O., Alukov, Spol. S.R.O., Pool & Spa Enclosures, LLC, and Poolandspa.com (collectively, “Respondents”) filed a joint motion (1069-005) to terminate the Investigation as to all Respondents based on a settlement agreement. They also requested that the undersigned stay all discovery obligations, events, and procedural schedule deadlines, pending final resolution of this motion. On January 16, 2018, the Commission Investigative Staff (“Staff”) filed a response in support of the joint motion.

The Commission’s Rules provide that “[a]ny party may move at any time for an order to terminate an investigation in whole or in part as to any or all respondents on the basis of settlement, a licensing or other agreement . . . .” 19 C.F.R. § 210.21(a)(2); *see also Certain Organizer Racks and Prods. Containing Same*, Inv. No. 337-TA-466, Order No. 7 at 2 (Feb. 19, 2001). In the instant proceeding, the motion to terminate is based upon a Settlement and Royalty Agreement, which appears to resolve the dispute between Complainant and Respondents.<sup>1</sup> A

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<sup>1</sup> Respondent PoolandSpa.com is not a party to the Settlement and Royalty Agreement. Nevertheless, Respondent

copy of said agreement is attached hereto as Exhibit 2. Consistent with 19 C.F.R. § 210.21(b)(1), Complainant and Respondents confirm that “[t]here are no other agreements, written or oral, express or implied, regarding the subject matter of this Investigation.” (Mot. at 3.)

In any initial determination terminating an investigation by settlement agreement or consent order, the administrative law judge is directed to consider and make appropriate findings regarding the effect of the proposed settlement on the public health and welfare, competitive conditions in the United States economy, production of like or directly competitive articles in the United States, and United States consumers. 19 C.F.R. § 210.50(b)(2). Complainant and Respondents assert that it is in the interest of the public and administrative economy to grant this motion because “Commission policy and the public interest generally favor settlements.” (Mot. at 3.) Staff takes the position that “terminating this investigation based on the settlement agreement would not be contrary to the public interest.” (Staff Resp. at 4.) The undersigned agrees that termination of this Investigation does not impose any undue burdens on the public health and welfare, competitive conditions in the United States economy, production of like or directly competitive articles in the United States, or United States consumers.

Accordingly, it is the undersigned’s Initial Determination that the joint motion (1069-005) to terminate this Investigation based on a settlement agreement be granted. The undersigned further finds that Complainant and Respondents’ request for a stay should be granted and the Investigation is hereby stayed pending final resolution of the motion. This Initial Determination, along with supporting documentation, is hereby certified to the Commission.


Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the

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PoolandSpa.com is included in the joint motion to terminate, and Complainant and Respondents have represented that the Settlement and Royalty Agreement “completely resolves all disputes in this Investigation.” (Mot. at 3.) In addition, Aqua Shield jointly moved with PoolandSpa.com to terminate this Investigation. The undersigned therefore finds it appropriate to terminate the Investigation with respect to PoolandSpa.com, along with the other Respondents, on the basis of the parties’ representation.

determination of the Commission unless a party files a petition for review of the Initial Determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders, on its own motion, a review of the Initial Determination or certain issues herein.

**SO ORDERED.**

  
\_\_\_\_\_  
Charles E. Bullock  
Chief Administrative Law Judge

**PUBLIC**  
**EXHIBIT 2**

[REDACTED]

[REDACTED]

**SETTLEMENT AND ROYALTY AGREEMENT**

This Confidential Settlement and Royalty Agreement (“Agreement”) is made as of December 13, 2017 (“Effective Date”) by and between Aqua Shield, Inc. (“Aqua Shield”), a corporation organized under the laws of the State of New York, having a principal place of business located at 114 Bell Street, West Babylon, New York 11704, and Alukov HZ spol. S.r.o., now called Alukov a.s., a European business entity located in the Czech Republic, at Orel 18, 518 21 Slatinany, Czech Republic, Alukov, spol. S.r.o., a European business entity located in the Slovak Republic, at Skultetyho 1597, 95501 Topolcany, Slovakia, Inter Pool Cover Team, now called IPC Team, EEIG, a European Economic Interest Grouping formed under the laws of the European Union with its headquarters located at Alukov HZ, Orel 18, 518 21 Slatinany, Czech Republic, and Pool & Spa Enclosures, LLC, a limited liability company organized under the laws of the State of New Jersey, having a principal place of business located at 10 Centre Drive, Monroe Township, New Jersey, 08831 (collectively referred to herein as “the Alukov Companies”). Aqua Shield and the Alukov Companies are each referred to herein as a “Party” and collectively as the “Parties”.

**RECITALS**

**WHEREAS**, the Parties have been involved in litigation concerning, among other things, the infringement by the Alukov Companies of United States Patent No. 6,637,160 (“the ‘160 Patent”) pursuant to 35 U.S.C. §271(a) and other ancillary causes of action in an action entitled *Aqua Shield, Inc. v. Inter Pool Cover Team*, Civil Action No.: 09-cv-13-TS, in the United States District Court for the District of Utah, Central Division (the “Utah Action”); and

**WHEREAS**, Aqua Shield was the prevailing party in the Utah Action, which judgment was entered in the United States District Court for the District of Utah, Central Division in favor

of Aqua Shield and jointly and severally against the Alukov Companies in the amount of \$216,000 and costs in the amount of \$1,917.17 and the entry of a permanent injunction; and

**WHEREAS**, on or around August 25, 2017, Aqua Shield filed an action against the Alukov Companies entitled *Aqua Shield, Inc. v. Inter Pool Cover Team, Alukov HZ spol. S.r.o., Alukov, spol. S.r.o., and Pool & Spa Enclosures, LLC* in the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. MID-L-005091-17 (the "New Jersey Action") seeking to docket the judgment in the Utah Action as a statewide lien in the State of New Jersey; and

**WHEREAS**, Aqua Shield filed a Verified Complaint seeking the institution of an investigation pursuant to Section 337 of the Tariff Act of 1930, as amended, against the Alukov Companies before the United States International Trade Commission entitled *In the Matter of Certain Pool and Spa Enclosures No. 337-TA-1069*, Docket No. 3223 (the "ITC Action"); and

**WHEREAS**, Pool & Spa Enclosures, LLC filed an action against Aqua Shield entitled *Pool & Spa Enclosures, LLC v. Aqua Shield, Inc.* in the United States District Court for the Northern District of New York, Civil Action No. 17-cv-01013-TJM-TWD pursuant to Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a)(1)(b) and 15 U.S.C. §1125(a) (the "Lanham Act Action"); and

**WHEREAS**, Aqua Shield and the Alukov Companies wishing to avoid the expense of further litigation, have agreed to settle the Utah Action, the New Jersey Action, the ITC Action and the Lanham Act Action pursuant to the terms set forth below without any Party making any admission of any liability.

**NOW, THEREFORE**, in consideration of the foregoing promises, covenants and agreements contained herein, the Parties agree to be bound as follows:

**1. DEFINITIONS**

For purposes of this Agreement, the following defined terms shall have the meanings set forth below:

**1.1** "Aqua Shield" means Aqua Shield, Inc., a corporation organized under the laws of the State of New York, and its successors and assigns, their respective predecessors, past, current and future affiliates, divisions, subsidiaries, board members, directors, officers, principals, agents, servants, representatives, employees, administrators, executors, conservators, heirs, beneficiaries, trustees and any other legal representative thereof.

**1.2** "Alukov Companies" means Alukov HZ spol. S.r.o., and Alukov a.s., a European business entity located in the Czech Republic, at Orel 18, 518 21 Slatinany, Czech Republic, Alukov, spol. S.r.o., a European business entity located in the Slovak Republic, at Skultetyho 1597, 95501 Topolcany, Slovakia, Inter Pool Cover Team, IPC Team, EEIG, a European Economic Interest Grouping formed under the laws of the European Union with its headquarters located at Alukov HZ, Orel 18, 518 21 Slatinany, Czech Republic, and Pool & Spa Enclosures, LLC, a limited liability company organized under the laws of the State of New Jersey, and its past, present and future parents, distributors, affiliates, divisions, subsidiaries, predecessors, successors, , and any and all directors, officers, principals, owners, shareholders, agents, servants, employees, attorneys, trustees, executors, administrators, conservators, heirs, beneficiaries, and any other legal representatives thereof.

**1.3** "Person" or "Persons" shall mean any individual, corporation, partnership, unincorporated association, organization, Governmental Agency, sole proprietorship, trust or any other entity (or estate, guardian or beneficiary thereof) recognized in law or in fact to have rights or obligations.

1.4 “Governmental Agency” means (i) the government of the United States of America, and any state, commonwealth, territory or possession of the United States of America, including the District of Columbia and Puerto Rico, and the government of any county, province, city or municipality thereof; (ii) any subdivision, instrumentality, department or agency of any of the foregoing; (iii) the government of any foreign country, state or territory and any province, county, city or municipality thereof; and (iv) any subdivision, instrumentality, department or agency of any such foreign country, state, territory or any province, county, city or municipality thereof.

1.5 “‘160 Patent” means Aqua Shield’s United States Patent No. 6,637,160 valid July 10, 2001 to July 10, 2021. ‘160 Patent shall also include re-issues and extensions of the ‘160 Patent as they arise.

1.6 “The Utah Action” means the action entitled *Aqua Shield, Inc. v. Inter Pool Cover Team*, Civil Action No.: 09-cv-13-TS, in the United States District Court for the District of Utah, Central Division.

1.7 “The New Jersey Action” means the action entitled *Aqua Shield, Inc. v. Inter Pool Cover Team, Alukov HZ spol. S.r.o., Alukov, spol. S.r.o., and Pool & Spa Enclosures, LLC* in the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. MID-L-005091-17.

1.8 “The ITC Action” means the action instituted by Aqua Shield against the Alukov Companies and pending before the United States International Trade Commission entitled *In the Matter of Certain Pool and Spa Enclosures No. 337-TA-1069*, Docket No. 3223.

1.9 “The Lanham Act Action” means the action instituted by Pool & Spa Enclosures, LLC against Aqua Shield and pending before the United States District Court for the Northern



District of New York entitled Pool & Spa Enclosures, LLC v. Aqua Shield, Inc., Civil Action No. 17-cv-01013-TJM-TWD.

**1.10** "Permanent Injunction" means the permanent injunction entered by the United States District Court for the District of Utah, Central Division against Alukov HZ spol. S.r.o., Alukov, spol. S.r.o., Inter Pool Cover Team, and Pool & Spa Enclosures, LLC, and specifically referenced in its judgment entered on August 17, 2015.

**1.11** "The Parties" shall mean Aqua Shield and the Alukov Companies.

**1.12** "Claims" means any and all past, present or future claims, counterclaims, cross-complaints, rights, demands, requests, allegations, suits, lawsuits, administrative proceedings, causes, causes of action, liens, debts, bills, accounts, duties, dues, reckonings, sums, sums of money, bonds, specialties, rights of indemnity, rights of subrogation, demands for injunctive relief, controversies, contributions, exonerations, covenants, agreements, contracts, promises, acts, omissions, trespasses, variances, damages, judgments, compensations, set-offs, reimbursements, restitution, costs, expenses, losses, exposures, executions, attorneys' fees, obligations, orders, and liabilities, whatsoever, known or unknown, whether in law, equity, admiralty or otherwise, that the Parties may now have, or hereinafter may have against each other arising from the Utah Action, the New Jersey Action, the ITC Action, and the Lanham Act Action.

**1.13** "Effective Date Of This Agreement" shall mean the latest date of any Party's signature to this Agreement.

**1.14** As used in this Agreement, the singular and masculine gender shall mean also the plural and feminine or neuter, as may be appropriate; "it" shall include "he" and "she"; and "each" and "all" includes "each" and "every."

2. PAYMENT TO AQUA SHIELD BY THE ALUKOV COMPANIES

2.1 [REDACTED]

2.2 [REDACTED]

3. **ROYALTY**

3.1 License Royalty Payment Amount. The Alukov Companies shall also pay to Aqua Shield a royalty for the total sum of [REDACTED] ("Royalty Payment") [REDACTED]

[REDACTED]

3.2

**REDACTED**

[REDACTED]

**3.3 Limited License Grant to the Alukov Companies. Subject to timely payment**

[REDACTED] by the Alukov Companies pursuant [REDACTED]

[REDACTED] Aqua Shield agrees that the Alukov Companies shall have the nonexclusive, absolute right to make, have made, use, import/export and/or sell any enclosures allegedly covered by the '160 Patent in the United States. Aqua Shield further agrees that it will not now or in the future assert any claims for patent infringement against the Alukov Companies arising out of the use, importation, manufacture, marketing, and/or sale of pool, spa or patio enclosures in the United States provided each royalty payment is timely paid. [REDACTED]

[REDACTED]

[REDACTED] The Alukov Companies shall have no right to transfer this limited license grant except by operation of law to any successor to all interest to the Alukov Companies or to any wholly-owned subsidiary and only upon giving Aqua Shield at least

ten days written notice of such transfer. Under no condition shall the Alukov Companies be permitted to sublicense this limited grant, but this provision shall not be a restriction upon any of the Alukov Companies' distributors to sell products covered by this limited license. Upon full satisfaction of the Royalty Payment by the Alukov Companies to Aqua Shield, the limited license and grant set forth herein shall remain in full force and effect so long as the '160 Patent and any related patents deriving from the same or related applications, including any continuations, divisionals, continuations-in-part, or foregoing related patents remains in-force and has not expired.

4. **RELEASES, WITHDRAWALS, AND DISMISSALS**

**REDACTED**

**REDACTED**

[REDACTED]

4.4 Stipulations of Dismissal. Within three business day after receiving payment of the initial sum [REDACTED] the Parties shall be obliged to cooperate, make and file all appropriate filings, appearances and consent motions and/or motion to terminate or orders to withdraw and dismiss, without prejudice, the Utah Action, the Permanent Injunction, the New Jersey Action, the ITC Action, and the Lanham Act Action as permitted by law, with the Parties to bear their own costs, expenses and attorneys' fees. [REDACTED]

[REDACTED]

4.5 [REDACTED]

[REDACTED]

# REDACTED

4.6 **Releases Do Not Extend To Obligations Under The Agreement.** The releases set forth above are not intended to, and shall not, extend to or otherwise release or discharge any rights, privileges, benefits, duties, or obligations of any of the Parties hereto by reason of, or otherwise arising under, this Agreement.

4.7 **Subsequent Discovery Of Different Facts.** The Parties hereto, and each of them, acknowledge that they may hereafter discover information or facts different from, or in addition to, those which they now believe to be true with respect to any and all of the Claims herein released. Nevertheless, the Parties hereto, and each of them, hereby agree that each of the releases set forth above shall be and remain effective in all respects, notwithstanding the discovery of such additional or different information and facts unless such information or facts had been wrongfully withheld by the Party when the Party had an obligation to disclose such information or facts.

4.8 **No Assignment Of Claims.** The Parties warrant and represent that none of the claims herein released have been, or will be, assigned or transferred, in whole or in part, to any Person not bound by this Agreement; provided, however, that this Agreement shall not prohibit



any assignment by the Parties by merger, consolidation, operation of law or to a party who succeeds to all or substantially all of such Party's assets.

5. **CONFIDENTIALITY**

**REDACTED**

[REDACTED]

6. **MISCELLANEOUS PROVISIONS**

6.1 **Amendments.** Neither this Agreement nor any term set forth herein may be changed, waived, discharged, or terminated except by a writing signed by the Parties hereto.

6.2 **No Precedential Value.** The settlement reflected in this Agreement shall be without precedential value, and it is not intended to be, nor shall it be construed as, an admission of liability by the Parties.

6.3 **Agreement Voluntarily Entered Into By Each Of The Parties Hereto.** This Agreement is executed voluntarily by each of the Parties hereto without any duress or undue influence on the part, or on behalf, of any of them. The Parties hereto represent and warrant to each other that they have read and fully understand each of the provisions of this Agreement and have relied on the advice and representations of competent legal counsel of their own choosing.

6.4 **Interpretation.** This Agreement has been negotiated at arm's length and between and among Persons sophisticated and knowledgeable in the matters dealt with in this Agreement. In addition, this Agreement was drafted by experienced and knowledgeable legal counsel for each of the Parties hereto. Accordingly, none of the Parties hereto shall be presumptively entitled to have any provisions of the Agreement construed against any of the other Parties hereto in accordance with any rule of law, legal decision or doctrine. The provisions of this Agreement shall be interpreted in a reasonable manner to effect the purposes of the Parties hereto and this Agreement.

6.5 **No Admission Of Liability.** The Parties hereto agree that this Agreement is the result of a compromise of disputed issues, and that execution and delivery of this Agreement by any of the Parties hereto shall not constitute or be construed as an admission of any liability or wrongdoing on the part of any of them.

6.6 **Attorneys' Fess, Costs, And Expenses.** Each of the Parties hereto shall bear its own costs, attorneys' fees, and expenses in connection with the matters set forth in this Agreement.

6.7 **Entire and Integrated Agreement.** This Agreement is intended by the Parties hereto as a final expression of their agreement and is intended to be a complete and exclusive statement of the agreement and understanding of the Parties hereto with respect to the subject matters contained herein. This Agreement supersedes any and all prior promises, representations, warranties, agreements, understandings, and undertakings between or among the Parties hereto with respect to such subject matters and there are no promises, representations, warranties, agreements, understandings, or undertakings with respect to such subject matters other than those set forth or referred to herein.

6.8 **No Third Party Beneficiaries.** Nothing in this Agreement is intended or shall be construed to give any Person, other than the Parties hereto and their respective successors and permitted assigns any legal or equitable right, remedy, or claim under or in respect to this Agreement or any provisions contained herein; this Agreement and any conditions and provisions hereof being and intended to be for the sole and exclusive benefit of the Parties hereto and their respective successors and permitted assigns and for the benefit of no other Person.

6.9 **Successors And Assigns.** This Agreement shall bind, and inure to the benefit of, the respective directors, officers, shareholders, employees, agents, representatives, attorneys,

parent and affiliated corporations, subsidiaries, divisions, successors, beneficiaries, grantees, assigns, heirs, executors, administrators, and estates of each of the Parties hereto.

**6.10 Severability.** If any provisions of this Agreement, or the application thereof, shall for any reason or to any extent be construed by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement, and application of such provisions to other circumstances, shall remain in effect and be interpreted so as to reasonably effect the intent of the Parties hereto.

**6.11 Notice.** Any notice or request required or desired to be given pursuant to this Agreement shall be made in writing and sent by first class mail, postage prepaid, addressed as follows or as the Parties subsequently may direct in writing:

As To the Alukov Companies: Alexander Stonkus, President  
Pool & Spa Enclosures, LLC  
10 Centre Drive  
Monroe Township, New Jersey 08831

Copy to: Gregory J. Coffey, Esq.  
Coffey & Associates  
310 South Street  
Morristown, New Jersey 07960

As To Aqua Shield:  
Igor Korsunsky, President  
Aqua Shield, Inc.  
114 Bell Street  
West Babylon, New York 11704

Copy to: Todd E. Zenger, Esq.  
Duren IP  
610 E. South Temple Street, Suite 300  
Salt Lake City, Utah 84102

**6.12 Headings.** The section titles, captions, and headings contained in this Agreement are inserted solely as a matter of convenience and for reference, and shall in no way be construed to define, limit, or extend the scope of this Agreement or the effect of any of its provisions.

**6.13 Recitals.** With the exception of an action or proceeding brought to enforce the terms of this Agreement, the Recitals set forth at the beginning of this Agreement shall not be admissible to prove the truth of the matters asserted therein in any action or proceeding involving any of the Parties hereto (other than an action or proceeding brought to enforce the terms of this Agreement), nor do any of the Parties hereto intend such Recitals to constitute admissions of fact by any of them.

**6.14 Additional Representations and Warranties.** Each of the Parties and signatories hereto represent and warrant that (a) it is fully authorized and empowered to enter into this Agreement and by so signing to legally bind the respective party, (b) it has read and fully understands each of the provisions of this Agreement, (c) it has relied on the advice and representations of legal counsel of its own choosing with respect to the matters set forth herein, (d) it has signed the Agreement voluntarily, without any duress or undue influence on the part, or on behalf, of any party, and (e) the terms of this Agreement are contractual and not merely recitals.

In addition, each of the corporate Parties hereto that is still in existence as of the Effective Date Of This Agreement represents and warrants that (a) it has taken all necessary corporate and internal legal actions to duly approve the making and performance of this Agreement and that no further corporate or internal approval is necessary, and (b) the making and performance of this Agreement will not violate any provision of law or the Party's articles of incorporation, charter, or by-laws.

**6.15 No Waiver.** This Agreement is not intended to and shall not be construed so as to deprive the Parties of any rights that either may have against any Person not a party to this Agreement.

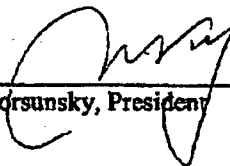
**6.16 Execution in Counterparts.** This Agreement will be signed via two original signature documents as outlined above to establish to create a document binding on all of the Parties..

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IN WITNESS HEREOF, the undersigned have caused this Agreement to be duly executed on:

Aqua Shield, Inc.

Dated: 12/07/2017


By:   
Igor Korsunsky, President

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INTENTIONALLY LEFT BLANK]

IN WITNESS HEREOF, the undersigned have caused this Agreement to be duly executed on:

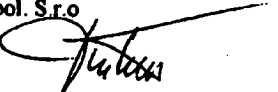
Pool & Spa Enclosures, LLC

Dated: 12-8-17

By:   
Alexander Stonkus, President  
Pool & Spa Enclosures, LLC


Alukov HZ spol. S.r.o

Dated: 12-13-17

By:   
Jan Zizko, President  
Alukov HZ spol. S.r.o.

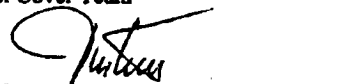
Alukov, spol. S.r.o

Dated: 12-13-17

By:   
Jan Zizko, President  
Alukov, spol. S.r.o.

Inter Pool Cover Team

Dated: 12-13-17

By:   
Jan Zizko, President  
Inter Pool Cover Team

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CONFIDENTIAL – SETTLEMENT DOCUMENT  
PROTECTED FROM DISCLOSURE PURSUANT TO F.R.E. 408

**EXHIBIT A**

**LIMITED HOLDING ESCROW AGREEMENT**

**REDACTED**

**REDACTED**

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**REDACTED**

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**REDACTED**

**REDACTED**

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**REDACTED**

**REDACTED**

**REDACTED**



**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that **PUBLIC VERSION ORDER NO. 9** has been served by hand upon the Commission Investigative Attorney, **Sarah Sladic** and the following parties as indicated, on **1/23/2018**.



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
500 E Street, SW, Room 112  
Washington, DC 20436

**On Behalf of Complainant Aqua Shield, Inc.:**

Todd E. Zenger, Esq.  
**DUREN IP**  
36 South State Street, Suite 1900  
Salt Lake City, UT 84111

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: \_\_\_\_\_

**On Behalf of Respondents Inter Pool Cover Team;  
Alukov HZ Spol. S.R.O.; Alukov, Spol. S.R.O.; Pool &  
Spa Enclosures, LLC; and Pool and Spa.com:**

T. Spence Chubb, Esq.  
**LAW OFFICE OF T. SPENCE CHUBB**  
1025 Connecticut Avenue, NW, Suite 1000  
Washington, DC 20036

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: \_\_\_\_\_